

DEPARTMENT OF
ECOLOGY
State of Washington

Concise Explanatory Statement

Chapter 173-518 WAC

Water Resources Management Program for the Dungeness Portion of the Elwha- Dungeness Water Resource Inventory Area (WRIA) 18

Summary of rule making and response to comments

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Concise Explanatory Statement

Chapter 173-518 WAC Water Resources Management Program for the Dungeness Portion of the Elwha-Dungeness Water Resource Inventory Area (WRIA) 18

Water Resources Program
Washington State Department of Ecology
Olympia, Washington 98504-7600

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Due to the volume of comments received, Appendix A: copies of all written comments and Appendix B: Transcrit of the public hearing are available separately.

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Introduction

The purpose of a Concise Explanatory Statement is to:

- Meet the Administrative Procedure Act (APA) requirements for agencies to prepare a Concise Explanatory Statement (RCW 34.05.325).
- Provide reasons for adopting the rule.
- Describe any differences between the proposed rule and the adopted rule.
- Provide Ecology's response to public comments.

This Concise Explanatory Statement provides information on The Washington State Department of Ecology's (Ecology) rule adoption for:

Title: Water Resources Management Program for the Dungeness Portion of the Elwha-Dungeness Water Resource Inventory Area (WRIA) 18

WAC Chapter(s): 173-518

Adopted date: November 16, 2012

Effective date: January 2, 2013

To see more information related to this rule making or other Ecology rule makings please visit our web site: www.ecy.wa.gov/laws-rules/index.html

Reasons for Adopting the Rule

The Dungeness watershed, the eastern portion of Water Resource Inventory Area (WRIA) 18, is located in Clallam County and a small portion of Jefferson County, and surrounds the City of Sequim.

The Dungeness watershed is home to several important fish species including Chinook, Coho, pink and chum salmon, and steelhead, cutthroat, and bull trout. There are four species protected under the federal Endangered Species Act (ESA): Chinook and summer chum salmon, steelhead, and bull trout. Stream flows during the critical low-flow months of summer/fall have been identified as an important factor in both the decline and future recovery of these populations.

There is a long history of active water management in the Dungeness watershed, dating to 1896 when construction started on the first irrigation ditch system. The surface water rights for the Dungeness River were adjudicated in superior court in 1924. The adjudication confirmed water rights totaling 518 cubic foot per second (cfs) during the irrigation season. This total diversion rate,

confirmed by the Superior Court, compares to the mean monthly flows of 701 cfs during June and 171 cfs during September. June and September are the months with the highest and lowest streamflows during the 1924-2011 period of record for the US Geological Service gage at River Mile 11.8. The daily mean flows in the late summer fall as low as 80 cfs. A 2012 Memorandum of Agreement between Ecology and The Dungeness Water Users Association confirms a new total diversion rate of 93 cfs subject to maintaining a 60 cfs bypass and an agreement to never divert more than 50% of flow. The Dungeness River is over allocated during the July 15 to November 15 timeframe.

The Dungeness watershed is facing increasing water demand for new residents.

Water management, which balances tradeoffs between instream and out-of-stream uses, has been an ongoing effort in this watershed since 1991 when the Dungeness-Quilcene watershed was selected as a pilot area to test the feasibility of local watershed planning. The Dungeness-Quilcene (D-Q) Plan, adopted in 1994, contains recommendations for water conservation, public education, protection of fish stocks and habitat, restoration of instream flows, protection and restoration of water quality, and provision of water for growth. The D-Q Plan identified a gap between biological requirements and out-of-stream uses, meaning that stream flow with existing uses is considerably lower than stream flow needed to meet biological needs.

Planning continued in this area under the Watershed Management Act of 1998, resulting in adoption of the Elwha-Dungeness Watershed Plan by the Clallam County Board of Commissioners in 2005.

RCW 90.82.080 sets forth a consensus-based process for establishing instream flows through the watershed planning process, and obligates Ecology to adopt instream flows and other plan recommendation in a rule. This rule adopts instream flow levels and other applicable recommendations in the Watershed Plan.

Ecology has conducted extensive public outreach while developing this rule and incorporated changes in response to public input.

Purpose and Authority

The rule helps Ecology meet statutory obligations to manage waters for public use and for the protection of instream flows. In accordance with the Watershed Planning Act, Chapter 90.82 RCW, the proposed water management rule adopts recommendations of the watershed plan. Ecology's underlying obligations and authority for this rule making reside in the following statutes:

- Chapter 90.82 RCW Watershed Planning Act

- Chapter 90.54 RCW Water Resources Act of 1971
- Chapter 90.22 RCW Minimum Water Flows and Levels Act
- Chapter 90.03 RCW Water Code
- Chapter 90.44 RCW Regulation of Public Ground Waters
- Chapter 90.42 RCW Water Resource Management

Key Elements of This Rule

The key provisions include:

- Setting instream flow levels for the Dungeness mainstream, tributaries, and independent drainages.
- Closing subbasins to new surface water withdrawals for at least part (if not all) of the year.
- Requiring mitigation of all new groundwater uses, and provides for a water exchange to facilitate mitigation. This includes permitted and permit-exempt uses.
- Requiring metering of all new withdrawals. This includes permitted and permit-exempt uses.
- Establishing reservations (“reserves”) under RCW 90.54.050(1) for domestic (indoor) use.
- Establishing maximum depletion amounts to limit temporary adverse impacts for non-domestic water use under an approved mitigation plan, and set a limit on total impacts from all new water uses to closed surface waters.
- Establishing maximum allocation amounts for interruptible purposes from high flows from the Dungeness mainstem.
- Including a provision allowing storage projects for environmental enhancement and other purposes consistent with the watershed plan.

Differences between the Proposed Rule and the Adopted Rule

RCW 34.05.325(6)(a)(ii) requires Ecology to describe the differences between the text of the proposed rule as published in the *Washington State Register* and the text of the rule as adopted, other than editing changes, stating the reasons for the differences.

Section	Change	Purpose
WAC 173-518-010(3)	Change bullets to letters	Response to comment requesting the change
WAC 173-518-030	Clarify definition of “domestic use” to provide more definition of incidental household uses.	Clarification needed
WAC 173-518-030	Clarify definition of “interruption” to clarify potential application to all water rights, including those established under the groundwater permit exemption	Response to comment requesting change
WAC 173-518-030	Clarify definition of “public water system”	Response to comment requesting change
WAC 173-518-030	Clarify definition of “Water budget neutral” regarding consumptive use impacts to surface water (instead of consumptive use without qualifier)	Clarification needed
WAC 173-518-040(1)	Change comma to semi colon	grammar
WAC 173-518-040(2)	Change from capital to lower case – watershed plan	Internal consistency
WAC 173-518-040(5)	Change from “new water use” to “new water appropriation”	Response to comment requesting change – clarifying only new appropriations subject to interruption, not a new hook up to existing public system
WAC 173-518-050	Added year-round closure of unnamed tributaries to the Dungeness River, based on plan recommendation	This is a plan recommendation that should have been included. Without inclusion unnamed tribs would be included in seasonal closure for mainstem. Current baseline is year round closure under a Surface Water Source

		Limitation issued under RCW 77.50.050.
WAC 173-518-050	Wording change – delete “no” insert “not”	grammar
WAC 173-518-060(1)	Change from “ecology’s specification” to “specifications available through ecology”	Clarification needs to avoid confusion regarding metering specifications in Chapter 173-173 WAC
WAC 173-518-070(2)	Change bullet to letter	Internal consistency
WAC 173-518-075(2)	Altered intro sentence to clarify all of listed items apply	Response to comment requesting clarification
WAC 173-518-076	Delete “expedite” and insert “give priority to”	Response to comment requesting clarification
WAC 173-518-090(2)	Inserted “Washington” department of fish and wildlife	Internal consistency
WAC 173-518-095	Change from capital to lower case – watershed plan	Internal consistency
WAC 173-518-110(1)	Added implementation plan to list of materials made available to the public	Clarification needed
WAC 173-518-140	Change heading from “Maps” to “Map	grammar
WAC 173-518-140	Clarify heading on map	Response to comment requesting clarification

Response to Comments

Ecology accepted comments between May 7, 2012 until July 9, 2012. This section provides both summary general responses, and individual comment responses to the comments that we received during the public comment period. (RCW 34.05.325(6)(a)(iii))

Ecology carefully considered all comments received.

General Responses

A large portion of the comments received on the proposed rule related to several core issues. We felt we could better communicate our responses by providing a summary response that addressed these issues up front. You will find many of the responses to the following individual comments will also reference these general responses.

A. Public outreach

A number of commenters felt that Ecology's efforts to make the affected public aware of the rule were inadequate.

Commenters

Kathi Larsen 2; Florence E Blay 1; Howard V Doherty Jr, Jim McEntire, & Michael C Chapman, Board of Clallam County Commissioners 8; Doug Hale, Coldwell Banker Town & Country 3; Warner J Litchfield 15; Marnee Foldoe 8, 10; Ed Bowen H5;

Response

The Washington State Legislature guides all state rule-making through a law known as the Administrative Procedure Act (APA), Chapter 34.05 RCW. All state agencies must follow the requirements of the APA. The APA, in RCW 34.05.320, requires publication of notice of the public hearing in the State Register at least 20 days before the hearing.

In addition a second state statute, Chapter 90.22 RCW, Minimum water flows and levels, requires that a hearing be held in the county in which the water bodies are located. Notice of the hearing must be published in a newspaper of general circulation in that county once a week for two consecutive weeks before the hearing. The notice must include the names of each stream, lake, or other water source, the place and time of the hearing, and a statement that people may comment orally or in writing. Notice of the hearing shall also be served upon the administrators of the departments of social and health services, natural resources, fish and wildlife, and transportation.

The Department of Ecology met these requirements. In addition, notices of this hearing were mailed to over 30 interested parties, email notices were sent out to over 2,500 interested parties, and a news release was issued on May 9 and May 21, 2012.

Prior to filing the proposed rule, Ecology conducted a total of five public workshops in the Sequim area about water management and concepts for a water management rule in November 2007, March 2008, February 2009, and January 2012 (two). At Ecology's request, a series of 11 news articles were published in the Sequim Gazette in 2007, 2008, and 2009.

While developing the rule Ecology met regularly with stakeholders in the Dungeness watershed planning area. Stakeholder meetings began shortly after adoption of the Dungeness Quilcene Water Resources Management Plan in 1994, under Chelan Agreement pilot planning. Watershed planning under Chapter 90.82 RCW began in 1998 and continues until today. Below is a list of groups that met regularly to further rule discussions at the local level.

The **Dungeness River Management Team**, part of the original planning unit, continues to meet monthly to develop and implement locally-based, long-term solutions to watershed management issues.

The **Dungeness Water Executive Committee** was a group of local government entities including Clallam County, the city of Sequim, Clallam County PUD, Dungeness Valley Water Users Association (irrigators), the Jamestown S'Klallam Tribe, and Ecology, joined by Washington departments of Fish and Wildlife and Health as needed. The group was formed in 2007 and met monthly through 2009 to work on rule development.

The **Dungeness Water Working Group**, a group representing realtors, well drillers, local government staff, environmental organizations, and Ecology formed in 2007. This group combined with the Dungeness Water Executive Committee in 2008, and interested members attended the monthly meetings to represent these interests.

We have given presentations and answered questions at meetings held by community groups including the following:

- Clallam Board of County Commissioners
- Clallam PUD #1 Commissioners
- Clallam Conservation District
- Sequim City Council
- North Olympic Peninsula Lead Entity (salmon recovery)
- North Olympic Land Trust
- Olympic Environmental Council
- League of Women Voters
- Sequim Realtors
- Port Angeles Business Association
- Rotary
- Sequim Chamber of Commerce
- Clallam County Homebuilders Association
- Kiwanis
- Clallam Economic Development Commission

B. Motivation and authority for adopting the rule

Many commenters questioned Ecology's motivation or authority for adopting the rule.

Commenters

Ross Krumpe 22; Karen Huber 1, 5; Larry Doyle 2; George Chandler 5; Noelle Levesque 1, 3, 5, 6, 8; Magan Waldron 2, 4; Rick Weiss 1; Mr. Chun; Joyce Horner 1; Martin Gutowski 1; W David Sharman 4; Dale Blankenship 1; Marguerite A Glover 30; Scott Gordon 31; Gail Sumpter 12; John Mackay 6; George Chandler H4

Response

As a governmental agency that took part in watershed planning, Ecology is obligated by RCW 90.82.130(3) to adopt a rule to implement the plan approved by the watershed planning unit and adopted by the Clallam County Commission. When the Legislature passed the Watershed Planning Act, RCW 90.82, in 1998, it made a significant commitment to local water management. The legislature said that if local planning units could resolve water management issues or disputes by consensus using the watershed planning process and participants it prescribed, then Ecology and other participating governmental entities must adopt rules to implement the recommendations. For the participating governmental entities, RCW 90.82.130(3) specifically requires:

“...The obligations on state agencies are binding upon adoption of the obligations, and the agencies shall take other actions to fulfill their obligations as soon as possible, and should annually review implementation needs with respect to budget and staffing; (b) for counties, the obligations are binding on the counties and the counties shall adopt any necessary implementing ordinances and take other actions to fulfill their obligations as soon as possible, and should annually review implementation needs with respect to budget and staffing; or (c) for an organization voluntarily accepting an obligation, the organization must adopt policies, procedures, agreements, rules, or ordinances to implement the plan, and should annually review implementation needs with respect to budget and staffing.

The Legislature expressed its support for the consensus process by streamlining some of the rule adoption procedures under the Administrative Procedures Act, RCW 34.05, allowing a simplified or more streamlined rule development process. RCW 90.82.080(1)(b) provides:

“...The department shall undertake rule making to adopt flows under (a) of this subsection. The department may adopt the rules either by the regular rules adoption process provided in chapter [34.05](#) RCW, the expedited rules adoption process as set forth in RCW [34.05.353](#), or through a rules adoption process that uses public hearings and notice provided by the county legislative authority to the greatest extent possible. Such rules do not constitute significant legislative rules as defined in RCW [34.05.328](#), and do not require the preparation of small business economic impact statements.

Yet another way that the Legislature expressed its support for consensus-based planning was to explicitly state that the adopted watershed plan is a primary expression of the public interest. RCW 90.82.130(4) provides:

“ After a plan is adopted in accordance with subsection (3) of this section, and if the department participated in the planning process, the plan shall be deemed to satisfy the watershed planning authority of the department with respect to the components included under the provisions of RCW [90.82.070](#) through [90.82.100](#) for the watershed or watersheds included in the plan. The department shall use the plan as the framework for making future water resource decisions for the planned watershed or watersheds. Additionally, the department shall rely upon the plan as a primary consideration in determining the public interest related to such decisions.”

Washington State law directs Ecology to protect instream resources when making decisions on water use and management. Until a decision is made on what stream flows are needed in the stream to protect fish and other instream resources, it is difficult to know if there is any water to allocate for future out-of-stream needs. Secondly, if stream flows are a limiting factor for salmon production in a watershed, it is problematic to plan for salmon recovery until instream flows are set and achieved. And finally, knowing what stream flows are needed helps to determine whether to invest in conservation, storage and other measures to meet out-of-stream and instream needs. Setting instream flows defines the stream flows needed to protect instream resources and values, and therefore provides a key benchmark for future water management decisions.

In addition to Chapter 90.82 RCW, described above, authority for setting flows is derived from state statutes. The primary statutes relating to flows and flow setting are:

- The Water Resources Act of 1971, [Chapter 90.54 RCW](#), provides that the quality of the natural environment be protected and where possible enhanced through the retention of base flows for preservation of wildlife, fish, scenic, aesthetic, and other environmental values, and navigation values.
- The State Water Code, [Chapter 90.03 RCW](#), in [section 247](#) describes Ecology’s exclusive authority for setting flows and describes conditioning permits to established flows.
- The Minimum Water Flows and Levels Act [Chapter 90.22 RCW](#) permits Ecology to establish minimum flows or levels on streams and lakes by regulation for the purpose of protecting fish, game, birds or other wildlife, recreational or aesthetic values or water quality. The Act sets forth a process for protecting instream flows through adoption of rules. Among other provisions, it says Ecology must consult with the Department of Fish and Wildlife and conduct public hearings.
- Fishways, flows, and screenings [Chapter 77.57 RCW](#) (formally Chapter 75.20 RCW), [section 020](#) requires Ecology to consult with the Department of Fish and Wildlife prior

to Ecology making a decision on any water right application that may affect flows for food and game fish. Fish and Wildlife may recommend denial or conditioning of a water right permit.

C. Prior appropriation: what's fair?

Commenters

Kathleen Cooper 2, 5, 7, 8, 11; Florence E Blay 2

Response

Many comments suggest or claim it is unfair that new water users must comply with the proposed rule, while existing users are not required to comply with the rule. The reason for this perceived lack of fairness is the prior appropriation system of water law.

The prior appropriation doctrine is often referred to by the phrase “first in time, first in right.” In Washington, it comprises common law and legislation developed over the past 150 years.

The prior appropriation doctrine allows for private rights to be established for the use of water, a public resource, but the water itself retains its public character, i.e. water rights, once established, are considered “usufructuary” property rights. A water user only obtains a property interest in the water to the extent they have actually withdrawn and has put the water to beneficial use. The prior appropriation doctrine was developed in the western United States in the 19th century. Courts found that the non-riparian user who had previously applied part of the water from a stream to beneficial use had superior rights to the water with respect to a riparian owner who claimed a right to use of all the water at a later time.

Water right priority dates establish which rights gets water relative to other rights during times of shortage. With respect to permitted water rights or other existing rights based on pre-water code beneficial use, the water user's intent to use water determines the priority date and the manner and purpose for which the right may be exercised, assuming the right is developed with diligence. With permit-exempt rights, the date of first beneficial use will determine the priority date.

The older and more reliable water rights (with earlier priority dates) are referred to as senior rights. The more recent and less reliable water rights in the event of a shortage, whether based on water right permits or on the groundwater permit exemption, are referred to as junior rights.

Ecology's rules establishing appropriations of water, such as for instream flow purposes and reserves for future water uses, have a priority date equal to the effective date of the rule. These new appropriations are junior to existing rights and the prior appropriation doctrine precludes

imposition of these new rights upon the senior existing water rights. Therefore, these portions of a new water management rule can only be applied to new uses of surface water and groundwater.

D. Mitigation: who pays?

The rule places responsibility for meeting its mitigation requirements on new water users. This is because the new instream flow water rights established by the rule are junior to all existing water rights. It can be no other way under Washington water law (see the response on the prior appropriation doctrine).

The rule does not preclude the use of public funding sources to offset prospective homeowner costs and smooth the transition to the mitigation requirement for new water users under the proposed rule. Ecology's available funds to assist water users are very limited in the current biennium. To offset the cost of domestic water use related to the mitigation requirement under the rule, Ecology can only commit funds the legislature has appropriated for the current biennium. To extend the transition beyond the current biennium, which ends June 30, 2013, the legislature would need to appropriate funds to support the domestic water use mitigation program

Other funding approaches are potentially available, including county assessment districts or legislative appropriation. The public funding sources are subject to legislative, commission, or voter approval and therefore Ecology or anyone else should not presume them to be available.

Ecology has worked with Clallam County, the Dungeness Water Users Association, and the Washington Water Trust (WWT) to create a mitigation exchange (a subset of the Dungeness Water Exchange) to establish a relatively straightforward means for new water users to meet the mitigation requirements associated with the domestic water reservation.

The Dungeness Water Exchange will align multiple public and private fund sources to acquire water rights and implement water management projects intended to improve or restore instream flows within the Dungeness basin. These are the same functions that a mitigation exchange would need to undertake. Since flow restoration funding is expected to far exceed the mitigation funding, aligning the flow restoration and mitigation activities will avoid duplication of most of the administrative and professional services needed to support them.

E. Mitigation: what's understood

Many commenters expressed concern over how the Exchange will function and the potential cost of mitigation credits.

Commenters

Andy Sallee 1; Howard V Doherty Jr, Jim McEntire, & Michael C Chapman, Board of Clallam County Commissioners 6, 10; Bill Clarke, Washington Realtors/Sequim Realtors 8; Florence E Blay 4; Pamela Cameron 4

Response

Ecology is sympathetic to the questions raised about the cost and availability of mitigation through the Exchange. However, Ecology disagrees with the assertion that *all questions* regarding how mitigation will occur must be answered before adopting the rule. Working with Clallam County, the Dungeness Water Users Association, the Tribe and others, Ecology has made a genuine effort to answer as many questions as possible. Ecology has provided funds to Clallam County to assist with design, development, and start-up of the Dungeness Water Exchange.

The proposed rule includes a reservation for domestic water, subject to a mitigation requirement, that allows new domestic water uses to continue developing without interruption. This, coupled with the Dungeness Water Exchange's mitigation program, would allow most of the economic value associated with development of rural land to be realized at a cost of \$500 to \$3500 per residence. For that cost, whether the payment came from a public funding source or from the new domestic water user, it would entitle the new domestic water user to build a house and live in it. The Exchange would then use that payment to acquire water rights or invest in a flow improvement project that would "repay" the water borrowed from the domestic water reservation.

For domestic water uses, the availability of the reserves and the Exchange greatly simplifies compliance with the mitigation requirement. Without these tools, each new domestic water user would need to seek out and purchase senior water rights to mitigate for their proposed use.

Mitigation programs for entire watersheds are inherently complex because, if they are to be durable, they must be adaptable to a variety of circumstances and to change over time. Washington Water Trust has developed two key reports describing the approach an exchange could use to develop a mitigation program, assess the market, and assess the financial feasibility. The reports demonstrate that the mitigation program will deliver effective mitigation at a cost of \$500 to \$3500 for each residence. The reports, identifying specific types of projects to be used to generate mitigation certificates, were considered in the Local Leaders Work Group process as well. In total, the range of cost is understood, the types of mitigation projects are understood, the funding mechanism is understood, and the approach taken is acceptable to the fisheries agencies.

Ecology disagrees with the recommendation to prescribe the mitigation mechanism as part of the rule itself. Instead, the rule prescribed the results the mitigation program must achieve. This will allow innovation and adaptation that will result in cost effectiveness not possible with a mitigation framework that is rigidly prescribed by the rule.

F. Effects on future homebuilders

Ecology disagrees with the assertion that it is not possible to analyze the true impacts of the rule. For a new use of water consisting of an average single-family household the primary impacts of the rule are as follows:

- As a new water user, you must request service from a public water supplier if you are located within their service area and they can serve you.
- If a public water supply is not available for your new use, then:
 - You must mitigate for the impact of your future consumptive water use on closed surface water bodies.
 - You will be required to measure your water use by installing a meter that meets Ecology specifications.

The rule allows flexibility with respect to how mitigation may be achieved:

- Through purchase of a mitigation certificate from the Dungeness Water Exchange; or,
- Through implementing an individually prepared mitigation plan approved by Ecology.

G. Small impacts

Many comments stated that there shouldn't be a mitigation requirement when the impacts from future domestic water use won't impact the streams by more than a percent or two of the seasonal low flows.

Commenters

Scott Gordon 21; Gail Sumpter 2; Steve Marble 3, H3; Pamela Cameron 9 ; Kris G Kauffman, Water Rights Inc 3; Marguerite A Glover 22

Response

Setting aside that impacts to small streams from pumping groundwater could be far greater than 1-2 percent of the low flow in the small streams, the concepts of de minimus use or de minimus impact are not supported by Washington water law.

The Legislature's passage of the Water Resources Act of 1971 (see RCW 90.54.020(9)), gave direction to administer the State's water allocation and use programs in a manner that gives full recognition to the natural interrelationships between surface water and groundwater. Since 1971, Washington's courts have held that a small or minimal impact on a stream that deprives a senior water right holder cannot be ignored. In *Hubbard v Dept. of Ecology*, the Court of Appeals said "Any effect on the [Okanogan] river during the period it is below the minimum instream flow level conflicts with existing senior rights (such as the minimum flow level itself) and may reasonably be considered detrimental to the public interest."

The Pollution control Hearings Board (PCHB) has reached similar findings "if the evidence demonstrates that any of the water from the ground at the place, and depth, in question would otherwise have contributed to particular surface water."

In summary, the Legislature and Washington Courts have said small adverse impacts to senior surface water rights, including instream flow rights adopted by rule, resulting from groundwater withdrawals by junior users are not to be ignored if they would result in impairment to a water right.

H. Metering

Ecology received many comments related to the metering requirement for all new uses in the Dungeness rule.

Commenters

Carol Person 1, 2; Noelle Levesque 2, 4, 7; David Unruh 1, H1; Dick Sutterlin 5; Greg & Joanna Carroll 4; Warner J Litchfield 6; Bruce Larsen 10; Marnee Foldoe 4; Roger Short H2

Response

The metering requirement in the rule is the same as what has been required by WAC 173-173, the statewide rule for measuring and reporting water use, since 2001. Water meters are already in widespread use in the Dungeness watershed by farmers, community water systems, the City of Sequim, the PUD, Batelle Labs, and a variety of businesses. In compliance with a 2001 Superior Court ruling, metering is required in the Dungeness Basin as one of the [16 "water short" critical basins](#) in our state. Ecology adopted WAC 173-173 in 2001, establishing metering standards and requirements for recording and reporting water use data.

It is true that there are ways to estimate average use other than by requiring meters for all new uses. The Dungeness River Management Team and local governments discussed the possibility of a voluntary approach to metering. The conclusion was that such an inconsistent sample would provide little useful information.

- For the Water Exchange to function fairly and accurately, measuring and tracking water use is necessary. Individual users will be purchasing mitigation credits based on how much water they would like to use. Knowing that water use is (or could be) monitored would result in fairer behavior among program participants. It also provides a way for the mitigation program to respond to any instances of unfair behavior by its customers.
- Metering allows for periodic analysis of water use data. This, in turn, provides a basis to verify assumptions about water use and mitigation built into the proposed Water Exchange program, protecting instream flows and existing water users.
- Without measuring and tracking, there would be no means to verify if the amount of use equals the mitigation. Without a way to verify, we would have to require an additional cushion of mitigation, which would increase costs for new water users. For this reason, metering and reporting water use will keep mitigation fees as low as possible.

Many commenters expressed concern that metering was a first step to being charged for water use. There is no authority granted under state law for Ecology to charge water users for their water use, and this rule does not do that. Neither state nor local agencies, other than water service providers, can charge fees for water use. In the future, the Legislature could change the law.

All measuring devices or measuring methods must conform to requirements for measuring devices and methods described in WAC 173-173, in this chapter, or other method(s) approved by the department. Ecology is specifying remote-read meters for the Dungeness watershed.

Specifications can be found here: <http://www.ecy.wa.gov/programs/wr/measuring/meter.html>.

I. Groundwater permit exemption

In Washington State, prospective water users must obtain authorization in the form of a water right permit or certificate from the Department of Ecology (Ecology) before withdrawing groundwater.

The exceptions to the permit requirement for withdrawals of groundwater are:

- Stockwatering (no gallon per day limit).
- Irrigation of a non-commercial lawn or garden up to one-half acre in size (no gallon per day limit, however limited to reasonable use).
- Single domestic or group domestic uses (limited to 5,000 gallons per day).
- Industrial purposes (limited to 5,000 gallons per day).

Although permit exempt groundwater withdrawals don't require a water right permit, to the extent the groundwater is beneficially used, the water user withdrawing groundwater under the exemption establishes a water right that enjoys the same privileges as a water right permit or certificate obtained directly from Ecology. You only establish a water right through regular "beneficial use" of water from your well that is consistent with the exemption. If you wait until the rule is in place

to start using a permit-exempt well for your intended purposes, your new water use will be subject to the rule.

Water use in Washington is subject to the "first in time, first in right" clause, originally established in historical western water law and now part of Washington State law. This means that a senior right cannot be impaired by a junior right. Seniority is established by priority date. Typically, that's the date an application was filed for a permitted or state-certificated water right; the first expressed intent to use water in the case of water right claims or adjudicated water rights, or the date that water was first put to regular beneficial use in the case of permit-exempt groundwater withdrawals.

Although exempt groundwater withdrawals do not require a water right permit, they are always subject to state water law. For example, an existing right based on the groundwater permit exemption is entitled to protection from impairment by a more-junior withdrawal of groundwater; similarly it cannot impair a more senior right. In some instances, for example in Upper Kittitas County, Ecology has had to regulate, stop, or reduce groundwater withdrawals when they interfere with prior-established or "senior" water rights, including those rights based on instream flow rules.

J. Federal Reserved Water Rights

Several comments touched on or questioned the existence of instream flow water rights or other reserved rights of the United States.

Commenters

Steve W Smith 3; Tom Williamson H2, H6

Response

The law of federal reserved rights is complex. Except where it consents, the federal government itself is not subject to state law or to regulation by state government. When states were created, the United States retained an interest in public waters and the states and territories had no power to cut off this interest or subordinate it to appropriations under local law. States cannot terminate or alter the nature of federal water rights.

In *United States v. Winan* (1905), the US Supreme Court upheld the Yakama Nation's reserved right to fish "at all usual and accustomed places." While the United States had conveyed lands outside the Yakama Nation's reservation to the state and private parties, these reserved federal rights nevertheless "imposed a servitude upon every piece of land..." The Yakima adjudication court has recognized these federal rights to fishing and hunting and water to support them, although it did not specifically quantify that right for each stream.

When it enacting the the McCarran Amendment, Congress waived the United States' sovereign immunity and consented to be named in state water rights adjudications, including judicial and administrative proceedings. The McCarran Amendment applies only to general stream adjudications, and the United States did not waive its sovereignty in water rights disputes that do not involve all claimants to a given stream.

K. Science/fish

A number of commenters questioned the science related to the instream flow levels set and why, especially during late summer and early fall, the instream flow was higher than historical averages.

Commenters

Bill Schroepfer 2; Richard French 5; Pearl Rains Hewett 11 ; R Doreen Emerson 4; Teren MacLeod, Jefferson County Association of Realtors 5

Response

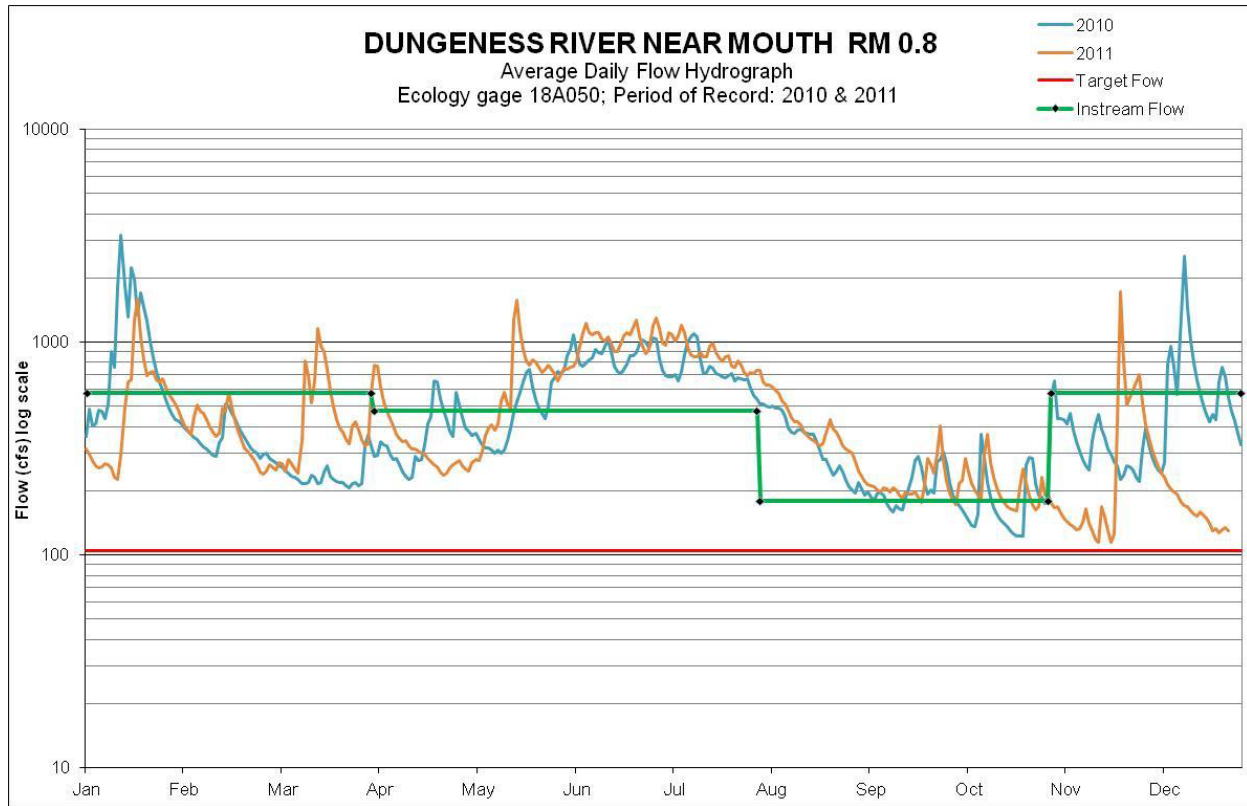
Instream flow standards in statute require Ecology to set instream flows that protect fish habitat when nature provides such flows. Therefore, an instream flow is not the lowest amount of water that has occurred in the stream according to stream flow records, or even the average flow. Instream flows are a regulatory number – a threshold -- used to determine when there is water available for new withdrawals that will not hurt fish or other instream resources. They are the flow levels that will be protective of fish and fish habitat when those levels are in the river.

Establishment of an instream flow does not require that water always be present at that flow level; it is merely a limitation on when new junior water rights may be exercised. Instream flow numbers inform Ecology whether there is surplus water in the stream unneeded to protect existing instream resources and values. These instream flow numbers help Ecology make decisions about whether to allow more water rights to divert water from the river.

In small streams, there is seldom surplus water that can be allocated to out-of-stream uses without adversely impacting fish habitat and fish production. For fish that spawn during a season of flashy high flows, such as coho and chum salmon in lowland and mid-elevation streams in western Washington, infrequent high flows (3-10% exceedence flows) are achievable and necessary to protect spawning habitat. Instream flow recommendations that exceed median flows are not a result of flawed methods.

For the Dungeness River, an instream flow level of 180 cfs in August through September has been determined as the level that will help support healthy fish runs and protect and preserve other instream resources. Although, instream flows are not set with the expectation those flows will

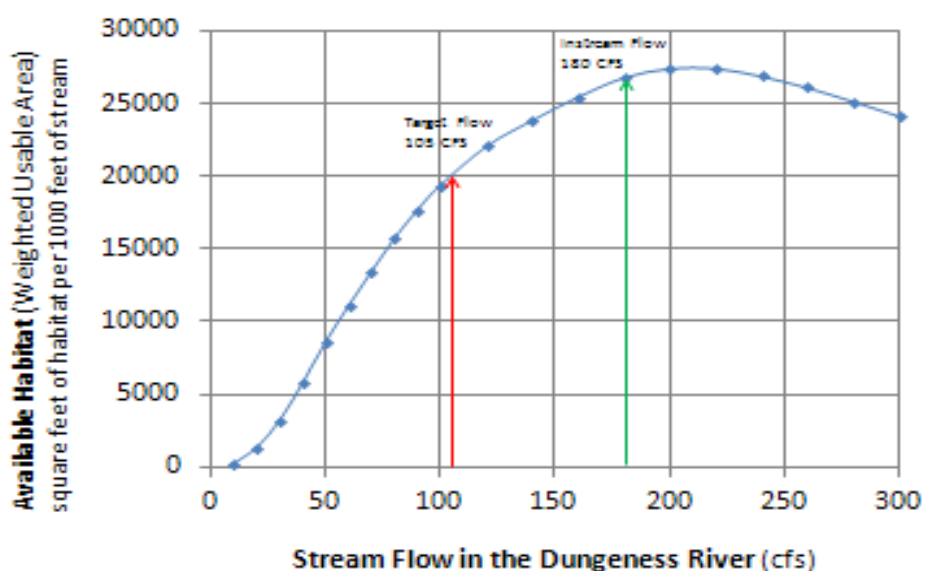
necessarily be in the river, in recent years the river has been above 180 cfs for most of the dry months (see Figure below). This data supports that 180 cfs is within the normal range of the river.



The hydrograph above shows the Dungeness River flows over the past two years. The solid green line in the middle is the adopted instream flow level, which drops in August through October, following natural seasonal variation. This data shows stream flows (the jagged lines) have often been above the proposed 180 cfs in recent years. The solid red line slightly above 100 cfs is the target restoration flow of 105 cfs.

The recommended Dungeness River instream flows in the Elwha/Dungeness Watershed Plan were based on computer models that take into consideration flow, channel shape, water velocity, side channels, salmon biology, and usable stream habitat area. Instream flow studies quantify how fish habitat changes with the amount of stream flow. (*Habitat* refers to *living space*, and more habitat generally equals more fish. See figure below.) Flows based on fish habitat are often assumed to cover the needs of other instream uses. Recommendations from fish biologists plus future water needs of people are then considered when rules are drafted.

Dungeness River Flows for Spawning Chinook How Habitat and Flow Interact.



Fish habitat increases as flows increase. Setting flows at 180 cfs during the summer spawning period follows Washington’s anti-degradation standard and protects existing fish habitat from the impacts of new withdrawals.

The figure above shows that if the instream flow was set lower than 180 cfs there would be a significant loss of fish habitat for spawning Chinook salmon. Other fish species and lifestages that exist simultaneously with Chinook during summer would also lose significant amounts of their habitat, which would lead to a long-term degradation of the fish population.

If an instream flow was set at a low number so it could always be achieved during summer, then we could expect the salmon population to drop as new water uses reduced stream flows. Available habitat would shrink and water temperatures rise. Eventually habitat and the fish population would be severely reduced. State law is clear that instream flows must be set at levels that protect and preserve fish and other instream values over the long-term. This “anti-degradation” standard has been confirmed in State Supreme Court rulings.

There have been several scientific studies over the last 20 years to answer questions on how salmon and steelhead (salmonid) habitat is related to flow in the lower 10 miles of the Dungeness River. They have received extensive peer review. The following narrative describes four of the many reports that have been useful for Ecology for determining the instream flows for the Dungeness River.

In 1987, the Dungeness River Management Team (DRMT) was formed to bring all water users to the table to discuss how to tackle the problem of the degraded Dungeness River spring Chinook

and pink salmon runs. The team identified water withdrawals as the primary reason preventing upstream migration of adult pink and spring Chinook salmon along with reduced spawning and rearing habitat for salmonids.

In 1988, the team requested the U.S. Fish and Wildlife Service do an instream flow study to determine the flow required in the lower Dungeness River to restore the degraded pink and spring Chinook salmon runs. The study was done under guidance from an interagency technical team. This Dungeness Instream Flow Group helped design, implement, and peer review the study using the Instream Flow Incremental Methodology (IFIM). This group consisted of Hal Beecher Ph.D. and Tim Rymer with WA Dept. of Wildlife, Brian Winter Ph.D. with National Marine Fisheries Service, Brad Caldwell M.S. with WA Dept. of Ecology, Joe Hiss and Phil Wampler with U.S. Fish and Wildlife Service, Randy Johnson with WA Dept. of Fisheries, and Mike Reed, Ann Seiter, and Brad Sele with Jamestown S’Klallam Tribe.

This interagency technical work group had an unusually large amount of expertise with the PHABSIM/IFIM hydraulic model. Dr. Hal Beecher and Dr. Brian Winter and Brad Caldwell and Phil Wampler all had several years of experience using this particular computer model on rivers in Washington State to determine instream flows needed by salmonids.

Field data was gathered in 1988 and 1989 by measuring the depths and velocities along 8 transects at a representative site at river mile (RM) 4.2 and another 8 transects at RM 2.3. These sites represent the braided reach from RM 3.3 to 6.4 and the diked single channel from RM 1.8 to 2.5. The representative sites were selected by walking the lower 6 miles of the river and then rafting from RM 6 to 4 to quantify the amount of each habitat type (pool, riffle, etc) to determine transect weighting in the hydraulic model.

This study went beyond most IFIM studies by gathering site-specific fish preference data. Dr. Beecher and others snorkeled the river to collect observations on the depths and velocities used by juvenile steelhead, coho, Chinook, and dolly varden (bull trout). Dr. Beecher reviewed the creation of the fish preference data and final curves used in the hydraulic model. Calibration of the 10 hydraulic models for the upper site and 4 hydraulic models for the lower site was reviewed by Dr. Brian Winter and Brad Caldwell. This final report is available: **Fish Habitat Analysis for the Dungeness River Using the Instream Flow Incremental Methodology** by Wampler and Hiss, USFWS, July 1991. <http://www.fws.gov/wafwo/fisheries/Publications/FP186.pdf>

The model is complex and requires extensive training to understand the numbers input into the computer model and the how the model calculates its regressions. For instance, around 25,000 pieces of raw data input, including depths, velocities, substrates, cover, water surface elevations, streamflows, roughness coefficients, and so on, are input into the model so it can accurately predict the depths and velocities over useable substrate over a wide range of streamflows. A knowledgeable fish biologist must then interpret the resulting graphs of how much fish habitat gained or lost for each increment of streamflow to determine what streamflow is best for fish.

There are many species (steelhead, Chinook, coho, pink, chum, dolly varden) and multiple lifestages (spawning, rearing). Each species and lifestage has a different streamflow where habitat peaks. One has to prioritize month by month, and by species and by lifestage and by PHABSIM/IFIM site. Clearly, there is no single streamflow that is optimum for all the fish species and lifestages that exist simultaneously in the stream.

The process of determining how to use the fish habitat relationships in the IFIM report is documented in the following report: **Recommended Instream Flows for the Lower Dungeness River** by Hiss, USFWS, May 1993. <http://www.fws.gov/wafwo/fisheries/Publications/FP070.pdf>

The technical experts from the Dungeness River instream Flow Group reviewed the IFIM report over 1992 and 1993. They incorporated their knowledge of other streamflow requirements for fish survival (migration, incubation, past hydrology, gravel deposition and scouring, etc.) with the fish habitat information from the IFIM report and arrived at the following recommended instream flows at a location just downstream of the irrigation diversions:

- November through March = 575 cfs
- April through July = 475 cfs,
- August through October 180 cfs.

The 14 hydraulic models at the 2 sites allowed comparisons of how the fish habitat changed in the Dungeness River with and without the 4 side channels at the upper site (the lower site did not have any side channels). The fish habitat results for the upper site at RM 4.2 compliments the results at RM 2.3. The lower site is diked, so there is only one channel, whereas the upper site is not diked, so it has 4 side channels as well as the main channel. These 2 independent hydraulic models predict that the peak habitat flow for Chinook spawning is 200 cfs at the lower site and 220 cfs at the upper site. One would expect to get similar results for the two mainstem channels if the side channels are not included. This is an indication that both models were done well since they were done independent of each other.

However, there were still questions about how well the proposed instream flows would provide fish habitat in the all the side channels of the Dungeness River. To answer that question in 2003 the Bureau of Reclamation did a very extensive peer-reviewed study of all the side channels. Their report is: **Dungeness River In-Stream Flow Side Channel Study** by the Bureau of Reclamation (Daraio et al.) in cooperation with the Jamestown S'Klallam Tribe done February, 2003.

http://www.clallam.net/environment/assets/applets/Reclamation_Dungeness_River_Side_Channel_Report.pdf

This study provided detailed information on the flow interaction between the main and side channels and their impact on fish habitat. The 10 large side channels downstream of the fish hatchery RM 10.6 to Woodcock Bridge at RM 3.3 were analyzed. They measured when the channels became connected and disconnected from the main channel as flow changed, and how the fish habitat changed in the side channels as the mainstem flow changed. The 1991

PHABSIM/IFIM study only measured side channels at river mile 4.2 and these side channels totaled about 600 linear feet whereas the 2003 Bureau of Reclamation study covered 10.6 miles of river with 24,080 linear feet of side channels.

Further analysis on the flow interaction between the main and side channels and quantification of the amount of fish habitat in the side channels was done in 2007. This was a study on the potential effects of surface water withdrawal on the freshwater habitats in the Dungeness River. The following link contains the report: **Task 4 Dungeness River Aquifer Recharge Habitat Technical Memorandum** by Ron Campbell (R2 Consultants, Inc.) done May 31, 2007. Particularly useful are Figures B-1 to B-4 in Appendix B titled **Assessment of mainstem Dungeness River flows for preferred anadromous fish spawning and rearing habitat conditions in the surface water-connected side channels after Daraio et al. 2003**. This study was peer-reviewed by technical experts with the state and federal agencies and the Tribes. http://www.clallam.net/environment/assets/applets/R2_Habitat_Tech_Memo_5-31-07.pdf

After review by the agencies' technical experts it was determined the proposed instream flows of 180 to 575 cfs would protect salmonid habitat in the side channels throughout the river.

L. Groundwater model

Ecology received a number of comments expressing doubt regarding use of the model for determining mitigation demand and credit.

Commenters

Dr Robert N Crittenden 2, 4, 5, 6, 7, 11, 12, 14, 17; Dan & Lois Perry 2; Ross Krumpe 8 ; R Doreen Emerson 9, 11

Response

The Dungeness groundwater model is constructed in a program called MODFLOW. MODFLOW is the most widely used groundwater modeling program in the world and is considered the industry standard for simulating groundwater flow. MODFLOW is essentially a water balance tool used to calculate how water moves into, through, and out of the aquifers represented in the model.

The model was built using data and information regarding water withdrawals, irrigation ditch leakage, groundwater elevations, aquifer properties, lithology, unit thicknesses, soils, topography, climate, streamflow, geology, water rights, population, land use, and bathymetry among other things. As a result, the Dungeness River basin is one of the most well characterized and understood hydrologic systems in the state.

Although there are uncertainties with all groundwater models, Ecology and other project partners, including Clallam County, Clallam County PUD, City of Sequim, USGS, Jamestown S'Klallam

Tribe, Foster-Wheeler Tetra Tech, Aspect Consulting, and Pacific Groundwater Group all agree that the model reasonably simulates groundwater conditions in the Dungeness River basin near the City of Sequim. In the past 15 years over a million dollars was invested in collection of data, model construction, revisions, calibration, peer review, and documentation. Local project partners have contributed time and resources and have actively participated in the project every step of the way.

The groundwater model for the Dungeness is a regional-scale model initially developed by Brian Drost at the USGS. It is important to remember why the model was constructed, what it represents, what its limitations are, and what it should be used for. The model was constructed as a tool that could be used to quantify and simulate groundwater movement through the basin at a regional scale. It was developed as a way to evaluate and predict hydrologic impacts resulting from piping irrigation ditches and increasing groundwater withdrawals. It was also more recently revised so it could be used to evaluate groundwater recharge projects that could help mitigate new groundwater withdrawals, protect senior water rights, and help streamflow during the low flow time of the year in late summer. The model can also help us identify and quantify the impacts to streams from groundwater withdrawals in a standardized way.

Although we cannot detect very tiny impacts to streams, we are confident that the model provides a reasonable approximation of the hydrologic system and provides the best tool currently available to estimate hydrologic impacts within the local groundwater flow system. As noted above, significant investments have been made collecting data and characterizing site conditions, which were used to construct the model. Our knowledge of the basin, our understanding of hydrology, as well as our legal obligations to manage water gives us the confidence that we are using the model appropriately.

M. WRIA 17 Rule

Ecology received several comments related to the adoption of Chapter 173-517 WAC.

Commenters

Teren MacLeod, Jefferson County Association of Realtors 4, 8; Dennis Schultz, Olympic Stewardship Foundation 7, 8, 9, 10; Dr Diane Johnson, Chimacum Grange #681 2;

Response

Comments on the WRIA 17 rule cannot be considered through the rule adoption process for WRIA 18. See the response to comments on Chapter 173-517 WAC, the Water Resources Management Program for the Quilecene-Snow Water Resource Inventory Area (WRIA 17) at this link : <http://www.ecy.wa.gov/laws-rules/activity/wac173517.html>. If you believe the WRIA 17 rule does not have an adequate legal basis or needs revision you may appeal to the pollution control hearing board, or petition Ecology to amend the rule.

Rule sections

010 - General provisions

Comment # 1

What will happen to households where couples decide to add to their families either by adoption, natural birth or taking in foster children? Will they be made to pay mitigation fees for the expansion of the use of water?

Commenter

Karen Pritchard 2

Response

Ecology recognizes that existing uses fluctuate, and that sometimes existing uses may increase or decrease, for example as families grow or shrink. It is not Ecology's intent to apply the rule to existing uses that merely fluctuate so long as that increase (or decrease) can be reasonably considered part of an established and existing use.

Comment # 2

In addition to the already restrictive uses ready to go into effect it seems that if a couple decides to add to their family that they too will have to pay mitigation for their "new use" even if they have an existing well that is established in the beneficial usage.

I cannot imagine any country outside of Communist China that would control its population to this extent by these means. If this type of intrusion into our personal lives exists or the possibility that it could become applicable under this new rule then steps need to be taken to preclude it. Isn't it enough that those of us who garden and raise our own livestock cannot live out that dream under the new rule? This is the very definition of "rural living".

Often times our representatives are unwilling to tighten language in a proposed law because they deem the possibility absurd. I, for one, insist that if there is nothing in the rule to preclude this suggestion from becoming a reality that steps will be taken to absolutely, resolutely insure it will not.

Commenter

Karen Pritchard 1

Response

Ecology recognizes that existing uses fluctuate, and that sometimes existing uses may increase or decrease, for example as families grow or shrink. It is not Ecology's intent to apply the rule

to existing uses that merely fluctuate so long as that increase (or decrease) can be reasonably considered part of an established and existing use.

Also see the general response on Small impacts.

Comment # 3

I have put in a well on property I intended to build a home on, and have been using it to supply an RV and to do some irrigation on-site. Are we grandfathered in to unrestricted water use?

Commenter

Richard Brough 1

Response

To distinguish between permit-exempt uses that are subject to the rule and those that are preexisting and have established water rights, Ecology must determine when and to what extent beneficial use occurs, and every case will be fact specific. It is not possible to make a determination about applicability of the rule without site specific water use information. Please contact Ecology's Southwest Regional Office at (360)407-6300 for more information.

The permit-exemption for non-commercial irrigation use allows a total irrigated area up to one-half acre. If you planted your trees and garden and irrigated them for a reasonable period before adoption of the rule, your irrigation use would not be affected by the rule.

If you live on the property and started regularly using water in your residence before the rule was adopted, this is an existing domestic use and your domestic use is not subject to the rule.

Whether pre-existing camping and recreation use is a regular beneficial use is a legal question the statute doesn't directly answer and the courts haven't specifically ruled on. Ecology does not interpret intermittent camping and recreation as establishing a domestic water right under the groundwater permit exemption.

Situations can arise where you may need to show that you established your water use before the rule went into effect. The most certain way to do that is to install a meter to measure water use prior to the effective date of the rule. You might also be able to demonstrate your water use through power bills, dated photographs and affidavits.

Comment # 4

Exempt wells that are drilled and capped should be exempted from this rule.

Commenter

Carol Johnson, North Olympic Timber Action Committee 7

Response

Ecology does not have the authority to exempt existing wells that have not been used. Although exempt wells do not require a water right permit, they are subject to state water law. Under state water law you only establish a water right through regular beneficial use of water from your well. Water rights that are initiated after the rule's effective date must comply with the rule requirements. See also the general response on the Groundwater permit exemption.

Comment # 5

By what authority does the DOE take on the role of proactively protecting the rights of senior water rights holders?

Commenter

Tom Williamson 4

Response

A basic premise of water law in this state is the prior appropriation doctrine. The state water code at RCW 90.03.010 and .290 requires protection of existing water rights.

Comment # 6

It seems that the mission of the DOE now is defined as to protect the interests of senior water right holders. How did they get that job? Sounds like a job for the courts or maybe the Department of Commerce. Who are the senior water right holders, you might wonder; I do. We are told that it's the municipalities and irrigators.

Commenter

Tom Williamson H5

Response

Thank you for your comment. Please see the response to Comment # 5.

Comment # 7

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

The exclusion of the Elwha/Morse Creek watershed basin presents substantial obstacles to the City's potential desire to use Elwha/Morse Creek watershed basin water both from a direct purchase of water rights standpoint and from an intertie standpoint. It is respectfully submitted that DOE should either follow the definition created by statutory recognition of WRIA 18 --- which definition includes the Elwha/Morse Creek watershed basin--- or DOE should seek legislative authority to create a new WRIA, such as 18 East. It is the City of Sequim's position that failure to properly identify the WRIA and the attempt to regulate a different area of land than is authorized by statute and regulation invalidates the proposed rule.

Commenter

Craig A Ritchie, City of Sequim 2, 4

Response

Thank you for your comment. Ecology disagrees. Neither this rule nor the watershed planning process redefined the boundaries of WRIA 18. The planning process conducted addressed the entire watershed and adhered to the requirements of RCW 90.82, the Watershed Planning Act. The adopted plan covered the entire WRIA. The City of Sequim took part in watershed planning, and did not petition the state Legislature to split WRIA 18 for the purpose of watershed planning as was done in WRIA 29. WRIsAs are not defined in statute they are defined in Chapter 173-500 WAC.

Comment # 8

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

Commenter

Craig A Ritchie, City of Sequim 5

Response

Comment noted and correction made to rule.

Comment # 9

Another concern in the same section is that it is not intended to affect "federal and tribal reserved rights." There is no definition of federal and tribal "reserved rights."

There are, of course, various speculative federal and tribal "reserved rights." It would seem more reasonable to change that sentence to "federal and tribal legally protected rights to the extent of such legal protection." This issue has yet to be fully litigated and there is no reason for language in this rule which could be construed as either an admission by the State of Washington or as a grant of rights by the State.

Commenter

Craig A Ritchie, City of Sequim 6

Response

Ecology respectfully disagrees. Please see the general response on Federal Reserved Water Rights.

Comment # 10

The water resource management rules proposed by the Department of Ecology do not affect water rights reserved by the Jamestown S'Klallam Tribe.

Commenter

Scott Chitwood, Jamestown S'Klallam Tribe 10

Response

Ecology agrees. Please see the general response on Federal Reserved Water Rights.

Comment # 11

You propose that the priority date for an exempt well will be the date that water is put to beneficial use, and distinguish between the different subcategories of beneficial uses (e.g., prior domestic use does not give the right to water a garden in the future). Such a rule would be bad public policy.

It would tell a landowner who has a permitted well for future use that he must place it in use now, even if not needed, to avoid losing its use in the future when it will be needed. It would tell a landowner who owns land without a well on it that he perhaps plans to build on later, that he must immediately drill a well and begin using it. This would result, in addition to unnecessary consumption of electricity from running a well pump 24/7 (and think how hard our utilities are working to get everyone to save electricity) in over 1.8 million additional gallons of water (at 5,000 gpd) being extracted from the aquifer every year for each well. Surely this would be a result directly opposed to the goals of the proposed rule. A common sense adjustment is needed.

Commenter

Pearl Rains Hewett 31; Randy Simmons 21; Kaj Ahlburg 19

Response

Although permit-exempt groundwater withdrawals don't require a water right permit, the extent to which the groundwater is put to regular beneficial establishes a water right with the same privileges and legal restrictions as a water right permit or certificate obtained directly from Ecology. "Beneficial use" refers to the application of a reasonable quantity of water to a non-wasteful use. Typical beneficial uses allowed under the groundwater permit exemption include irrigation, domestic water supply, and stock watering. Ecology considers each type of use separately. Regular use generally means a recurring use that conforms to normal usage patterns.

Pumping water from a well that is not needed implies the water is being wasted. Wasting water is not allowed under state water law. See also the general response on the Groundwater permit exemption.

Comment # 12

Under Washington Water Law, Priority Date for Exempt Wells, Like Other Beneficial Uses, Must Be Based on Relation-Back Doctrine

Ecology's draft ISF Rule states that the priority date for exempt wells will be the date that water is put to beneficial use. Proposed WAC 173-518-010(3) states that the rule will apply "to the use and appropriation of surface and groundwater in the Dungeness River watershed begun after the effective date of this chapter. Unless otherwise provided for in the conditions of the water right in question, this chapter shall not affect:

. . . Existing groundwater rights established under the groundwater permit- exemption where regular beneficial use began before the effective date of this chapter.

This provision violates relation-back doctrine that is part of Washington's water code. This flaw has been in prior versions of the draft rule, including prior Proposed WAC 173-518-070(4) that stated as follows: "The priority date of a withdrawal under the permit exemption in RCW 90.44.050, is the date upon which water is first put to beneficial use."

REALTORS® previously commented on this legal flaw, and it appears that Ecology's response was not to correct the flaw, but to make its erroneous legal conclusion even more obscure. That is, rather than defining the priority date for exempt uses as done in prior rule drafts, the Proposed Rule removes this definition. Ecology's conclusion is further explained in an email from Ann Wessel dated April 9, 2012: "If you wait until the rule is in place to start using a permit exempt well for your intended purposes, your water use will be subject to the rule. You only establish a water right through regular beneficial use of water from your well." [Exhibit J] Or, as explained by Ecology in its Questions and Answer document:

Q: I have already drilled a well but not started using it. Would my water use be subject to the rule?

A: Yes. If you have not started using the well for your intended purpose before the rule takes effect, your water use would be subject to the rule. You do not have an existing right unless you used water from the well for "regular beneficial use" prior to that date.

Ecology's conclusion that a water users priority and the right to use water is established only upon beneficial use is inconsistent with both the historical common law of water rights, and how the State Legislature codified the relation back doctrine.

Ecology's current interpretation creates significant risk for lenders, homebuilders, and homebuyers and should be re-examined by Ecology and modified.

"The relation back doctrine was created under the principles of equity to allow an appropriator to receive as a priority date the date the appropriator first initiated the use of water and not later when the appropriation was completed. The ability to receive the early priority date depended on the appropriator's diligence in applying water to use. An Introduction to Washington Water Law, Office of the Attorney General, January 2000, at III:27, citing RCW 90.03.340 and *Hunter Land Co. v. Laugenour*, 140 Wn. 558, 565 (1926).

The relation back doctrine is relevant to the process used to develop new housing in order to provide certainty to lenders, builders, and homebuyers. If the right to use water for domestic use is not actually obtained until the time of beneficial use, lenders and homebuilders are at significant risk that water may not be available. In the development process, the time from when a construction loan is issued to when the house is completed by a builder and then sold to a homebuyer can often take a number of years. During this period of time, the local

government will have to determine whether water is available under RCW 19.27.097 in order for a building permit to be issued. The priority date for this type of project should relate back to when the project was first initiated, to protect the investments of the lender and builders, and so that consumers know that water will be available.

The structure of the mitigation requirements in the Proposed Rule further require that the priority date should be based on the relation back doctrine. The Proposed Rule would mandate that mitigation plans include financial assurances such as bank letters of credit, a cash deposit, negotiable securities, savings certificates, or surety bonds. Even though such assurance would be provided by water users, Ecology appears to offer to no security in return – the priority date is part of the assurance to lenders and buyers as to the validity of water supply and viability of the project. Ecology should not impose mitigation requirements and yet be unwilling to provide regulatory assurance in return.

For permitted water rights, the relation back doctrine was codified so that the “date of filing of the original application” becomes the priority date. RCW 90.03.340. Because exempt wells require no application, the analogous point in time would be the notice of intent filed by a well driller. So long as the project is developed and completed with due diligence, the priority date should relate back to the date of the notice.

Further, Ecology’s conclusion in the Proposed Rule that the priority date of an exempt withdrawal is the date of beneficial use is inconsistent with how it has dealt with the same legal issue in other instream flow rules. For example, in Chapter 173-503 WAC, the Skagit Basin Instream Flow Rule, the rule provides that exempt withdrawals based on a reservation of water have a priority date of the date of rule adoption when the water reservation was established. For other exempt withdrawals, the Skagit Instream Flow Rule does not provide a date of priority. This is likely correct, since the exact priority date of an exempt withdrawal may be based on fact specific considerations. In any case, Ecology should not be adopting instream flow rules in different parts of the state that are based on different legal standards.

REALTORS® request a provision be added to the Proposed Rule, if adopted, that provides if an development project was initiated prior to the effective date of the rule through issuance of a land subdivision approval, building permit, or well start card, that the project not be subject to the rule if completed with due diligence. The due diligence standard should be based on the terms of the local government land use approval and existing Ecology policies relating to the demonstration of due diligence for water right permit development schedules.

Commenter

Dennis Schultz, Olympic Stewardship Foundation 15; Bill Clarke, Washington Realtors/Sequim Realtors 11 ; Bill Riley, Washington Realtors 6

Response

Thank you for your comment. Ecology recognizes the difference of the priority date when it reserves water by rule for a purpose described on an application and then allocates that water by issuance of a permit for that use. It has consistently stated the date of the right is equal to the effective date of the rule with such a reserve or reservation of water.

For domestic uses under the proposed rule, the key question may not be the priority date of a new use initiated after the rule is adopted. If eligible to use the reserve, that date is the date of the rule; however, the reserve is subject to a mitigation requirement. For all other purposes of use exempt from a groundwater permit, it is important to be able to distinguish between an existing use and a new use.

As to applicability of the relation-back doctrine, Ecology's interpretation is that the plain language in the statute governs. There is no application acceptance date for these permit-exempt withdrawals, as would be the case for a surface water and ground water permitted use.

We respectfully disagree with comments suggesting that a permit-exempt priority date should relate back to any period other than actual beneficial use.

Comment # 13

Ecology Lacks Authority to Condition Beneficial Use of Water from Exempt Well on Obtaining Permit for Residential Structure.

The error in Ecology's conclusion that the date of beneficial use of an exempt well determines its priority date is further compounded by its conclusion that "for domestic use, beneficial use shall not be considered to occur until water is used within a permitted residential structure." Proposed WAC 173-518-070(4). By creating the additional legal requirement that beneficial use of water from an exempt well does not occur until a local government has issued a permit, Ecology is unlawfully conditioning the use of an exempt well on the action of a local government. What constitutes "beneficial use" of water is determined by the state water code (See RCW 90.54.020(1)), not by the action of local government.

Further, it is common for construction projects to use (if not require) beneficial use of water at the construction site for uses such as dust control, fire suppression, potable consumption, concrete mixing, and other construction-related uses. Owner-builders often live on-site during construction, not in the "permitted residential structure," but in a temporary structure or recreational vehicle. Such uses of water clearly establish beneficial use.

Commenter

Dennis Schultz, Olympic Stewardship Foundation 16; Bill Riley, Washington Realtors 7

Response

The section of the rule mentioned in this comment is cited inaccurately. The rule does not include such language. RCW 90.44.050 clearly states that you only establish a water right through regular “beneficial use” of water from a permit-exempt well. However, Ecology recognizes that a substantial investment is made when someone receives a building permit. If an individual receives approval of a building permit from the County before the effective date of the rule and follows through with building the house, Ecology does not intend to enforce the mitigation and metering requirement for the new home, unless there is a third party impairment claim or other challenge.

Comment # 14

Subsection(3)

The rule, as proposed, exempts yet undeveloped parcels that are part of a group domestic if one parcel has put water to beneficial use. Subdivisions or portions of subdivisions, based upon permit exempt wells or private water systems in which water has not been put to use should not receive a five-year exemption from the rule. *Dept. of Ecology v. Theodoratos*, 135 Wn.2d 582, 957 P.2d 1241 (1998) requires actual beneficial use of water, not a demonstration of system capacity, to secure a water right certificate. Therefore, for a subdivision based upon a permit exempt well or private water system, the use associated with each new residence should only obtain a priority date once beneficial use begins.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 8

Response

Clarification of the period of time for a project to complete a groundwater withdrawal, once begun, is necessary to distinguish between existing and new uses of the groundwater permit exemption. The 5-year due diligence period reflects a reasonable period of time for a permit-exempt groundwater use, whether a single or group domestic use or other permit-exempt use, to complete the project associated with the withdrawal of groundwater. If the use or group use began prior to the effective date of the proposed rule, any subsequent use perfected within 5 years (but only for the permit-exempt purposes actually begun before the rule is effective) of the first regular use will share the priority date of the first use by the group

Comment # 15

Subsection(4)

The water problems of the Dungeness and WRIA 18 are not just the concern of local residents. The Dungeness and the Elwha rivers are cherished regionally, nationally, and internationally.

Both rivers are essential to the health of Puget Sound and the Strait of Juan de Fuca. Nothing could make the importance of the rivers of WRIA 18 clearer than the national and international attention focused on the removal of dams from the Elwha River. Therefore, while watershed plans may express some component of the public interest the locally developed watershed plan is not the sole expression of the public's interest in the river. Nor does the plan fulfill the state's public trust obligation to protect the public's interest in returning adequate instream flows to the Dungeness. The state's trust obligation to protect the public's interest in instream environmental values limits the state's authority to diminish or impair minimum flows. In the Matter of Water Appeals. PCHB Nos. 90-08 ct seq. (1996) ([T]he water code, by recognizing the waters of the state belong to the public and acknowledging the state acts as the trustee for the public in regulating the use of those waters"): See also *Weden v. San Juan Cty.*, 135 Wn.2d 678,698. 958 P.2d 273. 283 (1998) (quoting Ralph W. Johnson, et al. *The Public Trust Doctrine and Coastal Zone Management in Washington State*. 67 Wash. L. Rev. 521,524 (1992)): *Orion Corp. v. State*. 109 Wn.2d 62 L 640-41, 747 P.2d 1062. 1073 (1987) (Washington courts have recognized new public trust interests in keeping with evolving public need). In disregard of its trust duties--for the sake of political compromise--Ecology proposes to allow new consumptive uses--even if not fully mitigated--in spite of the fact that the very minimum flows the rule establishes remain unmet. The state's duty as trustee of public waters constrains Ecology from giving away trust resources to private users by waiving impairment of instream flows by establishing reserves that are not fully mitigated and maximum depletion amounts. See. *Rettkowski v. Dept of Ecology*. 122 Wn.2d 21 9. 232. 858 P.2d 232.239 (1993).

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 9

Response

Ecology has determined that allowing a small impairment of instream flows that will result from reserving water for future domestic use is in the overriding public interest, and is allowable under RCW 90.54.020(3)(a).

020 – Purpose

Comment # 16

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

Commenter

Craig A Ritchie, City of Sequim 7

Response

Ecology respectfully disagrees. Chapters 90.03 and 90.82 RCW both call for protection of resources.

030 – Definitions

Comment # 17

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

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

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

Commenter

Craig A Ritchie, City of Sequim 8, 9

Response

Thank you for your comment.

Comment # 18

Define "Change of Use" I cannot believe you would enact a rule without having so important a term defined. Any Scientist knows that adjectives are open to subjective interpretation, that is poor rule making at it's best.

"Change of use" is not defined within the glossary. This is totally unbelievable, and allows anyone within ecology to set and use a subjective vague and changing standard of use and change of use. PLEASE define change of use.

Leaving change of use undefined allows any change or alteration of use, loss of family member, births, change of landscaping, change of livestock to poultry, leaving a house vacant for a year or more, to fall within the definition of change of use. It also encourages a ridiculous level of monitoring by the state. Several times employees from the department of ecology have mentioned monitoring electric usage, and checking historical use from satellite photographs, but only when a complaint comes in? The whole idea is completely to Orwellian to be believed.

Here is a livable definition. -

Those uses allowed by county zoning , at the time original building permit was applied for should be allowed under the rule.

Example; So if I have a home on 1.5 acres and want to add a guest house, and it was allowed by the County and planning department rules when I applied for the building permit for my existing home, then adding a guest house should not be a change in use. It is the use that the property was intended for and does not substantially increase water utilization, and adds no increase in outdoor water use.

Commenter

Leland Schwab 2; Scott Gordon 3

Response

Water right applications do not vest in the manner of land use decisions. The Washington Supreme Court ruled in *Stemple v Department of Water Resources* (1973) that an application for a water right is subject to rights, rules, and requirements in effect when the Department of Water Resources (now Ecology) makes its decision to approve, condition, or deny a permit to appropriate water:

“The issuance of water use permits by the Department of Water Resources (superseded by the Department of Ecology) which did not become final prior to the enactment of the State Environmental Policy Act of 1971 (RCW 43.21C) and the Water Resources Act of 1971 (RCW 90.54) is governed by these statutes even though the applications were filed and some administrative and judicial actions on such permits were completed prior to the effective date of the statutes.”

Additionally, the Pollution Control Hearings Board in *Knight, et al. v. Ecology*, PCHB Nos. 94-61, 94-77, & 94-80 (1995) held that a right based on the permit exemption cannot be changed to another place or to another purpose of use.

“An exempt use under RCW 90.44.050 is illusory for the purposes of the change statute.”

A new use of water could be an expansion of an existing purpose of use or a new purpose of use at an existing location. Under law, a water right cannot be changed with respect to the

location of the point of diversion or withdrawal, the source, the instantaneous and annual amounts, or the purpose or place of use without first obtaining permission. Whether the existing use is authorized by an existing claim, permit, or certificate, or if it is based on the permit exemption, unless there is a statutory provision authorizing it, there is no basis to simply presume the right can be changed. Other water users with rights that could be affected are entitled to due process, including notice, and opportunities to comment and to appeal the decision by Ecology to approve a request to change or transfer the water right.

Comment # 19

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

Commenter

Craig A Ritchie, City of Sequim 10

Response

"Closure" is a term of art historically used by the courts, Ecology, and Ecology's predecessor agency. It signifies a determination that water is not available for appropriation from a surface water or groundwater source. It has appeared in water management rules throughout the state since the 1970s. Mitigation of new water use is authorized as a resource management technique in RCW 90.03.255 and 90.44.055. Reserving water for domestic use is authorized under RCW 90.54.050 and does not require a water right permit.

Comment # 20

"Critical Period"

The definition of critical period is wholly inadequate in the proposed rule. There are many important fish species in the Dungeness and all species have several critical life stages:

spawning, rearing, and migration, to name a few. The critical life stages of the various species in the basin generally persist for more than thirty days and can vary greatly. For example, Chinook are considered to be spawning throughout August and September; Steelhead spawn from February through June; and Bull Trout spawn from September through November. P.L. Wampler and J.M. Hiss. Fish Habitat Analysis for the Dungeness River Using the Instream Flow Incremental Methodology, U.S. Fish and Wildlife Service. Western Washington Fishery Resource Office, Olympia, W A (1991). It is unclear why the "critical period" is limited to thirty days when scientific evidence clearly indicates that critical periods almost always persist for longer than thirty days. The definition of critical period should be amended in the final rule to include all the critical life stages, for their full duration of the important species of the Dungeness. Moreover, the definition of "critical period" is difficult if not impossible to apply accurately since by its terms it applies to the thirty day period with the "lowest stream flow available": a judgment that can only be made with hindsight once the low flow period is over.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 10

Response

Thank you for your comment. Please see the response to Comment # 60 regarding how streamflow is related to salmon survival. Strong correlations relating adult coho salmon returns to streamflows two years earlier have typically found approximately 30 consecutive day periods during the time of lowest summer/fall flows to have the highest correlation as the most critical period for salmon survival.

Comment # 21

I also believe that when you look at the flow of 105 cubic feet per second in a 30 day period, I would recommend that Ecology study retroactively the data of ten years going backwards, as well as going forwards.

Commenter

David Unruh H2

Response

Thank you for your comment. Achieving the 105 cfs target will require meeting that flow level for 8 out of 10 consecutive years. Ecology will be studying at least 10 years of flow data.

Comment # 22

Include Gardens, lawns and some quatiified outdoor watering within the definition of Domestic use.

Commenter

Leland Schwab 5

Response

The purposes of use have been defined by the Legislature and common law over more than a century. Ecology uses definitions in its rules that are consistent with the statutory meaning and common law.

Comment # 23

RCW 90.54.020 (1) states that “Uses of water for domestic, stock watering, ... irrigation, ... are declared to be beneficial.” Ecology’s attempt to discriminate against outdoor water uses in the future is directly inconsistent with this statement. Such outdoor uses, which are an essential component of the rural life style of Clallam County, under the statute need to be given equal priority to “domestic use”.

Commenter

Pearl Rains Hewett 28; Randy Simmons 18; Kaj Ahlburg 16

Response

Washington’s water code contains no hierarchy of beneficial uses. Please also see the general response on Prior appropriation: what’s fair?. The proposed rule provides a priority for domestic water use. RCW 90.54 provides that the Director of Ecology may place a priority on some water uses above instream flow purposes if it is in the overriding public interest. Ecology made a finding that providing a future supply of water for domestic purposes was in the overriding public interest. All other future uses including, temporarily and to a small extent, instream flow purposes, are therefore subordinate to the domestic water use under this rule.

Comment # 24

RCW 90.54.020 (1) states that “Uses of water for domestic, stock watering, ... irrigation, ... are declared to be beneficial.” Ecology’s attempt to discriminate against outdoor water uses in the future is directly inconsistent with this statement. The definition of 'domestic use' as the only beneficial use of a well is in direct contradiction with the RCW. Again a repeat of the error in WAC 173-517.

Commenter

Ross Krumpe 4; Dennis Schultz, Olympic Stewardship Foundation 3

Response

Please see the response to Comment # 23.

Comment # 25

Domestic water use - your definition specifically precludes gardening and lawns! At every meeting department of ecology employees state that existing house holds with wells, and new mitigated house holds with wells, will be able to irrigate a portion of their property and have a garden. YOU MUST include gardening and lawns are part of domestic use. You can and should define how large an area can be water. But to state the domestic water use precludes gardening and lawns is to deny how people have lived for thousands of years. Domestic pertains to house holds and non commercial activities.

Commenter

Scott Gordon 8

Response

Please see the responses to Comments #22 and #23.

Comment # 26

WAC 173-518 -030 Definitions: 1) Existing water rights: Please explain further. What are perfected riparian rights and perfected inchoate appropriative rights? What federal rights were actually given to Indian and non-Indians. Is this trying to imply that Indians have the right to 50% of the water (as might be interpreted by a “Judge Bolt”)? Is Ecology saying that a river or stream has always had a certain amount of water so, it has a right to this amount. Do the plants, fish and wildlife have implied stream or river water right along with owners of waterfront property? I don’t trust what I don’t understand.

Commenter

Warner J Litchfield 3

Response

Perfected riparian rights are water rights legally in use that were established under a riparian doctrine of water law prior to the 1917 adoption of the current state water code. The current

state water code is based on the prior appropriation doctrine. By 1932, all owners of lands riparian to streams in Washington had to begin appropriating water for a beneficial use in order to retain their priority date based on the riparian doctrine.

Inchoate appropriative water rights are rights held by an entity such as a municipality that include authorization to develop use of the full quantity of the water right over an extended period. The portion of such a water right not yet in use is considered “inchoate.”

Please see also the general response on Federal Reserved Water Rights.

Comment # 27

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

Commenter

Craig A Ritchie, City of Sequim 11

Response

The legislature has defined a municipal water supplier and both statute and practice recognize municipal purpose of use to comprise many beneficial uses normally proved by municipal water suppliers. Some beneficial uses, like agricultural irrigation, have been excluded from municipal use by the Courts (see *West Richland v Ecology*, Court of Appeals, 2003).

Comment # 28

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

Commenter

Craig A Ritchie, City of Sequim 12

Response

Thank you for your comment. Ecology is not aware of any statutory or Supreme Court definition of hydraulically connected so the definition in the rule cannot be inconsistent with something that does not exist. The definition in the rule describes the physical state between two water bodies that are hydraulically connected and is the definition Ecology has consistently used for many years.

Ecology also respectfully disagrees that the Postema decision is the only authority Ecology has for regulating groundwater withdrawals for the purpose of protecting surface water. Ecology is adopting the Dungeness rule under the authority of the Watershed planning (chapter 90.82 RCW), Water Resources Act of 1971 (chapter 90.54 RCW), Water code (chapter 90.03 RCW), Regulation of public groundwaters (chapter 90.44 RCW), Minimum water flows and levels act (chapter 90.22 RCW), and Water resource management (chapter 90.42 RCW); and in accordance with the Administrative Procedure Act (chapter 34.05 RCW).

It is possible that some wells may tap groundwater that is not hydraulically connected to surface water bodies within the proposed rule boundaries. WAC 173-518-080 requires that consumptive water uses that would impact surface water sources listed in Table III be mitigated. Thus, only groundwater withdrawals that would capture water from a regulated surface water body would require mitigation.

Comment # 29

What statute or legal precedent authorizes the definition of “hydraulically connected”?

Commenter

Pearl Rains Hewett 57; Randy Simmons 47; Kaj Ahlburg 45

Response

The definition in the rule is technically accurate and consistent with the directive in RCW 90.44.020(9): Full recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and ground waters.

Comment # 30

“Instream flows”

The equating of “base flow” and “instream flow” confuses hydrology with regulatory terminology and misstates the law. The reference in RCW 90.54 to “base flows” makes clear that base flows are different from minimum instream flows or instream flows, by stating in pertinent part, as follows:

(3) The quality of the natural environment shall be protected and where possible enhanced as follows:

(a) 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. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

RCW 90.54.020(3)(a) (emphasis added).

Base flows are therefore "natural" flows, which the state is obliged to retain, to sustain, and, where possible enhance wildlife, environmental, and aesthetic purposes. Base flows can enhance where the purpose of minimum flows is to protect. Instream flow rules take into account use both by wildlife and humans and do not necessarily mimic natural flows. Instream flows, as the name of their authorizing statute-the Minimum Flow Act-suggests, are (or at least should be) set at levels absolutely necessary to protect salmon and other wildlife. Hence, instream flows may be less than base flows.

In short, by conflating these two terms Ecology is rewriting the Legislature's purposeful use of two different terms in two different statutes, and the proposed rule should be amended accordingly.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 11

Response

Ecology respectfully disagrees. RCW 90.82.020 (3) defines "minimum instream flow" as a minimum flow under chapter 90.03 or 90.22 RCW or a base flow under chapter 90.54 RCW. This rule adopts instream flows as recommended in the Elwha-Dungeness WRIA 18 Watershed Plan that was adopted under the authority of chapter 90.82 RCW. Please also see the response to Comment # 66.

Comment # 31

"In-stream flow" definition. The minimum flows set appear to be under the statutory authority found only in RCW 90.22. RCW 90.22.020 requires prerequisite notices. It is questionable whether notices given under the WRIA planning statute and which do not specifically mention RCW 90.22.020 qualify as proper notices to set minimum in-stream flow. Further, minimum in-stream flow must be consistent with the existing in-stream flow based upon current lawful water usage. Any authority to set minimum in-stream flow probably comes from the Clean

Water Act, 33 USC §1251-1387 (1972 and 1977). See Public Utility District #1 of Pend Oreille County v. State Department of Ecology, 146 Wn 2d 788, 51 P3d 744 (2002), and 40 CFR § 131.12 (1993). Thus, until an in-stream flow amount is adopted, assuming proper notice, the rule can protect only what exists at the time the rule is adopted, not what the "historical" in-stream flow used to be. Even if the rule could relate back to earlier in-stream flows, those could not be earlier than 1977.

Commenter

Craig A Ritchie, City of Sequim 13

Response

Authority for setting instream flows for this rule is in RCW 90.22 and RCW 90.54. Notice consistent with the requirements of RCW 90.22 was completed. Please also see the response to Comment # 66.

Comment # 32

“Interruption” is defined as referring to water rights issued after the effective date of the rule. The term “issued” should be changed to “acquired”. Permit exempt water groundwater rights are not generally thought-of as “issued”; they are acquired via beneficial use. Such rights should clearly be subject to interruption under the rule, however.

Commenter

Shirley Nixon 11

Response

Thank you for your comment. Ecology agrees the rule required clarification, however, Ecology feels the term “established” better clarifies your point. The term “acquired” could be interpreted to mean a purchased water right.

Comment # 33

On Page 5 of Chapter 173-518 WAC [the definition of “interruption”] new uses are subject to interruption - does this apply to new wells, if so how do you intend to stop people from using their water. How far bellow the minimum flows, and how long, does the river have to drop before you impose an emergency closure? Will this closure be imposed on only new wells?

Commenter

Scott Gordon 10

Response

This rule does not apply to continued use of existing water rights, including current uses of permit exempt wells. The rule will apply to new uses of water from a permit-exempt well or authorized through a water right permit. The rule requires mitigation for new water uses. New uses of water that are mitigated are not subject to interruption since the impacts of the new use are offset by the mitigation. In addition, the rule established reserves of water for domestic use to ensure an uninterrupted water supply for new homes.

Comment # 34

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

Commenter

Craig A Ritchie, City of Sequim 14

Response

RCW 90.03.265(1)(d) does not define or suggest a substantive definition of mitigation. The PCHB has held that no rule is necessary. Mitigation is a technique, method, or project that results in eliminating detriment or injury to an existing water right. The right embodied in the instream flows adopted in this rule is the water right that would be first affected by junior appropriators. Ecology has identified the criteria that resolve conflicts with the right it holds on behalf of the public.

Comment # 35

"Mitigation"

The definition of "mitigation" the proposed rule means "action taken to offset impacts"... "on closed surface water bodies or senior water rights. The proposed language is unacceptably vague, and fails to prevent detriment to the public interest. To protect the public interest, any action purporting to constitute mitigation must fully replace the newly appropriated water in-quantity, in-quality, in-time, and in-place: bucket for bucket and drop for drop. "Action...to offset impacts" simply expresses the intent to mitigate, it does not promise delivery of full mitigation.

Moreover, the definition for "mitigation" in the proposed rule differs from the definition Ecology uses for mitigation in its draft mitigation policy (Final Draft 1/17/12-Water Resources Policy - POL-xxx, Evaluating Mitigation Plans).² It is not clear why Ecology proposes to use

two different definitions of the term mitigation and what the differences might be in how those definitions are applied.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 12

Response

Thank you for your comment. Ecology respectfully disagrees. Mitigation is defined in this rule to address the water management needs of this watershed. In addition, the draft policy has not been finalized and Ecology intends to revise the draft policy to defer to rule language, including definitions.

Comment # 36

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

Commenter

Craig A Ritchie, City of Sequim 15

Response

Thank you for your comment. Ecology has changed the rule to include a reference to RCW 90.03.015(3) in the definition of public water system. A public water system as defined in the rule includes both “municipal water supplier” as defined in RCW 90.03.015 (3) and group B water supply systems.

Comment # 37

Please include a definition of Non-Government-Organization in the rules. Also a reference to how someone can start a NGO and the rules and regulations governing such.

Commenter

Ken Morse 3

Response

Ecology does not agree that a definition of Non-Governmental-Organization is needed in the rule. This term is not used in the rule text and does not need to be included in the definitions.

Comment # 38

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

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

Commenter

Craig A Ritchie, City of Sequim 16

Response

WAC 173-500-050 (9) defines "Nonconsumptive use" as a type of water use where either there is no diversion from a source body, or where there is no diminishment of the source.

The definition in the rule is based on POL-1020, dated Oct 31, 1991, and further refines the definition in WAC 173-500-050(9) to include the water quality element arising from case law.

Comment # 39

"Reservation." While this definition fits the rest of the rule, there is no authority for a reservation as so defined. The only authority appears to be RCW 90.54.050(1). However, the findings in this rule seem to imply that there is no water available to "reserve." You can't reserve for future use, water which does not exist.

Commenter

Craig A Ritchie, City of Sequim 17

Response

The reserves of water established in this rule rely on a finding that the public benefits achieved by the limited domestic water reserves clearly overrides the potential for negative effect on instream resources, consistent with RCW 90.54.020(3)(a).

Comment # 40

DOE mentions the term “timely & reasonable”. What rule or person defines this term?

Commenter

Carol Johnson, North Olympic Timber Action Committee 4

Response

It is up to the water purveyor to determine whether water can be supplied in a timely and reasonable manner. The Washington State Department of Health has published a white paper explaining state laws that address timely and reasonable water service:
<http://www.doh.wa.gov/Portals/1/Documents/Pubs/331-444.pdf>

Comment # 41

CELP commends Ecology for encouraging as the first option in WAC 173-518-070 (2) for new water, hook-up to a public water system. and for requiring written evidence when hook-up is not "timely and reasonable." However, the term “timely and reasonable manner” is neither clearly defined nor linked directly to any guidance provided by the Department of Health. “Timely and reasonable” is only statutorily defined in relation to counties that have a Coordinated Water System Plan in place. RCW 70.116.060(3)(b) defines "timely and reasonable as follows: “[a]n existing purveyor is unable to provide the service in a timely and reasonable manner if the water cannot be provided to an applicant for water within one hundred and twenty days unless specified otherwise by local legislative authority.” If Ecology is referencing this provision, it should be stated with specificity in the rule.

In the alternative, if Ecology intends to leave the determination of "timely and reasonable” up to the County, then this provision fails to provide the public guidance on the term's application. This lack of guidance could mean that permit exempt wells are issued based on nothing more than the mere assertion that the time or cost of hook-up exceeds that of installing a well, even if the potential user is located within an existing water district and service is available. Such fuzzy language inevitably will not protect the public’s interest in reducing consumptive uses of Dungeness basin water, and is likely to make drilling new wells the tall back every time a prospective applicant finds the process for hook-up to be burdensome. The definition of

"timely and reasonable manner" should be amended in the final rule to avoid complications in implementation of section 070.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 13, 15

Response

Ecology respectfully disagrees with the recommendation to provide a definition of "timely and reasonable manner" in the rule. It is up to water purveyors to determine whether water can be supplied in a timely and reasonable manner, and this may vary considerably between different water purveyors. A single definition in the rule would likely prove unworkable for some water purveyors. Ecology will provide guidance on the "timely and reasonable" determination as part of rule implementation. Please also see the response to Comment # 40.

Comment # 42

Timely and reasonable: This vague definition must have been recommended by a lawyer to ensure continued legal participation. Timely and reasonable to me means within 2 weeks and at a cost less than \$1,500. Do government agencies have a sliding scale to fit their desired definition at any given time. Explain further or delete "timely and reasonable" from the water rule text.

Commenter

Warner J Litchfield 4

Response

Thank you for your comment. Please see the response to Comment # 40.

Comment # 43

Defining utilization - It would be easier to define volumes of water utilization allowed and forget about how people use their water ? This makes allot of sense, as some people will be collecting rain water, using irrigation systems etc, which could confuse where water if coming from. If your are metering utilization, then that should meet the level control you desire, as it meets the goals for reduction and monitoring. This also allows individuals to change their water use within allocation without needed permits or ecology or noseiy neighbors from intruding on a peaceful existence.

Commenter

Scott Gordon 9

Response

Ecology does not agree that a management framework based on defined volumes of water utilization would meet the water resource management needs for this watershed. Due to conditions in the watershed and consistent with recommendations in the 2005 Elwha-Dungeness Watershed Management Plan, this rule requires mitigation of all new water use that would have an effect on closed surface water bodies. Setting water allocation limits for new water users, without offsetting the impact of that use, would not meet the resource protection needs of the watershed.

Comment # 44

Change definition to "Water budget neutral" means an appropriation for a project where withdrawals of ground water are proposed in exchange for:

- (1) placement of other water rights into the trust water right program or stream flow improvement with appropriate assurances, that are at least equivalent to the amount of consumptive use for the project, or
- (2) return of Class A reclaimed waters to the watershed that are at least equivalent to the corresponding avoided volume of diversion from surface water, or
- (3) return of Class A reclaimed waters to the watershed that are at least equivalent to the corresponding volume of effluent from on-site septic systems that due to the project no longer diminish the quality of the water source, or
- (4) water imported from a source outside of the Dungeness portion of WRIA 18.

This change is intended to allow mitigation credits to be added to the water exchange for reuse of reclaimed water. Reclaimed water that replaces direct diversions of surface water and is reused for the same purpose of use should be credited in the total diversion amount avoided. This full diversion amount is consistent with the amount of water that is widely perceived to be conserved by irrigation ditch piping projects. Sections 173-518-070 and 173-518-075 in the draft language refer to mitigation of proposed consumptive use and stream depletions. According to Section 070 (3) (a) (i), depletion is determined by the groundwater flow model with the input of the proposed consumptive use. However, this is only a flow model, which calculates mitigation credits using the quantity of stream depletion. A method is needed to calculate mitigation credits for the reduction of prior consumptive use due to diminishment of the quality of the water source and of all other water bodies hydraulically connected to the water source.

Also, this change is intended to allow mitigation credits to be added to the water exchange for the water imported from Morse Creek via the District's Fairview Water System. Unconsumed

water from Morse Creek recharges groundwater in the Bagley, Siebert and two coastal sub-watersheds, and enhances streamflow in these creeks and possibly McDonald Creek, as well.

Commenter

Doug Nass, Clallam County PUD #1 2

Response

Ecology does not agree with the recommended changes. The existing language is broad enough to encompass return of reclaimed water to the watershed as a means of offsetting impacts to surface waters. It is not appropriate to include in this definition “water imported from a source outside the Dungeness portion of WRIA 18” since it is in direct conflict with a recommendation in the Watershed Plan.

Comment # 45

“Water budget neutral” is defined too broadly to include out-of-kind mitigation (non-water) mitigation for new consumptive uses. Remove the “either/or” language and change the definition of “water budget neutral” to that found in the November 2010 draft rule. That is:

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

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

Commenter

Shirley Nixon 12

Response

Thank you for your comment. Ecology respectfully disagrees. “Water budget neutral” is a finding, not an appropriation.

Comment # 46

"Water resources inventory area (WRIA)." While the definition is nearly correct, it must be emphasized that the rule violates this very definition. The rule, to be statutorily correct, should

state the date the WAC was referenced by the State Legislature when WRIsAs were statutorily authorized. E.g. WAC 173-500 as adopted on __ date.

Commenter

Craig A Ritchie, City of Sequim 18

Response

Thank you for your comment.

Comment # 47

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

Commenter

Craig A Ritchie, City of Sequim 19

Response

Ecology disagrees that the definition provided in the rule is inconsistent with state statute.

Comment # 48

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

Commenter

Craig A Ritchie, City of Sequim 20

Response

Ecology disagrees that the definition provided in the rule is inconsistent with state statute.

040 – Establishment of instream flows

Comment # 49

The Washington Department of Fish and Wildlife supports adoption of WAC 173-518, the Instream Flow Rule for the Dungeness River, its tributaries and adjacent streams. Protecting and restoring its stream flows in these waters is an essential part of recovering and maintaining populations of salmon, steelhead, trout, and char in these waters. Adequate flow is needed by the fish. Success of all other fish management efforts depends on adequate water.

Low summer flows in the Dungeness River have long been recognized as a severe limiting factor for salmon, steelhead, and bull trout. Listing under the Federal Endangered Species Act for some of these types of fish further emphasize the importance of restoring and protecting flows. Small streams near the Dungeness River, including tributaries, are generally small enough that they are clearly flow sensitive that any additional withdrawal during the summer would be detrimental to their fish production capacity. Flows aren't the only factor that can limit fish production, but they are a necessary component of fish habitat.

Thanks to all who contributed to making this plan and associated rule that addresses an important limiting factor for salmon and other fish.

Commenter

Hal Beecher, Washington Dept of Fish & Wildlife H1, H3

Response

Thank you for your comment. Ecology agrees this rule is needed to protect instream resources.

Comment # 50

What are the impacts of using different control point gages? USFS gage vs. Ecology gage and how well do the in stream flow gages represent the flows in the rest of the river?

Commenter

Carol Johnson, North Olympic Timber Action Committee 8

Response

The U.S. Forest Service does not operate any gages in the basin. The U.S. Geological Survey operates a gage at river mile 11.8 on the Dungeness River but it is upstream of all large diversions so it would not be a good control point because the effects of diversions cannot be seen in its flow measurements. Ecology established a gage at river mile 0.8 about 12 years ago

so we could see the effects of diversions. This is the control point we chose for the Dungeness River so we could see the effects of diversions on streamflow.

Comment # 51

The Dungeness Watershed Plan talks about flows in Matriotti Creek. It states that "Occasional measurements of Matriotti Creek have shown values as high as 20 cfs, but more frequently in the range of 5 to 10 cfs (DQ Plan 1994). Matriotti Creek listed for low flow on the Surface Water Source Limitation (SWSL) list in 1952." I will make a comment about Matriotti that I had previously made about Casselary Creek and Bell Creek. Why do we have to try to compensate for creeks that would not have carried water, consistently, year-round, without help from leaking irrigation ditches, and/or direct input from irrigation ditches? Note the following, from a Technical Memorandum to Ann Soule from Peter Schwartzman of the Pacific Groundwater Group:

In 2005, when irrigation diversions were reduced to zero or very low levels during late summer to restore Dungeness streamflow for fish passage, Matriotti Creek was dry at Woodcock Rd. (approximately RM 3). The Agnew District tightlined laterals that previously fed into the Creek, especially in the past 2-3 years. After Sept 15th, the end-date of the irrigation season, much of the middle and upper creek dries up. (pers. comm., Hals and Jeldness, 2007). Bedrock is absent in the Matriotti Creek channel, except near its headwaters (Plate 2).

Yet, in the Dungeness Water Management Rule, the Instream Flows set for Matriotti Creek are: 14 cfs for January, 10 cfs for February, 27 cfs each for March and April, 18 cfs each, for May and June, 5 cfs each, for July, August, September and October, and 14 cfs for November and December. When Matriotti Creek "frequently" had 5 to 10 cfs, and dried up at times, how can we give this creek these water rights? Due to the method used, toe width, which often comes up with a figure larger than real life, we have this problem for most, if not all, of the smaller streams.

Commenter

Marguerite A Glover 24

Response

Ecology's flow data indicates that Matriotti, Cassalery, and Bell creeks do flow year round, even after the leaking from ditches was stopped. Ecology set instream flows for these streams based on the width of the stream and the flows measured in those streams. Ecology would appreciate any new gage or streamflow measurements you may have and wish to share with us.

Comment # 52

The proposed instream flows for the Dungeness River which includes Bagley Creek and Siebert Creek is not based upon peer reviewed sound science. The proposed rules should be held in abeyance until such studies are performed and adequately presented to the public and affected property owners in appropriate meetings. The public meetings to date have not presented proof that such studies have been made resulting in clear and unequivocal evidence that instream flows are necessary for fish protection. This in turn has led to proposed well restrictions and the potential of a water bank controlled by a company or other authority not responsible to local officials.

An example of the shallow scientific analysis is including both Bagley and Siebert creeks in WRIA 18. There is no evidence that they are connected to the Dungeness system. I have written to you earlier about this during WRIA 18 hearings and you summarily dismissed my concerns by saying they are hydrologically connected but with no proof. Other streams with unique qualities have also have been similarly impacted. If you proceed with the rulemaking for the Dungeness you should exclude these watersheds with special characteristics

Commenter

Richard G Kott 1

Response

Section 2.1 in the Watershed Plan includes a description of regional geologic history. It also includes specific citations to prior studies and publications pertaining to geology, hydrogeology, and the relationship between groundwater and surface water:

- Clark's *Keys to An Understanding of the Natural History of the Dungeness River System* (Clark and Clark 1996);
- Bureau of Reclamation's *Physical Processes, Human Impacts, and Restoration Issues of the Lower Dungeness River* (Bountry et al 2002);
- USGS' *Hydrogeologic Assessment of the Sequim-Dungeness Area* (Thomas et al 1999), Thomas et al (1999) focus on the lower hills and lowland valleys of the
- Sequim-Dungeness area;
- Schasse and Logan's (1998) *Geologic Map of the Sequim 7.5 Minute Quadrangle, Clallam County, Washington* contains description and mapping of geologic units, and records of selected water wells used in constructing cross-sections.

Please also see the general response to Groundwater model.

Comment # 53

I am very disturbed by the expectations of the Department of Ecology. To achieve the river flows, we would need to decrease the current usage substantially. Who gets cut?

Commenter

Aloma Blaylock 6

Response

Setting instream flow levels does not mean that those levels will always be met in the stream. Natural variations in rainfall and the use of existing water rights can result in actual flows being lower than the instream flows. Instream flow rules do not require that water be put back in streams. The rules are intended to protect instream resources from future withdrawals of water. The rule does not affect the use of existing water rights, and does not require cuts in existing water use.

Comment # 54

The rule is the solution to the “brave new world” that the Dungeness Basin finds itself in. There are many (myself included) who take exception with the methods used to set instream flows and the numbers assigned to subbasins. That does not change the fact that a statutorily created Watershed Planning Unit has created a legal document finding these numbers to be appropriate.

Commenter

F Michael Krautkramer, Robinson Noble Inc 2

Response

Ecology agrees with this comment. RCW 90.82.080 obligates Ecology to undertake rulemaking to adopt instream flows recommended in an adopted Watershed Management Plan. The Clallam County Board of County Commissioners adopted the Elwha-Dungeness Plan in June 2005.

Comment # 55

Last month, Ecology published a proposed instream flow rule for the Dungeness River. Instream flows are the minimum amount of water that people need to leave in the river to sustain fish.

I support adoption of the proposed instream flow rule for the Dungeness River.

Commenter

John Townsell 1

Response

Thank you for your comment.

Comment # 56

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

Commenter

Craig A Ritchie, City of Sequim 21

Response

Thank you for your comment. The rule has been changed to address your concern,

Comment # 57

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

Commenter

Craig A Ritchie, City of Sequim 22

Response

RCW 90.03.345 states that reservations and minimum instream flows adopted by rule are appropriations with priority dates equal to the date the rule is effective.

Comment # 58

While the proposed instream flows are not what all parties would like to see, it is interesting to note that many voices argue for instream flows that are less than that proposed by the rule. We actually believe that there are reaches of the Dungeness that would benefit from higher instream flows and create more diverse habitats beneficial to Dungeness salmon populations. In the interest of seeing a rule adopted we are, for now, willing to see the proposed flows adopted so the work of restoring flows can begin.

Commenter

Scott Chitwood, Jamestown S'Klallam Tribe 6

Response

Thank you for your comment. It is possible that future studies of the Dungeness River on the relationship between streamflow and salmon production may find that Ecology's proposed instream flows are too low to fully protect and preserve the fish and their habitat.

Comment # 59

Basin water resource planning efforts may routinely include an allocation of waters to specific use categories, duly recognizing the first-in-time, first-in-right administration of Water Rights under Western Water Law generally and 90.03 RCW specifically for Washington State. Examples of water allocation budget elements to specific instream flow uses related to an average annual water year are set forth for four separate Washington State river basins. These are just four of several examples that could be used. In all cases the downstream gage or most appropriate gage data related thereto is used.

1. The Okanogan River of North central Washington (WAC 173-549 adopted 7/76).

Average annual flow (34 years- Malott) 2,300,000 Acre Feet

Instream flow protected (173-549) 1,043,000 Acre Feet

Drainage area above RM 17 = 8,080 sq-mi

Instream flow (base) as a % of average annual flow= 45 % actual¹

2. The Newaukum River of Southwestern Washington (WAC 173-522 adopted 7/76).

Average annual flow (58 years) 365,000 Acre Feet

Instream flow protected (173-522) 110,662 Acre Feet

Drainage area above RM 4.1= 155 sq-mi

Instream flow (base) as a % of average annual flow= 30% actual²•

3. The Deschutes River of Southwestern Washington (WAC 173-513 adopted 6/80).

Average annual flow (24 years) 299,400 Acre Feet

Instream flow protected (173-513) 173,860 Acre Feet

Drainage area above RM 2.4 = 162 sq-mi

Instream flow (base) as a % of average annual flow= 58% actual³

4. The Dungeness River of the Olympic Peninsula (WAC 173-518 proposed 7/12).

Average annual flow (69 years) 278,600 Acre Feet

Instream flow proposed (173-518) 322,370 Acre Feet⁴

Drainage area above RM 11.8 = 156 sq-mi

Instream flow (proposed) as a % of average annual flow= 116% proposed

¹ The Okanogan River Basin may have the largest salmon runs in over 70 years this year (this may not relate to the Instream flow-setting; however, flows may have played some role). The Instream flow as adopted ratio to the average annual river flow is less than 45%; and, less than 40% of the ratio proposed for the Dungeness.

² The Newaukum River drainage area is virtually the same as the Dungeness, with the Instream flow adopted ratio to the average annual river flow is about 30 %; or, only 26% of the ratio proposed for the Dungeness.

³ The Deschutes River drainage is less than 4% larger than the Dungeness yet the Instream flow ratio to the average annual river flow as adopted is ~58%; or, one-half (50%) of the ratio proposed for the Dungeness.

⁴ The Dungeness Instream flow proposed in 173-518 is about 1.16 times larger than the average annual flow for the Dungeness River and is 2.0 to 3.3 times greater as a ratio to historic adopted instream flow examples above.

INSTREAM FLOW SETTING ON THE DUNGENESS RIVER

The instream flow-setting methodology being employed on the Dungeness River does not follow either the Base Flow or Minimum Flow processes set forth in earlier efforts; but, rather, is combined as "Instream Flows as necessary to meet the water resource management objectives..."; and, "The term "instream flow" means "base flow" under ...90.54..., "minimum flow" under ...90.03 and ...90.22...and "minimum instream flow" under ...90.82...."

Specifically, the "minimum instream flow" for the Dungeness River, in fact, keys off of an optimum or near maximizing habitat flow analysis as depicted graphically in the technical background information. (see Attachment 3, pgs. 1,10, 14, 21and 32).

The concept embodied in the 90.54 RCW Base Flow relates directly to the hydrologically-defined Base Flow, that is the dry period recessional flow component of streamflow. The afore-mentioned Appendix D derives the regulatory Base Flow by developing actual duration hydrographs for the involved stream reach throughout the year and then applying specific criteria to suggest a variable Base Flow hydrograph throughout the year. Part of this analysis includes a qualitative rating of the functional uses of the stream. The end product relates directly to the basic stream characteristics under normative flow ranges and conditions.

The methodology used for the Dungeness River as proposed in 173-518 WAC takes the fluvial geomorphically defined river system formed by high energy (flow) events and then assesses habitat functions (spawnable areas, juvenile rearing conditions, adult passage, etc.) without regard to normative flow conditions, thereby obtaining significantly higher flows than have historically occurred under a sustained natural flow condition. The primary authors of the Instream Flows for the Dungeness River note that:

"Even though Chinook spawning habitat is maximum at 575 cfs, biologists chose 180 cfs for Chinook spawning based on the hydrograph showing the streamflow did not reach 575 cfs with enough frequency during September."

This statement displays clearly the flawed methodology relative to natural flow conditions and the development of minimum or base flows: if the objective function is to define maximum or optimum fish flows, then the applied methodology currently used in 173-518 WAC is appropriate; however, the allocation of water to Instream flows directly relates to the policy decisions relative to water available for other uses and users other than fish and the historic language spoke to Base or Minimum flows, not maximum or optimum fish flows.

Comparing these two methodologies as represented in the examples in the prior section provides the apparent following differences: "The Dungeness Instream flow proposed in 173-518 WAC is about 116% larger than the average annual flow for the Dungeness River and is 2.0 to 3.3 times greater as a ratio to historic adopted instream flows...." noted above.

By optimizing/maximizing the flow for fish, significant additional resources are allocated thereto as compared to providing a Base Flow amount. Simply defining "Instream flow" to include all flow related methodologies is not appropriate when, in fact, a maximizing methodology is relied upon. An analysis using the developed data with the PHABSIM model used for the lower Dungeness site and comparing, for example, the specific habitat (not actual fish use or production) functions displayed for 100 cfs (the 1994 and 1998 Agreement's Target Flow) rather than the 180 cfs recommended showed that the 100 cfs still provides 97%, 92%, and 67% spawning habitat function values for Coho, Pink, and Chinook salmon species respectively, when compared to the 180 cfs (83%, 97% and 98% respectively) specified for August to October. See Table 1, page 5 herein for a more complete display and Attachment 4

for a graphical representation of this data interpretation. Since this analysis did not find any correlation data between the flow figures recommended for adoption in the proposed 173-518 WAC and actual historic fish run sizes, it is assumed that that data does not exist and that we are only reviewing the theoretical interpretation of actual measured field habitat environments in the Dungeness River Basin.

Commenter

Kris G Kauffman, Water Rights Inc 2

Response

A minimum instream flow under state law is not a hydrologically-defined base flow. Please see the response to Comment # 66 regarding the legal definition of an instream flow.

Dr. Hal Beecher, WDFW's instream flow expert who worked extensively on the Dungeness instream flows since the 1970s, made the following comments that we agree with regarding Kris Kaufman's comments:

"In Kris Kaufman's letter on the Dungeness rule, he notes (p. 3) that "the historic language spoke to Base or Minimum flows, not maximum or optimum fish flows." His analysis is an incomplete analysis of the considerations of fish in the development of RCW 90.82, and the term "minimum" has also been interpreted in both hydrological (as he does) and ecological contexts. In a biological or ecological context, a minimum flow can be considered the lowest flow that will provide unimpaired fish conditions; lowering flow below the minimum can be expected to reduce potential fish production.

"At the top of p. 4, he speculates that the data do not exist to relate run sizes to flows. He is correct because an extended number of years of record are needed in which fish escapement was large enough to respond to flow effects, but in the Dungeness we are considering a group of populations which are recovering from severe depletion associated, in part, with historical severe flow depletion. Coho and pink salmon lend themselves best to such analysis because both return as adults within a fixed number of years, thus allowing analysis of flow-fish relationships.

"In Table I, he points out differences among species and flows. These differences were recognized and considered by tribal, federal, and state biologists in the context of existing hydrology, leading to the recommended flows."

Comment # 60

I was Fisheries director for the Summit Lake Paiute tribe in NV, and was responsible for Lahonton Cutthroat trout management. I also assisted in the planning development of housing in ecologically sensitive environment.

I am surprised by the high and unattainable level of river flow being used as the standard. The whole idea is to protect fish populations and retain the ability to provide water for multiple other uses. Most of the decline in fish populations seems directly attributable to ocean catch and influences other than freshwater habitat. Given the history of the fish population in the river at historic flows, and even greater historic irrigation use, it seems illogical to assume that greater water flow will do anything to increase or sustain the fisheries.

Commenter

Scott Gordon 20; Gail Sumpter 1

Response

Note that in recent years, the river was above 180 cfs for most of the dry months (see figure below). This data supports that 180 cfs is within the normal range of the river. Please see the general response to Science/fish.

In the 1999 Federal Register listing for Hood Canal Summer-run Chum Salmon, NOAA said a multitude of factors had contributed to the decline of chum salmon. They noted that destruction of freshwater habitat was not only an important factor threatening steelhead but also applied to the decline of chum salmon. They specifically mentioned that habitat alterations such as water withdrawals were resulting in insufficient flows.

Regarding the question of whether a loss of streamflow could cause a loss in the fish population: biologically, experts believe that a 1 percent loss in streamflow during a low flow month such as September can serve as a reasonable surrogate for estimating a 1 percent loss in the salmonid fish population that rear in streams.

Correlations relating low summer streamflow for juvenile coho to the numbers of returning adult coho two years later have been reported in literature here in Washington since the 1940's. Studies found that the higher the 30-day low summer flow the higher the number of returning adult coho salmon years later. Mathews and Olson, 1980 found that the relationship of more summer flow for coho juveniles equaling more returning adults two years later still held strong as did Neave 1949, McKernan et al 1950, Wickett 1951, Smoker 1955, Lister and Walker 1966, Pearson et al 1967. This relationship was reaffirmed in Hartman and Scrivener 1990, and Quinn and Peterson 1996. The Washington Department of Fish and Wildlife still use summer low flow to predict the number of returning coho adults in Puget Sound two years later as described in Zillges 1977 and Seiler 2001.

The correlation between late summer flow and returning adult coho salmon 2 years later is strong even though spawning and incubation habitat is only one of many factors that affect fish production (such as ocean survival, fish harvest, disease, winter floods, etc).

This relationship between low streamflow and salmonid survival has also been shown for steelhead. In the Green River in 1979, Dr. Hal Beecher (WDFW) found the higher the low summer flow the higher the number of returning wild steelhead adults 2.5 years later. For low summer flow he used the lowest daily flow recorded during the summer.

Ecology has previously found in other streams and rivers that a 1% loss of streamflow during the low flow month, usually September, corresponds to around a 1% loss of fish habitat. For example: Ecology and WDFW biologists used weighted useable area data (representing fish habitat) from the PHABSIM/IFIM fish habitat model to calculate the 1% loss of habitat for steelhead rearing and chum spawning in the Big Quilcene River during the September low flow. The agency biologists found that a 1% loss of habitat would be a 1.1 % loss of flow for the Big Quilcene River.

Ecology found for the mainstem Stillaguamish River a 1.1% loss of flow from the September 90% exceedance flow (its low flow month) was a 1% loss of steelhead juvenile habitat using the Instream Flow Incremental Methodology (IFIM) to quantify fish habitat.

Ecology found for the South Fork Stillaguamish River a 0.9% loss of flow from the September 90% exceedance flow (low flow month) was a 0.6 % loss of steelhead juvenile habitat and a 1.3 % loss of chinook spawning habitat. It's not exactly a 1% loss because there are multiple fish species and lifestages present in streams.

Ecology found for the North Fork Stillaguamish River a 0.94% loss of flow from the September 90% exceedance flow (low flow month) was a 0.7 % loss of steelhead juvenile habitat and a 1.0 % loss of chinook spawning habitat.

F.W. Olson in 1983 summarized the relationship between low summer streamflow and coho run size in a Draft EIS for the South Fork Skokomish River Hydroelectric Project.

the correlation between coho production in Puget Sound and the WDF low-flow index for a composite of streams indicates that a tripling of the stream flow during the critical summer period could be expected to nearly triple the adult coho run (Figure 3-8).

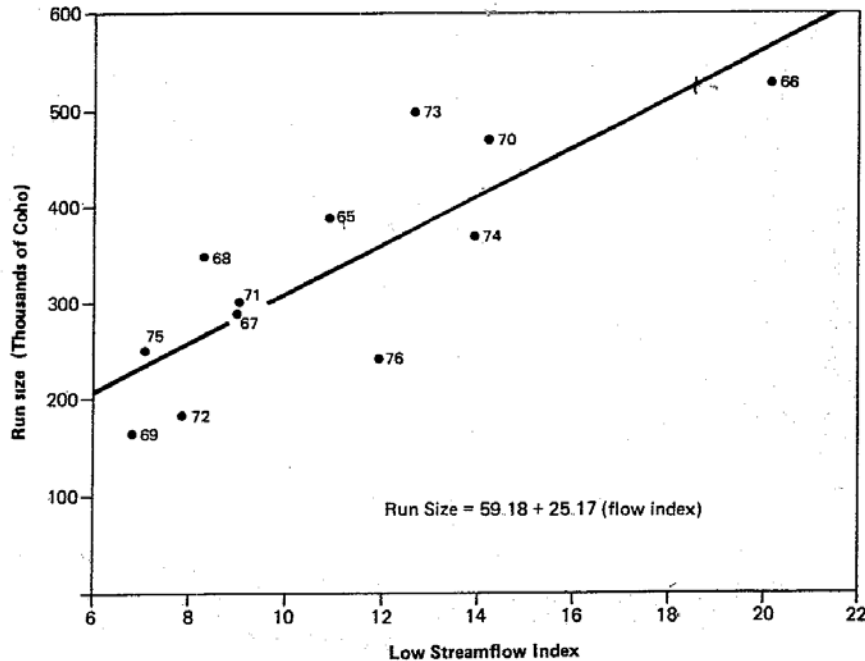
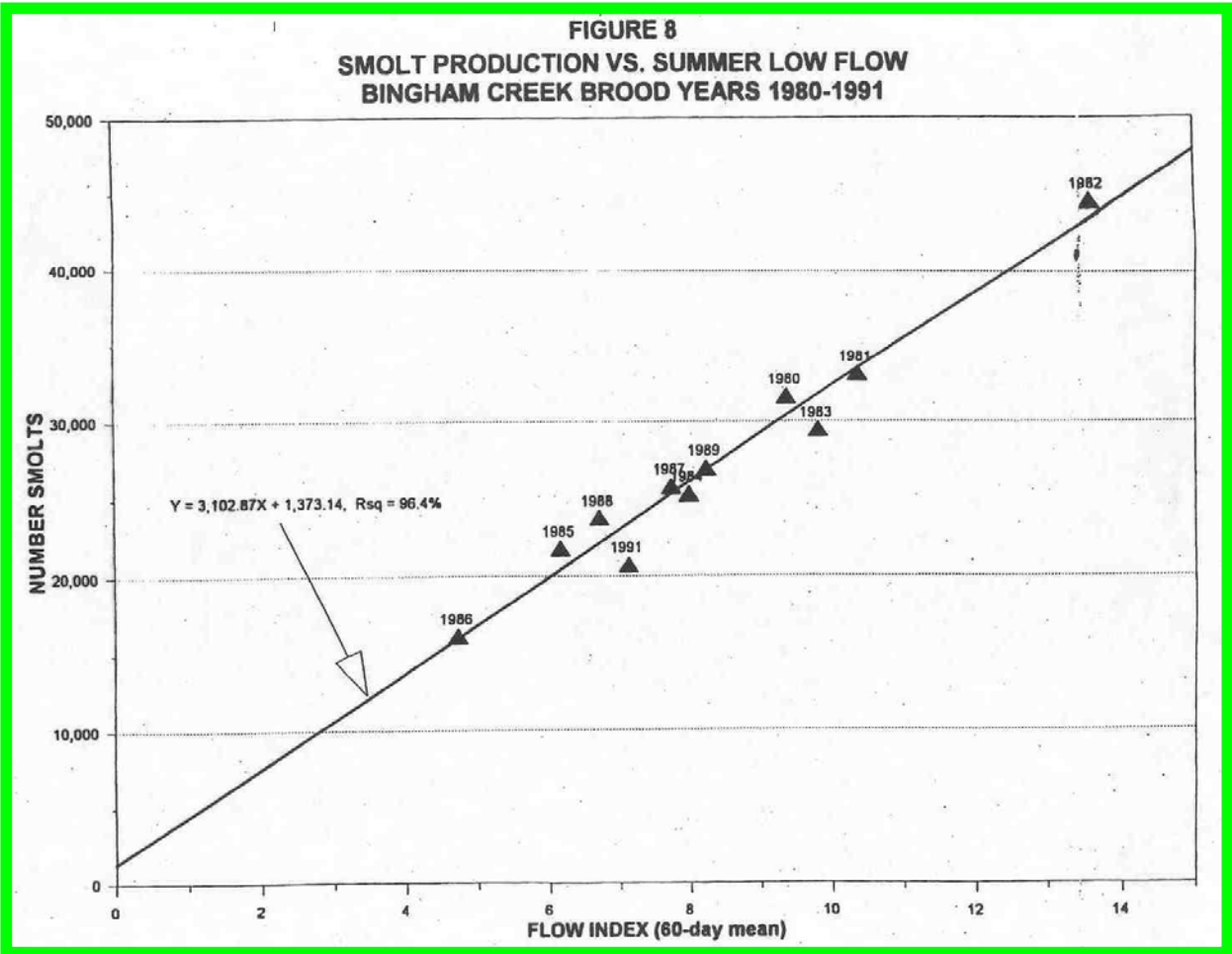


Figure 3-8
Relationship between
Puget Sound Coho Run
Sizes and Summer Low Flow

Summer Flow Enhancement

Numerous studies have shown that coho salmon smolt production and resulting adult returns are positively correlated with minimum summer discharge levels (Neave, 1949; Wickett, 1951; Smoker, 1955). Other studies of stream-carrying capacities for coho have found direct relationships between summer flows and coho production (Lister and Walker, 1966; Pearson et al., 1967). The strength of this relationship for Puget Sound streams is evidenced by its continued high correlation from 1935 (Mathews and Olson, 1980). Currently, the preseason run size prediction of Puget Sound wild coho is based on the relationship between the 60 lowest consecutive days of flow during year i and the return in year $i + 2$ (Zillges, 1974 and 1977).

Dave Seiler's studies on Bingham Creek for 1980-1991 found more summer flow equals more coho smolts migrating out the following spring.



Seiler (2001) used the Zillges 1977 document (Tech. Memo 28, WDFW) to estimate wild coho smolt production. Zillges 1977 contained estimates of the amount of coho juvenile habitat at summer low flow by using the 60 consecutive day low flow. The flow was averaged over 12 years was called the Puget Sound Summer Low Flow Index (PSSLFI). When Seiler mapped coho smolt production versus PSSLFI for Puget Sound streams he found a strong positive correlation between the previous summer's flow and the population of smolts the following spring. On Bingham Creek, Seiler stated: "for this low gradient stream, the relationship between smolt production and flow the previous summer is clear: production is a positive and proportional function of flow – water equals fish" (p 14).

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Comment # 61

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

Commenter

Shirley Nixon 13

Response

RCW 90.82.080 of the watershed planning statute, states if approval of “minimum instream flows” is achieved within four years of receipt of (Phase 2) funding from a planning unit, then the priority date is two years after Phase 1 funding is received. If approval is not achieved within four years, then the priority date is the date of rule adoption, unless Ecology adopts a

rule within two years (of the 4-year time frame). RCW 90.82.080(1)(a)(ii) states that approval is achieved if all government members and tribes... present... unanimously vote to support the proposed minimum instream flows, and all nongovernmental members...by a majority, vote to support.... The statute does not tie approval of instream flows to the date of formal plan approval.

Ecology interprets approval of instream flows under RCW 90.82.080 (1)(c) as approval of the instream flow numbers unless a planning unit specifically conditioned their vote on the numbers to include future decisions on other provisions, such as reservations, closures, water management, and mitigation. The approval must be conveyed in the form of a letter to Ecology or a watershed plan adopted by the planning unit.

Phase 2 funding was received by the Dungeness River Management Team on June 16, 1998. A letter from the DRMT to Director Fitzsimmons dated June 28, 2002, states the unanimous support of instream flow levels for the mainstem Dungeness River with significant caveats requiring resolution of issues related to exempt wells and mitigation. Instream flow recommendations for all streams in WRIA 18 were formally conveyed to Ecology upon the June 2005 adoption of the watershed plan by the Clallam County Board of Commissioners.

Ecology has determined approval of instream flows did not occur within the 4-year time frame expressed in RCW 90.82.080(1)(c) and the priority date of instream flows is the effective date of this rule.

Comment # 62

District Staff submitted to you via e-mail a report entitled: "Review of the 1991 Fish Habitat Analysis and Its Application to Setting Instream Flows for the Dungeness River--30Jan2012."

The District is concerned about the findings discussed in the report. Arithmetic errors were found in Table 5 of the report on the 1991 Fish Habitat Analysis (the 1991 Report). This brings into question the accuracy of the entire report and the thoroughness of any prior peer reviews (Department of Ecology Staff claimed prior peer reviews were conducted, but they did not provide any documentation of any such review).

Contrary to the 1991 Report's description of hydraulic model data collection, not all water surface elevation data were related to a permanent benchmark that was established for the study. Side channel water surface and channel cross-section elevation data were referenced to another benchmark. This presents a problem with the vertical control of the elevation and cross-section survey data. This problem causes uncertainty in the determination of the in the range of mainstem flows below which there is no longer a surface water connection to side channels.

The optimum weighted usable area (WUA) for fish in the river is highly sensitive to this range of flows. The optimum WUAs were used to determine the instream flow levels for the Dungeness River in the draft rule language. Consequently, there is uncertainty in these instream flow levels.

Furthermore, with regards to the mainstem connection to side channels, latter reports on the physical habitat of the Dungeness River do not corroborate the 1991 Report. In 2003, the U.S. Bureau of Reclamation (BOR) reported on their instream flow side channel study of the Dungeness River. BOR conducted a survey of side channels in the lower 11 miles of the river. They found 10 side channels with surface water connections. BOR predicted that the range of mainstem flows below which there is no longer a surface water connection ranges from 0 cfs to 156 cfs. The average of this range of flows is 69 cfs. The 1991 Report indicated that this flow was 260 cfs. This report omits a description of how the 260 cfs value was calculated. It appears that this value was selected arbitrarily. The side channels investigated in the 1991 Report are not representative of the side channels that the BOR found in their more comprehensive survey.

The January 30, 2012 Report by District Staff raised additional technical concerns regarding the application of the method used to determine instream flow levels in the draft rule language. This report described a review of only a portion of the hydraulic analysis presented in the 1991 Report. The report by District Staff provides evidence of technical errors and omissions and raises a valid question about the existence of such problems in the other portions of the 1991 Report. The District recommends an independent review of the entire 1991 Report. This review should look for any similar errors, omissions and/or arbitrarily selected values that are critical to setting instream flows for Chapter 173-518 WAC.

Commenter

Doug Nass, Clallam County PUD #1 1

Response

After getting email in January 2012 from the PUD's staff (who have not had any training or experience with the IFIM/PHABSIM hydraulic model) who asked what the numbers meant in the input file for the computer model, Ecology re-reviewed USFWS' and other consultants' technical studies and computer models along with other instream flow experts and did not find any technical errors warranting further study. See Ecology's website summary analysis below. Additionally, Dr. Hal Beecher did a sensitivity analysis and reported at the February 2012 LLWG meeting that any possible errors as suggested by the PUDs staff would not have any real effect on the habitat results as the model was insensitive to those kinds of changes.

This review and analysis been posted on our website since early February 2012 and afterwards when we went in person to take any questions about our review which found no errors, neither the Commission nor any of their staff had any concerns or questions about Ecology's analysis.

Comment # 63

Because of the questions raised regarding the 1991 Report, the District recommends reconsideration of the instream flows for the Dungeness Mainstem after an independent review of this report is completed.

Commenter

Doug Nass, Clallam County PUD #1 5

Response

There have been several scientific studies over the last 20 years to answer questions on how salmon and steelhead (salmonid) habitat relates to flow in the lower 10 miles of the Dungeness River. They have received extensive peer review. Please see the response to Comment # 60 and the general response related to Science/fish.

Additional review of the 1991 report by some of the top instream flow experts in the country in 2012 did not find any technical problems or concerns that would warrant redoing the IFIM hydraulic model and analysis.

Comment # 64

They adopt the best available science by picking only the studies that agree with their views. Their science has never been subjected to an independent scientific peer review.

Commenter

Dennis Schultz, Olympic Stewardship Foundation H2

Response

Thank you for your comment. Please see the general responses to Science/fish and the Groundwater model.

Comment # 65

CELP applauds the surface water closures and the minimum flow levels set under the proposed rule.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 3

Response

Thank you for your comment.

Comment # 66

Proposed Flow Levels Are Not “Minimum Flows” and Exceed Ecology’s Statutory Authority.

Ecology’s authority to adopt minimum instream flow is provided in Chapter 90.22 and 90.54 RCW, and both provide authority to Ecology adopt only “minimum” or “base” flows. RCW 90.22.010 provides that Ecology “may establish minimum water flows or levels . . . “ RCW 90.54.020(3)(a) states that rivers and streams “shall be retained with baseflows . . .” Ecology lacks authority to adopt instream flow levels that are not true “minimum flows” or “baseflows.” Ecology has defined “baseflow” as “that component of streamflow derived from groundwater inflow or discharge.” Sinclair and Pitts, Estimated Baseflow Characteristics of Selected Rivers and Streams, Ecology Water Supply Bulletin No. 60, Pub. No 99-327 (October 1999).

The flow levels proposed by the ISF Rule are contrary to the statutory authority granted to Ecology to set flows. A 1986 client advice letter from the Office of the Attorney General to Ecology describes the extent of Ecology’s instream flow rulemaking authority. Notably, this letter was written by Senior Assistant Attorney General Charles B. Roe, a preeminent water lawyer and original drafter of the statutes in question. The opinion of the Attorney General’s Office, was as follows:

. . . The intent was, simply stated, that streams with certain values were not to be dried up or reduced to trickles. Rather, flows, usually of an amount extending to a limited portion of a stream’s natural flow were to be retained in order to protect instream values of the stream from total relinquishment. Of import here, the thrust of the 1967 legislation was not designed to maintain a flow in excess of the smallest amount necessary to satisfy the protection and preservation values and objectives just noted . . . Letter from Office of the Attorney General to Eugene F. Wallace, Program Manager for Water Resources, dated February 20, 1986, at 8.

The Attorney General letter further describes a two-step process under which flows that may be higher than a true minimum flow may be adopted through a “maximum net benefit” legal framework. The two-step maximum net benefit process is described (again, by Mr. Roe) in the Washington State Bar Association’s Real Property Deskbook:

Of import here, the 1967 and 1971 legislation was not designed to maintain a ‘minimum’ flow in excess of the smallest amount reasonably necessary to satisfy the protection and preservation of such values. It was not, however, the legislative intent to preclude [Ecology’s] power, in appropriate factual situations, to establish higher or ‘enhanced’ instream flows than those established under the minimum flows provided by RCW 90.22.010. WSBA Real Property Desk Book, Water Rights, § 117.9(1)(b), p. 132-133.

The PCHB has also confirmed that instream flows are to be minimum flows, which may be increased only through the two-step maximum net benefits test – i.e., that the initial flow level is a true baseflow, not an optimal fish flow:

“Tacoma first urges that base flows may not be set at levels which provide the optimum flow regime for fish. We agree . . . “ PUD No. 1 of Jefferson County et al. v. Ecology et al., PCHB No. 86-118 (1988).

Perhaps more importantly, the PCHB has also concluded that Ecology’s instream flow authority enables it only to protect existing instream flows, not establish flows beyond actual flows to provide a “restoration” level of instream flow protection:

The optimum fish flows adopted as base flows by Ecology are also inconsistent with the statutory authorization for base flows. Base flows, as authorized at RCW 90.54.020(3)(a), are those ‘necessary to provide for preservation of’ fish and related values. The term ‘preservation’ is not specifically defined, nor ambiguous. . . the term ‘preservation’ means ‘the act of preserving’ . . .

The evidence in this matter is that the optimum fish flows adopted as base flows enhance fish habitat beyond that provided by the river in its natural state. This is inconsistent with the statutory plan that base flows ‘keep safe’ or preserve fish habitat, rather than enhance it. Id.

The proposed instream flow levels for the Dungeness River far exceed actual flow levels, and are not minimum flows. Specifically, the proposed flows for August, September, and October are 180 cfs. Using the date of September 1, this flow level has only been reached once since 2000.

Year	USGS Flows for Dungeness River
2009	112 cfs
2008	166 cfs
2007	148 cfs
2006	140 cfs
2005	99 cfs
2004	173 cfs

2003	157 cfs
2002	96 cfs
2001	148 cfs
2000	200 cfs

See <http://waterdata.usgs.gov/nwis/uv?12048000> (USGS flow gauge data for Dungeness River).

Ecology’s analysis demonstrates that it is minimum instream flows that are typically in excess of the flow of water actually in the river. Based on historical flow gauge data, the actual flows are less than the flows 78% of the time in July, 89% of the time in August, 93% of the time in September, and 82% of the time in October. February 8, 2012 Memo from Ecology Environmental Assessment Program, Exhibit I. The Proposed Rule asserts that the “instream flows established in this rule are water rights . . . “ – but how can they be water rights if the water is not there?

Commenter

Dennis Schultz, Olympic Stewardship Foundation 11; Bill Clarke, Washington Realtors/Sequim Realtors 10 ; Bill Riley, Washington Realtors 1

Response

Ecology does not agree with the assertion that the flow levels set in this rule exceed Ecology’s authority to establish instream flows in accordance with RCW 90.54.020(3)(a) and RCW 90.22.010.

The Minimum Water Flows and Levels Act (1969) permits Ecology to establish minimum flows or levels on stream and lakes by regulation for the purpose of protecting fish, game, birds or other wildlife, recreational or aesthetic values or water quality (RCW 90.22.010). The Water Resources Act of 1971 provides that the quality of the natural environment shall be protected and, where possible enhanced through the retention of base flows for preservation of wildlife, fish, scenic aesthetic, and other environmental values, and navigation values (RCW 90.54.020(3)).

In Webster’s New World Dictionary for the American Language the word minimum is defined as, “the smallest quantity, number, or degree possible or permissible.” The term base flow in hydrology is widely recognized as that component of streamflow sustained during extended dry periods by groundwater discharging to the stream channel. The choice of these particular terms in the statutes appears to indicate an intent that instream flows be set at relatively low levels that could be expected to be present a relatively high percentage of the time.

However, 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."

Ecology and the state Department of Fish and Wildlife have found from experience that instream flows set at low levels (such as the lowest flow of record or at hydrologic base flow levels) do not adequately preserve and protect instream values such as fish, recreation, and aesthetics. Therefore, Ecology regards the minimum permissible flow consistent with legislative intent as the lowest flow capable of protecting and preserving and where possible enhancing instream values.

The method employed by Ecology and the Department of Fish and Wildlife to establish instream flows was affirmed by the State Supreme Court in Supreme Court of Washington, En Banc.; State of Washington, Department of Ecology, Department of Fisheries and Department of Wildlife, Respondents, v. PUD No. 1 of Jefferson County and City of Tacoma, Department of Public Utilities, Appellants. No. 58272-6. April 1, 1993.

Comment # 67

We know that the levels set for the instream flow into Chimacum Creek were the maximum needs for fish, rather than the minimums as required.

Commenter

Dr. Diane Johnson, Chimacum Grange No. 681 H2

Response

Thank you for your comment. Please see the response to Comment # 66.

Comment # 68

The draft rule exceeds Ecology's statutory authority and contradicts common sense. This authority only extends to requiring instream flows equal to the stream flow derived from groundwater inflow or discharge, protecting currently existing instream flows, but not to requiring flow levels, as this draft rule does, that may be desirable from a fish habitat perspective but that in actuality have rarely been achieved. In some instances the minimum instream flows you propose to set have been achieved historically less than 10% of the time, and in others never. Required minimum instream flows for each stream and each month should be set at levels that for the last 10 years have actually been achieved a high percentage of the time (I suggest 80% or 90%).

WAC 173-518-020 states that the purpose of the rule is “retain natural surface water bodies ... with stream flows at levels necessary to protect instream values and resources”. Please explain from where Ecology derives the statutory authority for such a purpose.

Commenter

Pearl Rains Hewett 30; Randy Simmons 20; Kal Ahlburg 18

Response

Thank you for your comment. Please see the response to Comment # 66.

Comment # 69

WAC 173-518-040 Establishment of Instream flow: (Para 3) The instream flow is already impacted at certain times of the year. Does this mean no new businesses or homes, except on existing exempt water systems until the river flow meets the optimum desired flow for fish? (Para 5) Exceptions --- any new water uses --- will be subject to interruption when flows drop below flow levels of Table IIA. Does this say that any new water use to homes or businesses will be shut off or be litigated when stream flow is below the flow rates established by this new rule. This is for flow rates which we do not currently meet all the time. This is a good way to kill new business development. Do new water rights just cease water use during drought periods.

Commenter

Warner J Litchfield 5

Response

New groundwater withdrawals that are mitigated are not subject to interruption when instream flows are not met - WAC 173-070(3).

Comment # 70

When the Elwha-Dungeness Watershed Plan was in process, and finally approved, people in this community HAD gone on record, to say that they did not agree with the 180 cfs, planned as a water right for the River, for August, September, and October. This is NOT a flow that the River was able to achieve, often, historically. I thought that Ecology had a duty to make sure that there was water for People, Farms, and Fish. That was what one of your flyers said. We know that a flow of less than 180 cfs is enough to sustain fish, as in the past, there were lots of fish, with a Dungeness River flowing far less than that. And, aren't your rules supposed to set "minimum" instream flows? In the water groups I attended, we often talked about compromising, and doing something between minimum and 180 cfs.

Commenter

Marguerite A Glover 32

Response

Thank you for your comment. Please see the general response on Science/fish for an explanation of the basis for the 180 cfs instream flow level for the Dungeness River.

Ecology has duty to adopt instream flows as recommended in the 2005 Elwha-Dungeness Watershed Plan. Ecology has also made provisions for providing water for other uses. This rule establishes reserves of water to ensure water availability for future domestic uses.

Ecology has provided funding and technical support for the creation of the Dungeness Water Exchange to streamline the mitigation process for future water users. Also, Ecology has issued superseding certificates to and signed a Memorandum of Agreement with the Dungeness Water Users Association to protect water rights held by agricultural water users and provide water for mitigation.

There is no evidence that there were more fish salmon and steelhead in the Dungeness River in the 1970s. WDFW's data base has no counts for Dungeness River summer steelhead, fall and summer chum, and coho salmon during the 1970s. WDFW only began counting Chinook and pink salmon and steelhead in the mid-1980s. The population counts for pink and Chinook salmon show their numbers have increased since they started counting in 1985 and 1986, respectively.

In 1975 the Department of Fisheries in their *Catalog of Washington Streams and Salmon Utilization* said the Dungeness State Salmon Hatchery at river mile 10.5 was built in 1902 and was successful until 1909 when extensive irrigation projects were developed along the river. Severe depletions in the spawning stocks were noted thereafter. The report noted (in 1975) that although the Dungeness River hatchery had been artificially propagating spring Chinook for over three decades, the runs have not increased appreciably.

Comment # 71

It is my considered opinion that viable options other than the currently-proposed 173-518 WAC exist for an efficient water resource management regulation, or guidance document, to be adopted for the Dungeness River Basin and that these options will provide for a more efficient water management framework going forward. It is my conclusion that, for example, a reduction of the Instream flow allocation to the highest ratio of the previously adopted examples used (30 +years in place) would free up 115,000 Acre Feet per year (0.42 X 278,600 AF) with attendant significant impacts on [unreadable word] policy decisions.

Commenter

Kris G Kauffman, Water Rights Inc 4

Response

The proposed instream flow is set at a level recommended by the Dungeness Watershed Planning Unit to be protective of the habitat available in the mainstem Dungeness River. Comparison with examples of flows adopted 30+ years ago in other basins doesn't demonstrate the adequacy of the flows to protect existing Dungeness River habitat nor does it provide a reasonable basis to neglect an obligation placed upon Ecology to implement the instream flow as adopted by the initiating governments in the Watershed Plan.

Comment # 72

A rule to protect aquatic resources in the Dungeness Basin is vitally needed and long overdue. If this proposed water management rule fails to be adopted for some reason, Ecology should immediately adopt the instream flow portions of the rule separately. Ecology's failure to thus far adopt instream flow rules for the Dungeness Basin highlights the failure of local planning processes to adequately protect public water resources. Ecology has deferred IF rule-making far too long, wasting precious time trying to appease special interests and garner local political support. Ecology has a statutory duty to establish and enforce resource-protective flow regimes, and should do so despite vocal local opponents who do not understand or who deliberately misconstrue tenets of Western Water Law and Washington's Water Codes.

Commenter

Shirley Nixon 2

Response

Thank you for your comment. Ecology understands its obligation to adopt instream flow levels relative to RCW 90.82.

Comment # 73

CELP is very concerned that the proposed rule, as presently configured, does not (1) sufficiently protect the Dungeness from further degradation; (2) adequately consider changes to the basin occurring since the completion of the draft instream flow in 2010; and (3) provide protections and habitat enhancements required to conserve the river's four Endangered Species Act (ESA) listed salmonids. 16 U.S.C. 1532(3).

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 7

Response

Thank you for your comment. Please see the general response to Science/fish regarding the list of instream flow studies and their interpretation and rationale by agency and tribal fish biologists into instream flows that would fully protect and preserve salmonids and their habitat.

050 – Closures

Comment # 74

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

Further, in the statute, there is a requirement that DOE must find that there is not sufficient data to allow making sound decisions on appropriation. But that needs to be said in the WAC or in some findings. Absent that, the closure is not permitted. It also appears that, under the statute, DOE needs to go through the State Senate and House standing committees first.

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

Commenter

Craig A Ritchie, City of Sequim 23

Response

Please see the response to Comment # 19. This rule does not withdraw water from further appropriations because of a lack of information pursuant to RCW 90.54.050. The closure of surface water bodies is based on a finding that water is not available.

Comment # 75

What is “administratively closed”, what was the authority and basis for such an action and when was it taken, and why does Ecology believe this has legal significance as part of the baseline if there currently are no restrictions on permit-exempt wells in the affected area? What statute authorizes the definition of “closure”? What statute or legal precedent authorizes the definition of “hydraulically connected”?

Commenter

Pearl Rains Hewett 56, 57; Randy Simmons 46, 47; Kaj Ahlburg 44, 45

Response

An “administrative closure” is a term used to describe a finding that water is not available for new diversions from a specific surface water body based on a recommendation from the Director of Washington State Fish and Wildlife made pursuant to RCW 77.57.020. Please also see the responses to Comment # 19 and Comment # 29.

Comment # 76

Because of the questions raised regarding the 1991 Report, the District recommends reconsideration of the closure period of the Dungeness Mainstem after an independent review of the 1991 Report is completed. Mitigation methods relying on withdrawals from the Dungeness Mainstem for aquifer recharge may only be successful if withdrawals are allowed after July 15th. The quality of withdrawals from the Dungeness Mainstem to storage for potable water use will be affected by aging. Water treatment will become more expensive as storage time increases. Allowing withdrawals for potable water purposes after July 15th would reduce treatment costs.

Commenter

Doug Nass, Clallam County PUD #1 6

Response

Thank you for your comment. Ecology respectfully disagrees with your recommendation to reconsider the closure period of the Dungeness Mainstem. Please see the response to

Comment # 63 and the general response to Science/fish. Please note that WAC 173-518-095 could allow the authorization of a storage project that included diversions after July 15 if the project also provided environmental enhancement and had broad support from resource agencies, the Tribe, and the County.

Comment # 77

Originally, in the meetings a year or so ago at the John Wayne Marina, and then the private meeting with Mr. Sturdevant, you, others of DOE and Mr. Sturdevant insisted that wells put to any beneficial use were exempt, and that the well-rights holders would be able to continue to draw 5000 gallons per day from those wells.

You now contradict that representation (or was it a deliberate mis-representation), stating in your literature at the June 28 Hearing, that all new uses even from existing wells will be subject to permitting and mitigation charges, so long as the basin or sub-basin is not closed. You go on to state, for example, that Cassellary Creek sub-basin is now closed.

We understand a basin closure means that even existing wells having rights to 5000 gal per day must cease use. Is that correct? Or does that mean no change in use is permitted, and no mitigation would be possible for changes in use?

Commenter

Jacques M Dulin 17

Response

A closure does not affect existing water uses, it only applies to new water rights established after the closure is put in place, in this case the effective date of the rule. We recognize that existing uses fluctuate, and that sometimes existing uses may increase or decrease, for example as families grow or shrink. It is not Ecology's intent to apply the rule to existing uses that merely fluctuate so long as that increase (or decrease) can be reasonably considered part of an established and existing use.

If an existing water user decides to substantially increase their water use or start a new water use, then the increased or new water use would be subject to the requirements in the rule and would need to mitigate for the consumptive portion of the new water use and measure the new water use.

Comment # 78

Regarding seasonal closures (which per BAS are justifiable), has DOE been enforcing certificated water users such as City of Sequim to reduce use of DR Infiltration Beds during

critical periods? <A recent review/calculation of 2010 and 2011 data seemed to indicate Sequim getting ~16% of its supplies from this DR main-stem source, even though a condition was placed on its water certificate to reduce use from this source; please check data on this matter.>

Commenter

Judy M Larson, Protect the Peninsula's Future 6

Response

Thank you for your comment. The City of Sequim's Port Williams well field water right, Permit G2-29239, requires the city to gradually reduce and eliminate the use of "surface water" except as an emergency back-up supply. However, Ecology did not prescribe a timeline or define benchmarks for the reduction and there are no minimum flow provisions associated with the infiltration gallery right. Thus, there is no practical way to "enforce" this requirement.

Development of the Port Williams well field initially allowed Sequim to cut back their use of the infiltration gallery. However, groundwater levels in the vicinity of the Port Williams well field have declined and it appears that Sequim has been relying more heavily on their senior right at the infiltration gallery in recent years. We have asked Sequim to voluntarily cut back their use of the infiltration gallery as much as possible, particularly during the low flow period. However, this will require the city to increase groundwater pumping at the Port Williams and/or Silberhorn well fields, which may result in other undesirable ground and surface water impacts.

We will continue to monitor water levels and metering data and work with Sequim to determine an appropriate expectation for minimizing their use of the infiltration gallery.

060 – Metering and reporting water use

Comment # 79

I saw this thing from WRIA 17. That was two, three years ago. I immediately installed water meters -- one for domestic use and one for watering plants -- so I know, more or less, what the law will do.

On average, we're going through about 150 gallons of water per day -- I might need some of it now (coughing) -- but what was interesting to me was that even though over months and months, we averaged 150 gallons of water. The minute I installed the meter on my ten raised flowerbeds, those babies went through 2400 gallons in less than 12 days. So there's some things that I learned.

Commenter

Francisco De La Cruz H1

Response

Thank you for your comment. Ecology agrees that measuring water use can be very informative.

Comment # 80

If new wells need to be metered is it scientifically meaningful to meter both well output and water table height at the same location? The addition of water table height (water pressure at the well pump position) gives the added information on whether the well actually lowers the local water table. Current technology for wireless broadcasting of the pump meter readings is readily available.

The added information should show whether water table height is in fact a significant variable and if so, is it correlated with stream outflow?

Commenter

Charles E. Kramer, Ph.D. 1

Response

It is not scientifically meaningful to demonstrate that pumping water from a well causes a water table decline in the vicinity of the well. Conservation of mass, or the Second Law of Thermodynamics, is well understood. Darcy's Law describes the rate or volume of flow through a porous media in response to a hydraulic gradient. Without such a gradient there is no flow. Therefore, if water flows to a well, there must be a hydraulic gradient inducing that flow, and water level in and around the well must therefore be lower than in the surrounding aquifer.

Data presented in the USGS and Ecology report *Surface Water-Ground Water Interactions along the Lower Dungeness River and Vertical Hydraulic Continuity of Streambed Sediments* documents that observed changes in stream elevations result in changes in the water table elevation. Similarly, changes in groundwater elevations affect the hydraulically connected streams.

Comment # 81

I oppose the metering of private wells in rural areas for this reason: in rural areas the wastewater is recycled safely back into the aquifer via the septic system or from lawn watering.

The only "withdrawl" is from evaporation. Additionaly - evaoptranspiration should not be considered a withdrawl any more than other plant uptake.

Commenter

Ken Morse 1

Response

Ecology disagrees. Consumptive use associated with a new water use ultimately will reduce the flow in one or more small streams or in the Dungeness River.

Comment # 82

If private wells become metered, I will have an additional unexpected expense.

Commenter

Aloma Blaylock 3

Response

Thank you for your comment. Ecology is sympathetic to the additional cost of the metering requirement, however, water measurement is necessary for water management in the Dungeness Watershed. Please see the general response on Metering.

Comment # 83

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

Commenter

Craig A Ritchie, City of Sequim 24

Response

Thank you for your comment, please see the general response on Metering. The rule applies to new water use begun after the effective date of the rule. Under the state water code, Ecology has authority to require metering and reporting of all withdrawals and diversions of water in the state. We are presently phasing in meter requirements for existing users, beginning with the largest users, and new uses of water begun after the effective date of the rule.

Comment # 84

While ecology has stated that it is not thier intention to have all wells metered and pay for mitigation, your rule obviously states otherwise.

Commenter

Scott Gordon 27; Gail Sumpter 8

Response

The rule applies to new uses of water begun after the effective date of the rule. The rule does not apply to continued use of existing water rights.

Comment # 85

Because we believe active management of water resources in WRIA 18 is necessary, we are particularly interested in seeing that new water uses be measured. The irrigation companies and districts must measure the amount water of withdrawn from the Dungeness River. It makes sense that new uses of water pumped from the aquifers would also be measured. The proposed rule relies heavily on reserves to allow continued new uses of groundwater. In order to properly manage the reserves we need to know how much new water is being used. Requiring meters on new wells is the only way to accurately collect this information.

Commenter

Scott Chitwood, Jamestown S’Klallam Tribe 4

Response

Thank you for your comment. Ecology agrees that measuring water use is necessary for successful water resource management in the Dungeness watershed.

Comment # 86

Who would be responsible for installing and checking metered wells?

Commenter

Beth Garrison & Randy Holtkamp 5

Response

Water users are responsible for having meters installed. While Ecology has the authority to require water users to record and report their water use, Ecology's intention is to require installation of remote read meters and to rely on state staff or a contractor to read meters.

Comment # 87

The metering of private wells smacks of collectivism. Regardless of the technical rationale, the end result is it gives Ecology the ability to limit usage, or, worse yet, require payments of "mitigation" fees which affect physical water flow not one iota. This is about money and power.

Commenter

Raul M Perez 4

Response

There is no authority granted under state law for Ecology to charge water users for their water use. Therefore, neither state nor local agencies, other than water service providers, can charge fees for water use. In the future, the Legislature could change the law.

Comment # 88

For many years, the DOE has come forward with a proposed "well metering" scheme, and each time, has backed off because of public's outrage and lack of scientific evidence that wells are causing any kind of problem for salmon. (History shows -according to local newspapers over the years- that salmon populations have fallen, then returned – it's a natural cycle, some of which is caused by oceanic conditions, according to oceanographers.)

Now the DOE is back again, this time pushing even harder, with the metering idea to "measure" how much water is being used – and which will eventually cause a charge for the use of the water in addition to the burden of expenses on the owner of the land for the digging and maintaining of the well, and the cost to place a meter.

Commenter

Sue Forde 2, 3

Response

Thank you for your comment. Please see the responses to Comment # 60, Comment #80, and Comment # 87.

Comment # 89

Most of us in the area know that this is all about the Indians, and we are sure they are the ones who will get the checks from the meters, as well as being the ones reading them.

Commenter

Mike Cameron 4

Response

The Jamestown S’Klallam Tribe will neither receive checks for meters, nor will they read meters.

Comment # 90

WAC 173-518-060 – Metering. Metering and recording of all water use in the basin is important to successful water management, and this section should be expanded to include metering and reporting to Ecology of all future as well as existing water uses. This section should also be strengthened to clearly state that each water user is responsible for keeping and producing on request all historical metering records applicable to each water right.

Commenter

Shirley Nixon 14

Response

Thank you for your comment. Please see the response to Comment # 83 and the general response on Metering.

Comment # 91

P. 20 of the CBA states that existing state law requires metering of all new withdrawals, including permit exempt ones, in the Dungeness watershed (WRIA 18). Are you referring to all of WRIA 18 or just the area affected by this rule? What section in the RCWs contains that requirement?

Commenter

Pearl Rains Hewett 45; Randy Simmons 35; Kaj Ahlburg 33

Response

The Elwha-Dungeness Watershed, all of WRIA 18, is designated as one of 16 fish-critical basins in the statewide Salmon Recovery Plan.

<http://www.rco.wa.gov/documents/gdro/1999StatewideStrategyRecoverSalmon.pdf>

RCW 90.03.360(2), a provision in the Water Code relating to metering, provides that:

“Where water diversions are from waters in which the salmonid stock status is depressed or critical, as determined by the department of fish and wildlife, or where the volume of water being diverted exceeds one cubic foot per second, the department shall require metering or measurement by other approved methods as a condition for all new and previously existing water rights or claims. The department shall attempt to integrate the requirements of this subsection into its existing compliance workload priorities, but shall prioritize the requirements of this subsection ahead of the existing compliance workload where a delay may cause the decline of wild salmonids.” . . .

Comment # 92

Ecology very wisely incorporates metering into the Dungeness rule. Metering, which of course is common to all municipal water users encourages conservation by informing users of how much water they are using. Being able to track withdrawals is critical in an area like the Dungeness where the water resource is in short supply. However, the rule should also reiterate the metering requirements of RCW 90.03.360 and court orders as they pertain to existing water users in this fish-critical basin.

Additionally, the rule should be amended to require mitigation that matches the consumptive use as indicated by a meter. The rule should also set penalties for those who exceed their amount of mitigated consumptive use. Metering is a tool that can and should be used to ensure that water in excess of the mitigated amount is not being withdrawn.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 14

Response

Thank you for your comment. Ecology agrees that metering is necessary for successful water management in this watershed. Ecology disagrees, however, with the recommendation to require metering for existing water users, please see the response to Comment # 83.

Further, Ecology disagrees with the recommendation to require mitigation that matches the consumptive amounts as indicated by a meter. RCW 90.03.360 authorizes source meters; even without this limitation meters do not measure consumptive use. In addition the mitigation plan

requirements in WAC 173-518-075 call for a monitoring and reporting plan to ensure new uses of water, with mitigation in place, do not result in a net loss of water from a closed source greater than the applicable maximum depletion amounts.

Comment # 93

What do you think will happen when meters are installed on wells supposedly to just monitor the amount of water that is being used? Here's what I think people will use/waste incredible amounts of water to establish that they need that amount for their personal use. Even if those people normally use water carefully and conservatively, they would feel justified in being concerned that they be allowed enough water. Ask yourself what you would do if your neighbor said he was going to monitor your water use because he wants to sell what you're not using. Sell? I would say, you don't own the water it belongs to all of us collectively.

Commenter

R Doreen Emerson 8

Response

Thank you for your comment. Ecology cannot speculate on the motivation of individuals with respect to justifying their water use, however, the consumptive impact of all new water use must be mitigated. Individuals that consume more water than they have purchased mitigation for will be notified, and if they do not cut back on water use or obtain additional mitigation, enforcement is a possibility.

Ecology agrees that individuals do not own the water, it is owned collectively by the people of the State of Washington. However, once legally acquired, the right to use water is recognized as private property.

Comment # 94

A majority of the Board of Commissioners continues to oppose the requirement for meters on all new uses for reasons described at length in previous correspondence. (We continue to support indoor and outdoor water conservation, and education and incentives offered to all water users whether new or established). However, if future policymaking requires precise measurement of all components of the water budget (all stream flows, recharge, groundwater levels, well withdrawals, etc.) then we understand that residential metering by the Department of Ecology on new uses may be a necessary part of that effort.

Commenter

Howard V Doherty Jr, Jim McEntire, & Michael C Chapman, Board of Clallam County Commissioners 7

Response

Thank you for your comment. Ecology is aware of and sympathetic to the concerns about metering raised by the Board of Commissioners. However, Ecology believes metering is necessary for successful water management in the Dungeness Watershed.

Comment # 95

The DOE Dungeness Water Rule taking of water rights and metering of well is vigorously opposed by private property owners of Clallam County.

“It’s time to get EPA (and the DOE Dungeness Water Rule and SMP) out of Americans’ backyards,”

This is just my totally biased opinion after attending only one March 2012 meeting on DOE's red hot new rule.

Appointed DOE employees' verbally threaten, bully and try to intimidate private property owner's.

Only \$500.00 if you let DOE meter your private well on private property.

Extortion \$5000.00 if you exercise your right to refuse to let DOE put a meter on your private well.

Don't forget, we all have riparian water rights, 150 gallons of water a day. And, we have the assurance of DOE that existing wells do not have to be metered. But, don't forget DOE can extort your right to no meter on your private well by charging you \$5000.00 for your right to NOT PUT A WATER METER your private well.

However, if you let DOE put a meter on your well, it will only cost you \$500.00.

Commenter

Pearl Rains Hewett 4, 7, 9

Response

Thank you for your comment. Please see the general response on Metering. Ecology does not know the basis for the commenter's claims that a meter will cost \$500 and the penalty for not installing a meter will be \$5,000. The estimated cost to install a meter is \$250. There is no set penalty amount, and a penalty is always the last resort in an enforcement action. The commenter is incorrect in asserting that all property owners have riparian water rights. Please also see the general response on Prior Appropriation.

Comment # 96

I want to comment to the fact that, in regard to metering, I oppose that. I was very strongly advised throughout a lot of the past sort of management planning that metering was not a tool in investigating and solving our water issues; but I'll go on the record to say, I will think about metering the day the federal government, in its trust responsibilities, quantifies its water rights. I think they're a failure in this basin.

Commenter

Ed Bowen H2

Response

Thank you for your comment. Please see the general responses on Metering and Federal Reserved Water Rights.

070 – Future groundwater appropriations

Comment # 97

Now, going through the tanker through that eight-month period -- one of the 5,000-gallon tankers leased by Huntingford's Farms, stainless steel -- we lived on that for eight months. There were three households of ten people using it. And now these rules are out saying that we're supposed to only use 150 gallons for two-and-a-half people. The reality is, it takes 1300 to 1500 gallons a day to service that many people in a real world, and that's on an emergency basis because we're not watering lawns, we're not washing cars. It's just for sanitation, washing dishes, and laundry because a benzene laundry -- it's the worse thing you can do is wash your clothes in gas because it gets into your skin.

Commenter

Jeff Monroe H2

Response

Thank you for your comment. Ecology assumed a per capita water use of 65 gallons of water per day. This value is based on a number of estimates from other sources and data obtained from public water systems. The per capita water use was multiplied by the US Census value for people per household in Clallam County to get a total indoor water use daily value. We used 2000 Census data, the people per household value for Clallam County was 2.31. $65 \times 2.31 = 150.15$ gallons per day.

Comment # 98

What is the DOE analysis of recharge contribution to the watershed from septic systems and outside watering?

Commenter

Carol Johnson, North Olympic Timber Action Committee 6

Response

Ecology's analysis of groundwater recharge from septic systems and outdoor irrigation was performed by hydrogeologists licensed by the State of Washington in accordance with [Ch. 18.220 RCW](#). Their analysis considered published sources regarding climate, topography, soils, geology, typical practices in the area, septic design, water use, irrigation requirements, and population, as well as professional judgment, and other's use and consumption estimates. Ecology used their analysis to select standard indoor domestic values and outdoor consumptive rates for use in the rule.

The indoor use value is intended to represent an average annual scenario. This scenario assumes a single family home using self-supplied water and an on-site septic system. Daily per-capita use of 65 gallons per day was selected for indoor domestic water uses. This value is near the mean value of published indoor use estimates. Household water use was calculated by multiplying the average number of people per household by the daily per capita water use. Ecology used [US Census data](#) for this analysis in 2008 before the 2010 Census data was available.

Ecology defines consumption as the amount of water that is removed from the local hydrogeologic system, primarily through evaporation into the atmosphere, absorption and transpiration by plants, and transportation out of the basin. Some consumption of water is known to occur through indoor domestic uses although this type of use is assumed to be mostly non-consumptive. Consumption of residential indoor water is likely to occur primarily as evaporation and transpiration (combined to be called evapotranspiration) from the septic drainfield. This consumption is highest during the growing season. There is also likely some

consumption occurring through other indoor uses such as bathing, cooking, watering plants, and other uses. Ecology selected a value of 10% for the consumptive rate for indoor uses.

Outdoor domestic water use is assumed to be primarily for the purpose of irrigation of lawn and garden. Because the purpose of irrigation is to provide water that can be absorbed and used (consumed) by plants, the most efficient systems have the highest rate of consumptive use. Outdoor water that is not consumed either runs off as surface water or contributes to groundwater recharge.

The amount of irrigation needed each month is dependent on the location and type of plant being grown. Monthly irrigation requirements can be found in the [Washington Irrigation Guide](#). Because the volume of water consumed by irrigation is highly dependent on the size of the area being irrigated, the amount of outdoor water consumed will vary from one parcel to the next.

To estimate consumption from outdoor watering Ecology multiplies the size of the area being irrigated by the net water irrigation requirement for a representative location in the Washington Irrigation Guide. The net irrigation water requirement is defined as the water required through irrigation to satisfy crop evapotranspiration and auxiliary water needs that are not provided by water stored in the soil profile or precipitation. This is the amount of water the plant would absorb and consume if available, not the amount of water applied through irrigation. To account for inefficiencies, Ecology multiplies the net irrigation requirement volume by 90 percent to estimate total outdoor water use consumption.

Comment # 99

How can ecology say that irrigation of surface soils, ie. watering lawns or gardens, results in 100% consumption, but that domestic use attached to an on site septic system results in only 10% consumption? An OSS just concentrates the area where the water is applied. In fact evaporation of the water is a large portion of how a septic system works, that is why you are supposed to keep the grass growing over a drainfield mound, and also why above ground (mound) systems exist, to increase the amount of surface area that can evaporate water used in the household. If evaporation through a drainfield is considered non-consumptive, transpiration and evaporation due to irrigation of landscapes/gardens should also be considered non consumptive.

Commenter

Junko Harbord 2

Response

The proposed rule uses a default of 90 percent consumptive loss for irrigation use. Please see the response to Comment # 97.

Comment # 100

In light of what I have said in comment #14 [regarding the groundwater flow model], the phrase "best available method" in WAC 173-518-070 3ai should be removed, as it is undefined and misleading.

Commenter

Dr. Robert N Crittenden 15

Response

Thank you for your comment. Use of the 2008 groundwater model as the basis for determining the credits for offsetting the consumptive use and the statement that it is the best available method are Ecology decisions. See the general response to Groundwater model.

Comment # 101

How can you put a rule in place, without us knowing what the regulations and actions that will affect us all, actually are? How much will the mitigation fee be? How much will it cost to buy additional outside water? Will we all be able to buy additional irrigation water? Where will the Water Exchange be located? How will they be run? Who will oversee them? There are many questions--too many!

Commenter

Dick Sutterlin 2

Response

Refer to general responses on Mitigation: what's understood and Effects on future homebuilders.

Comment # 102

Also, the reason I'm here is because we're always the end of line on WRIA 20. And what happened in 17 is now happening in part of 18, and it's coming my way and it's steamrolling. And this is my only real public voice, to catch it here before it winds up crossing the Elwha Bridge and heading towards 20.

I have an interest here though, whether you go with the water trust or water passage -- I'm a little familiar with it. I listened to the Kittitas Concept quite a bit -- but I don't believe in an

advisory board. I think that this bank is going to be put in place. And I do realize it's the process, I believe at the county. It can't be an advisory board. It has to be accountable. It has to be responsible. So I'm going to advocate my testimony that it be voted for, and that it be voted in by the people of this water district and that way, it's well-established.

DOE does not represent us in 20, we do not have the same level that you do, we don't have staff members that we can consult with anymore, and I want the record to understand that.

Commenter

Ed Bowen H4, H6

Response

Thank you for your comment. You correctly identify the need for the Exchange to be accountable for its performance. Its performance will be judged against the mitigation plan Ecology's approves prior to its start up.

Comment # 103

We own a one acre parcel with a well that abutts our home but have not yet started using it. We are opposed to being charged a fee for it's use on our property. Since we have not yet started pumping water we should not be penalized for a delay in starting it as we are saving water while waiting.

Commenter

Alicia & Bob Lampert 1

Response

Thank you for your comment. Please see the general response on the Groundwater permit exemption. State water law is clear that you do not establish a water right under the groundwater permit exemption until you put the water to regular beneficial use. Pumping water from a well without putting the water to use is considered wasting water, and does not establish a water right. As explained in the Cost Benefit analysis for this rule, adopting this rule to manage future new water uses will greatly reduce the risk of a lawsuit that could halt all future development in the watershed, or require existing junior water users (including existing homes that rely on the groundwater permit exemption) to curtail their use during a drought.

Comment # 104

Since people can't sell water rights they don't use (5,000gal/day minus actual water used) because ecology says the unused water rights have already been relinquished, where are all the water rights going to come from for people who want water for their future homes/gardens?

Commenter

Pamela Cameron 7

Response

There are certificated water rights available for sale in the watershed.

Comment # 105

It is imposible for someone to prove that an existing water conection does not exist - remove this provision.

Commenter

Leland Schwab 6

Response

Thank you for your comment. The rule does not require proof that a water connection does not exist. The rule requires written evidence from the local water purveyor that a connection is not available in a timely and reasonable manner before another well may be used.

Comment # 106

Section (2): While requiring someone to connect to existing water supplies is fine. Forcing someone to prove that a water connection to water system does not exist is impossible. Please revise or remove that section of the rule, or make it the responsibility of the county Environmental Health Department to provide the letter to ecology within a reasonable period of time like 7 business days.

Commenter

Scott Gordon 11

Response

Thank you for your comment. Please see the response to Comment # 105.

Comment # 107

WAC 173-518-070(2) - Specify under what statutory authority the RCW 90.44.050 right for permit-exempt well water withdrawals can not be exercised if connection to a public water supply is available, even if only at exorbitant cost. In the absence of such authority, remove this provision. Specify precisely what written evidence that connection is not available will be acceptable under the rule.

Commenter

Pearl Rains Hewett 34; Randy Simmons 24; Kaj Ahlburg 22

Response

Thank you for your comment. Authority is found in RCW 90.54.020(8). In addition, this provision in the rule is based on a recommendation in the adopted Watershed Plan. Under the provisions of RCW 90.82.130(3) Ecology is obligated to implement plan recommendations.

Comment # 108

I am not opposed to the concept of mitigation if the best science truly finds, and can be substantiated by peer review, that there is truly a need to protect the long-term viability of the basin. Mitigation needs to be provided in way, however, that provides "increased certainty in development" and balances that with the need to provide funding to acquire water rights from other users. If there is indeed a need to provide funding for the water exchange to purchase water rights via mitigation credit purchases, I offer the following:

A. Property owners that own existing subdivided lots be allowed to purchase mitigation as soon as practicable immediately after the exchange has been implemented. This will provide those that have purchased lots and made an investment into the community assurance that they will be able to build a home at some future time. It will also provide the exchange with an immediate funding stream from those that choose to buy mitigation and provide certainty to protect their investment, which can be used to purchase water rights in the short term rather than allowing for the funds to build up over time on a per-building permit basis, providing greater purchasing power and economies of scale in the establishment of the exchange.

B. At a minimum, the option to immediately purchase credits should be offered to property owners that have drilled a well and made a further investment in the property, but have not yet obtained beneficial use of the property by building or occupying a home.

C. Allowing for property owners to purchase mitigation immediately, rather than when a building permit is obtained, in exchange for building assurances would clarify the status of buildable lots and lift the cloud that otherwise may exist for property owners looking to build

on or sell the property in the future. Otherwise, it creates a potential "taking" of the property without compensation in violation of the "takings clause" of the 5th Amendment of the U.S. Constitution, since a governmental action (i.e. withholding future water rights for a building permit) may preclude the use of the private property, otherwise in conformance with zoning and other reasonable governmental regulations, from its intended and reasonable use.

Commenter

Juan C Perez 4; Scott Gordon 23, 24; Gail Sumpter 4, 5

Response

The proposed rule requires that new groundwater uses must be mitigated. Your comment is directed at the operation of the mitigation exchange rather than the rule. Ecology can sympathize with your comments pertaining to the desirability of making mitigation certificates available to willing purchasers in advance of the building permit.

However, Ecology does not agree with your conclusion related to takings under the 5th amendment of the US Constitution. Washington's water belongs to the public and always has belonged to the public and the only lawful means to appropriate it and establish a water right has been to follow the territorial or state custom (prior to 1917 for surface water and prior to 1945 for groundwater) or, subsequently, the procedures enacted by the legislature in RCW 90.03.260 and RCW 90.44.050. Owning property, absent beneficial use of water according to custom or the water codes, does not create or vest a water right.

Comment # 109

My second objection involves the water exchange. You are attempting to implement a rule that includes an exchange with neither any water or mechanism ready to make the system work. All information about the exchange and the process is at this point is hypothetical. No solid information can be obtained in regards to cost, or process.

I am a REALTOR® in Sequim that has clients planning to buy land. I also have clients that own undeveloped land. Both of them are asking me how the water exchange will work and how much it will cost them for inside and outside water. I have perused the rule but have been unable to find the answer to my clients' questions, which makes it difficult to do my job intelligently

I have been told that you do not know the answers to these questions. If that is true, how can you put the rule into effect? Isn't that like giving someone a blank check and hoping that he/she will not fill in too high an amount?

What will the dollar amount of mitigation expected to be collected over the next 5 years under the proposed rule as now drafted?

Who, specifically, will be the recipients of that mitigation money?

Commenter

Clarence Glover 2; Roland Miller, Coldwell Banker Town & Country 1; Tom Williamson 1, 2

Response

Thank you for your comment. Please see the general response on Mitigation: what's understood. The amount of money that will be paid for mitigation over the next 5 years will depend on the cost of mitigation credits and the demand for mitigation water. The money will go to buying water rights and paying for other projects, such as shallow aquifer recharge in strategic places, to ensure the impact of new water uses are mitigated. Money used to purchase water rights would go to the water right holder who was selling their right.

Comment # 110

A failure in natural planning will cause economic hardships to the citizens of the community.

I am deeply concerned that the call for mitigation is a form of extortion of the public in their unencumbered use of their property.

Commenter

Steve Gale H3, H5

Response

Thank you for your comment. Please see the response to Comment # 109.

Comment # 111

What was even more bizarre was when DOE begins describing their solution as mitigation. I'm thinking, how do you mitigate for a shortage of water because that does not resolve -- couched in the form of we're running out of water, we're sucking the river dry, the salmon are going to die, a big problem. How do you mitigate for a shortage of water?

Well, then they started talking about money for mitigation and banks of virtual water and then all of a sudden, the lights go on. This has never been about anything except money. There is no other way to explain all the existing factors. DOE has spent years and millions of dollars to affect what they have described as an insignificant change in the amount of river. They are

quick to point out that they cannot be held liable if not a single additional fish returns as a result of all of this mitigation.

When they get done with us, they're going to move on to the Sol Duc, then the Queets and the Quillayute because they, obviously, need their help as much as we do. And someday when they're all done with all the watersheds in the state, this mitigation payoff is going to be huge.

I'd say that it is morally wrong for the Department of Ecology to proceed with this until they have identified how much money they're taking in and who's getting the money.

Commenter

Tom Williamson H3, H7

Response

Thank you for your comment. Please see the response to Comment # 109.

Comment # 112

Water rights transfer - please place a fixed rate on the cost of the water right transfer, Ecology, the water bank, nor the irrigators know how much water will cost or how much the transfer fee will be. Based on what the department of ecology / water Bank has already paid for the 25 CFS for the river, the mitigation fee should be less than \$1,000 per house hold well. Please fix a reasonable transfer fee. I would suggest a cap of \$500 for the transfer fee.

Commenter

Scott Gordon 6

Response

Thank you for your comment. Ecology and the Washington Water Trust have consistently indicated that the expected fee for a single domestic use including a small irrigated lawn or garden will be in the range of \$500 to \$3,500. That includes the cost of acquiring a water right or funding a project to generate mitigation credit to back up the mitigation certificate, plus expenses to operate the exchange.

Comment # 113

We have no idea how long it will take for a person to apply for mitigation and have it approved. Please fix the response time. This should be a reasonable time, not more than 60 days. We all know that the County, state and federal agencies have a tendency to use all the time they have to respond, even if they could respond sooner, keep the time short.

Commenter

Scott Gordon 7

Response

Ecology anticipates that transactions involving the purchase of mitigation certificates from the exchange would not require more than 60 days. Individual mitigation plans, however, could take much longer to negotiate between Ecology and a prospective water user.

Comment # 114

Section (5): Requiring that owners allow department of ecology employees on the property when ecology is not doing the metering is not reasonable. Land owners have a reasonable right to privacy, and should not have to grant an easement that is so ill defined in order to get water. If there are specific reasons why ecology should have access to private property please define the reasons. Otherwise you should ask permission of the landowner, who should be able to allow or deny access without recourse. This provision could be construed as extortion. The City of Port Angeles tried something similar, when the city was trying to force the Public Utility district (PUD of Clallam County) into making new users agree to be part of the city of Port Angeles if they wanted a water connection. People here remember and appreciate PUD's defense of our civil rights. The department of ecology should respect those rights. The only apparent reason could be to shut off someone's well.

Commenter

Scott Gordon 12

Response

Ecology employees do not inspect diversions, wells, or meters without contacting a landowner first. In addition, Ecology is specifying the need for remote-read meters for the Dungeness Basin to minimize the need to access private property.

Comment # 115

Remove Ecology's power to enter private property, leaving this in place opens the State up to Federal law suit. The State legislators should be protecting our property rights, where are you? This provision amounts to a public taking of private property rights, property ownership guarantees quiet title rights. It is unimaginable that ecology should be allowed to override these rights

Commenter

Leland Schwab 3

Response

Thank you for your comment. Please see the response to Comment # 114.

Comment # 116

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

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

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

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

Commenter

Craig A Ritchie, City of Sequim 25, 26

Response

Thank you for your comment. Ecology agrees that this rule could authorize the drilling of a well within city limits if a moratorium prevented hook up to the city water supply system. However, it is the City and not Ecology that controls the remedy for this potential concern. The city could adopt an ordinance prohibiting new wells within the city limits.

A city water system must comply with state water law and, therefore, must rely on a water right permit or certificate to serve water to its customers. Only an individual within the city limits could rely on drilling a new well under the groundwater permit exemption, unless the city has adopted an ordinance prohibiting new wells.

The rule implements a watershed plan recommendation which says that if you intend to use water in an area served by a public water supply you must first seek to hook up; only if a connection is not available in a timely and reasonable manner is another well allowed.

The city is responsible for service area planning for its water supply system. The rule does not require the city to extend their service area outside the city limits.

Comment # 117

In a June 21, 2011 email directed to “Dear Friends”, Mr., Ahlburg urged recipients to attend last night’s rule hearing, and he listed certain talking points for those desiring to comment. Among them:

“Commissioner McEntire has proposed a solution that, while not as good as abandoning the rule entirely (not very likely in the absence of a political change at the top of Ecology) would remove its most serious adverse effects on property owners and the local economy. This would involve the State of Washington, with money appropriated through its capital budget, purchasing the mitigation rights required by the rule from existing senior water rights holders and not charging individual home owners for domestic or garden watering use.”

Mr. Ahlburg has espoused a similar view in a recent letter to the editor published in The Peninsula Daily News: that is, that the public and not new water users should bear the cost of providing mitigation for those who wish to expand their water use or develop land in the Dungeness Valley. In other words, Mr. Ahlburg supported spending taxpayer money (state dollars) to subsidize costs for newcomer junior water right holders so that they might enjoy, for free, the uninterrupted use of a scarce public resource: water.

Mr. Ahlburg’s position on the mitigation provision in the Dungeness Rule is in striking contrast to his view on other government subsidies. In today’s Peninsula Daily News is an article about yesterday’s US Supreme Court Ruling on the constitutionality of the Affordable Care Act. <http://www.peninsuladailynews.com/article/20120629/NEWS/306299986/peninsula-residents-disappointed-elated-by-health-law-ruling>. Mr. Ahlburg was an individual plaintiff in that lawsuit, reportedly because he objected to the ACA’s provision that citizens must, by 2014, obtain health insurance coverage or pay a penalty. Expressing disappointment in the Supreme Court’s ruling, he is quoted as saying:

“I believe the federal government should not have the power to make us buy health insurance or any other product. I don’t believe we should be forced to do something simply because they want us to subsidize the cost for others.”

I for one strongly disagree with Mr. Ahlburg’s views that the public should pay for mitigation water on behalf of new water users in WRIA 18. And, it is puzzling to me why someone with such strong opposition to “government subsidies” would suggest to so many of his friends and neighbors that state-supplied mitigation is preferable to the terms of the proposed Dungeness Rule.

Commenter

Shirley Nixon 1

Response

Thank you for your comment. Please see the general response Mitigation: who pays?.

Comment # 118

Using county data there appears to be about 65 new uses per year. This translates into a very small amount of water use. Why hasn’t Ecology just mitigated this water use? It appears economically unsound to create a “water exchange” for such a small use of water. How is this justified?

Commenter

Michael E McAleer 2; Michael & Michael E McAleer H3

Response

Thank you for your comment. Please see the general responses on Small impacts and Mitigation: who pays?.

Comment # 119

In the light of when you intend to apply the rule without first having an mitigation process currently available, it you are showing no regard for the existing community, including those who intend to build in the future.

PLEASE do not make the rule law until AFTER the water bank or some other entity is available to make getting a building permit possible. If not all future development is halted and dependant on the whim of the people who have water to sell.

Commenter

Scott Gordon 19, 22; Gail Sumpter 3

Response

Thank you for your comment. This rule establishes reserves of water for domestic use that ensure that water is available for those getting new building permits immediately after the rule takes effect.

Comment # 120

It is the department of ecologies responsibility to monitor the river, and transfer water rights, giving that power over to the water bank or making them the only facilitator makes them a private utility. The Public Utility district #1 of Clallam county, (PUD) is a public utility with transparent and public records. They have a long history of protecting the environment and the community, and are part of our community. You could easily enter into an agreement with PUD, train their employees on how to effect the transfer of water and they already do water metering. Again, why recreate what we already have in a utility company?

Commenter

Scott Gordon 26; Gail Sumpter 7

Response

Thank you for your comment. Clallam County first selected the Washington Water Trust to develop and initially operate the Dungeness Water Exchange through a competitive process. Responsibility to run the Exchange could shift to another qualified entity in the future.

Comment # 121

Move to Sequim but don't plan to water the animals, grow a garden, or wash the car. Except for those tax payers living where they can take advantage of a vague mitigation scheme; more of their funds extorted. "We have to pass it to see what's in it" process does not create good policy. Nor does it engender confidence in our public servants.

Commenter

Steve Marble 6, H6

Response

As explained in the Cost Benefit analysis for this rule, adopting this rule to manage future new water uses will greatly reduce the risk of a lawsuit that could halt all future development in the

watershed, or require existing junior water users (including existing homes that rely on the groundwater permit exemption) to curtail their use during a drought. Please also see the general response on Mitigation: what's understood.

Comment # 122

Who will be able to sell back water rights to the water mitigation bank today and into the future?

What are the projected administrative costs of the water bank and if there are profits where would they go? How much will it cost to purchase a water right?

NOTAC is uncomfortable with the waterbank administering water allocations as a non profit, unelected board that does not represent the citizens of Clallam County.

Commenter

Carol Johnson, North Olympic Timber Action Committee 2, 9

Response

The rule establishes a framework where water users with existing, reliable water rights can choose to sell some or all of their water rights to new users requiring mitigation. Please also see the response to Comment # 120 and the general response on Mitigation: what's understood.

Comment # 123

How much would it cost property owners to buy water rights for their wells? Who would be responsible for installing and checking metered wells?

Commenter

Beth Garrison & Randy Holtkamp 4

Response

Reports produced by the Washington Water Trust demonstrate that the mitigation program could deliver effective mitigation at a cost of \$500/residence to \$3500/residence, depending on how much water was purchased. Water users would be responsible for having meters installed. Please also see the response to Comment # 114.

Comment # 124

How will the proposed rule affect future landowners who want to start small home businesses on their land with metered wells?

Commenter

Beth Garrison & Randy Holtkamp 6

Response

If a home business will require additional water use, then new water use must comply with the rule requirements and be mitigated. If water use is already being measured, then the new use would be measured using the same meter.

Comment # 125

The further “pile on” against the taxpayer/landowner is the idea of a mitigation fee for any “change” in use of the water – ie a garden, a greenhouse, etc.

Commenter

Sue Forde 4

Response

Ecology recognizes that existing uses fluctuate, and that sometimes existing uses may increase or decrease, for example as families grow or shrink. It is not the Department’s intent to apply the rule to existing uses that merely fluctuate so long as that increase (or decrease) can be reasonably considered part of an established and existing use.

Comment # 126

The gal whom we bought our home from had the property subdivided before we bought it but we bought both lots however there is currently a well on only one of the lots.

I have been quite concerned about what I have read in the newspapers and online about this new water rule and what it will mean for us and our properties. The rule seems vague, especially in terms of what "increased usage" would mean.

Commenter

Wendy Bonham 1

Response

Thank you for your comment. Ecology recognizes that existing uses fluctuate, and that sometimes existing uses may increase or decrease, for example as families grow or shrink. It is not the Department's intent to apply the rule to existing uses that merely fluctuate so long as that increase (or decrease) can be reasonably considered part of an established and existing use.

Please see the general response on Mitigation: what's understood.

Comment # 127

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

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

Commenter

Shirley Nixon 15

Response

Ecology respectfully disagrees with your recommendation to require an application for a water right permit for all new permit-exempt well users. RCW 90.44.050 clearly states that an application is the option of the party making the withdrawal. Ecology does not have the authority to impose such a requirement and does not believe a water right permit is necessary for successful mitigation to occur.

This rule does close surface water bodies and requires groundwater withdrawals that affect the closed surface water bodies to mitigate.

Comment # 128

WAC 173-518-070(3)(a)(i) – Specify exactly how drilling to the middle or deep aquifer is encouraged.

Commenter

Pearl Rains Hewett 35; Randy Simmons 25; Kaj Ahlburg 23

Response

Drilling to the middle or deep aquifer is encouraged by stating such encouragement in the rule. This rule provision could result in mitigation pricing policies, for example, that create incentives for drilling to a deeper aquifer.

Comment # 129

Drilling to the middle or deep aquifer, where available, will be encouraged only if adequate measures are taken to prevent cross-contamination from the shallow aquifer. The District's LUD #10 well in Carlsborg has had steadily increasing nitrate concentrations since March 2009, which is about 1 year after the nearby Carlsborg Mobile Estates replaced their shallow well with a deeper well. The shallow well had nitrate concentrations near the maximum contaminant limit. Encouraging moving withdrawals to the middle or deep aquifers will induce more leakage of water from the shallow aquifer and cause cross-contamination, unless preventative measures are required.

Commenter

Doug Nass, Clallam County PUD #1 7

Response

Existing well drilling requirements in Chapter 173-160 WAC require measures to prevent contamination between aquifers. WAC 173-518-070(4) requires compliance with the well drilling requirements of WAC 173-160-241.

Comment # 130

WAC 173-518-070 Future ground water appropriations. Section (3) (a) (i) refers to the Dungeness water exchange. Water use may be mitigated through the purchase of credits through the exchange. More detail is needed about the mitigation via the exchange. Purchase and transfer of water rights is a common method means of mitigation. The purchase and transfer does not change the period of use of the water right. Apparently the period of use specification is not considered because the exchange determines credits for offsetting consumptive use. Nothing in this language refers to the timing of consumptive use. The language should be clear regarding this period of use issue. There needs to be an assurance that irrigation water rights purchased for mitigation credit through the exchange can be used for mitigating future use outside of the irrigation season specified in the water right.

Commenter

Doug Nass, Clallam County PUD #1 3

Response

Ecology has long recognized the timing issues with respect to irrigation rights and future domestic use of water. This rule includes a provision in section WAC 173-518-075 (2) (b) designed to favor mitigation projects that provide instream benefits during the critical period. Please see the response to Comment # 60.

Comment # 131

Existing leakage of water through irrigation ditches should be used for mitigation credit in the exchange. This water has not been "wasted." Because of ground-surface water interactions the leakage water recharges the shallow aquifer and enhances streamflow later in the season. These interactions were demonstrated by Pacific Groundwater Group in their March 31, 2009 report entitled: "Aquifer Recharge Feasibility Study for the Dungeness Peninsula."

Commenter

Doug Nass, Clallam County PUD #1 4

Response

Thank you for your comment.

Comment # 132

Subsection (2)

The proposed rule provides that a new permit exempt withdrawal when added to an existing domestic system will be considered an additional and separate exemption. What also should be noted is that the priority date for that new permit exempt withdrawal is the date of beneficial use and that the exemption will be subject to the instream flow rule.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 16

Response

Thank you for your comment. An additional and separate exemption is subject to the rule and will have a priority date concurrent with the date of first regular beneficial use.

Comment # 133

Subsection (3) CELP is concerned about Ecology's too-hearty embrace of mitigation in closed basins or where instream flows are unmet. We should be restoring flows to levels sustainable for fish and people. Mitigation is theoretically possible only if sufficient in time, quantity, quality, and location.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 17

Response

Thank you for your comment. Ecology agrees that flow restoration is desirable. Flow restoration is outside the scope of this rule, however, the Agreement in Principal (AIP) signed by Clallam County, Ecology, and the Dungeness Water Users Association expresses active support for flow restoration of the Dungeness River and, where feasible, the smaller streams. A restoration plan for the Dungeness Watershed is being developed to implement this aspect of the AIP.

Comment # 134

Subsection 3(c)

This subsection allows a new use in a closed subbasin if the proponent can show no adverse effect. The problem is that the reason that the subbasin is closed is that it is already water-short and suffering the adverse effects of too little water. Closed should mean closed to any and all new consumptive uses-if not fully mitigated- until we restore enough water to the Dungeness and its side channels to meet the flow numbers established in the rule.

Ecology provides no guidance on what kind of showing or data it will require to demonstrate no adverse effect. The groundwater modeling prepared for the basin is insufficient: it is designed to analyze hydrological systems, not predict the impact of a single use over time. More specific analysis is required.

Furthermore, a new user should not only address the impact of his or her proposed use, but the cumulative impact of other individual users. Without assessing cumulative impacts, particularly in low flow periods, subsection (3)(c) fails to protect closed waters from the adverse effects of further withdrawals.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 18

Response

Ecology has closed (or seasonally closed) surface water bodies that chapters 90.22 and 90.54 RCW direct us to protect. Withdrawals of groundwater that do not have an adverse effect on closed surface waters or interfere with adopted instream flows should not be prohibited. The rule does not state that Ecology will rely on application of the Dungeness groundwater model to demonstrate no adverse effect. The evidence to demonstrate no adverse effect will be case and site specific and Ecology believes it is not appropriate to specify the means of making this demonstration. If any party demonstrates no effect on surface waters within the East WRIA 18 area, it would not contribute to the cumulative effects associated with other development proposals.

Comment # 135

Why is it that the Dept. of Ecology and those it deems worthy will be able to have a "Water Banking System" while all of the people who already have wells on their property but have not been using the water for a household are being punished for their conservation instead of being granted a banked amount of water? logic says that by creating a legal well they have already opened their bank account, have made deposits and withdrawals but are being penalized for letting their investment earn interest because they have not built on the property. Aren't these

people a part of the collective public water? It seems that they should have a banked amount of water sitting in their accounts for their use. The wells are installed and I'm sure they were counted as drawing wells when your study was created.

Commenter

R Doreen Emerson 7

Response

Thank you for your comment. Unfortunately, drilling a well does not establish a water right under State of Washington water law; such wells do not automatically have a banked amount of water allocated to them. Please see the general response on the Groundwater permit exemption. Wells that were drilled but were not in use were not counted as “drawing wells” when studies were done to develop this rule.

Comment # 136

It's disturbing because the infrastructure and access to the water is not being supplied by a public entity. If I lived in a city and water was maintained and delivered to my home through an infrastructure supplied by the city I would expect to pay for that service. Instead Ecology's expectation is that I will pay for the infrastructure and the maintenance of the water access so that Ecology and those deemed worthy can monitor and eventually charge for the use of the water. Where is the mitigation for my infrastructure?

Commenter

R Doreen Emerson 10

Response

As explained in the Cost Benefit analysis for this rule, adopting this rule to manage future new water uses will greatly reduce the risk of a lawsuit that could halt all future development in the watershed, or require existing junior water users (including existing homes that rely on the groundwater permit exemption) to curtail their use during a drought. Please also see the general response on Mitigation: who pays?

Comment # 137

Ecology Should Not Proceed With Rule Adoption Until Mitigation Programs Are in Place.

As it has done in other basins, Ecology appears poised to move forward with rule adoption without having mitigation programs in place. As an initial comment on mitigation, many of the areas that would be subject to groundwater closures absent mitigation likely have little impact

on surface water flows. Yet, mitigation will be required across the basin regardless of the specific impacts of a proposed withdrawal.

The promise of having a functional, affordable, and rational mitigation program in place at some unknown point in the future after the adoption of an Ecology rule has been problematic in other parts of the state. The strategy of first closing basins through rulemaking and only then developing mitigation strategies is a bad idea that should not be repeated. As evidenced by regulatory closures enacted by Ecology in Skagit or Kittitas Counties, the closure logically results in motivating people seeking to use water before the reservations are depleted (Skagit) or a dramatic increase in the cost of water for transfer that could be part of a mitigation program (Kittitas). By closing a basin first, and then seeking to obtain water rights for mitigation, Ecology creates exclusively a seller's market that drives up costs that will ultimately be paid by homeowners.

During the rulemaking process, it is impossible to analyze the true impacts of the rule because there is no mitigation plan or requirements in place: will mitigation sufficient for an average single-family house cost \$1,000 or \$20,000; will mitigation plan approval take one week or one year? Ecology must seek to develop mitigation requirements as part of the rule itself, so that regulated entities can understand the rule and its impacts. While premise for requiring mitigation in many parts of the basin is dubious, at the least, the mitigation requirements must be integrated into the local land use approval process. Homeowners and small builders should be expected to possess expertise in hydrogeology or provide Ecology or local governments with costly consultant reviews in order to obtain building permits.

Commenter

Dennis Schultz, Olympic Stewardship Foundation 18; Bill Riley, Washington Realtors 9

Response

Thank you for your comment. Please see the general responses on Mitigation: what's understood and Effects on future homebuilders.

Comment # 138

We also recommend that the Rule require a parcel number be included on every well driller's report (well log).

Commenter

Howard V Doherty Jr, Jim McEntire, & Michael C Chapman, Board of Clallam County Commissioners 9

Response

Thank you for your comment. The requirement to include a parcel number on the Notice of Intent to drill a well, and on the well report (well log) already exists in State well drilling requirements, Chapter 173-160 WAC.

Comment # 139

I would like to voice my concern as a resident of the Dungeness Valley as well as being a Realtor who has sold property and hopes to continue to do so.

The rule as proposed will separate property into a world of “haves” and “have nots” Future sales of non-exempt property will be subject to a tax or “mitigation” fee that has yet been undetermined.

Commenter

Doug Hale, Coldwell Banker Town & Country 1

Response

Thank you for your comment. Please see the general responses on Prior appropriation: what’s fair? and Mitigation: what’s understood.

Comment # 140

I just spent 2 1/2 hours at a March 2012, Clallam County Commissioners work session/meeting on DOE's red hot new rule on instream flow. DOE is going into the stock broker, mitigation and banking business, the stock is 100% of our confiscated ground and surface water. They are going into the buying and selling of water stock reserves, options and rights to the highest bidder.

Private property owners will be charged exorbitant mitigation and permit fees so the DOE can have a financially self sufficient DOE controlled program of all of our water. All profits and income will become the THE DOE'S operating fund.

Commenter

Pearl Rains Hewett 8

Response

Thank you for your comment. Ecology respectfully disagrees with your statement that property owners will be charged exorbitant mitigation fees. The current estimate of mitigation

fees, depending on the amount of water desired for residential use and the aquifer that would be the water source, range from \$500 to \$3500. The payment for mitigation will then be used to purchase water rights or fund projects to ensure mitigation is effective. Ecology will not receive any of the mitigation fees. See the general response to Motivation and authority for adopting the rule.

Comment # 141

Who are the people who create and operate a water exchange? How are they regulated and monitored to prevent over pricing and unrealistic restrictions to the public?

Commenter

Richard & Jill Pinder 16, 17

Response

Washington Water Trust (WWT) is the organization selected by Clallam County to develop and initially operate the Dungeness Exchange. WWT is a non-profit organization and will be primarily responsible for administrative tasks associated with the sale of mitigation certificates, following the mitigation plan Ecology would approve for its operations, purchasing water rights, funding mitigation projects, and informing Ecology and the County of the status of the Exchange operations. WWT, as a nonprofit, has no incentive to overprice the mitigation certificates. As a lessor and purchaser of water rights and flow improvement projects for flow restoration in WRIA 18, both WWT and Ecology have a strong disincentive to drive prices for water rights and flow improvement projects unrealistically high.

Comment # 142

What if nobody wants to sell their water rights? And who would? Nobody! Look what happened in the Chimacum Valley - we don't want that here.

Commenter

Kathleen Cooper 9

Response

There are water rights available for sale in the Dungeness watershed. The Chimacum Valley does not have a mitigation strategy in place and that is limiting water availability for outdoor use. However, new homes are being built in the Chimacum Valley and Ecology is still working with local entities to develop an alternative water supply or mitigation strategy for the area.

Comment # 143

At the open house we were talking to a couple of Clallam county reps and one said that to date none of the large water right holders (I assume irrigation districts) have sign on a contract/deal to give up/sell a portion of there unused rights. if this is the case and signups are not pending and essentially mostly complete, how can the rule proceed or would the rule be delayed until the trust/bank has some significant water reserve to meet mitigation demands?

Commenter

Bob Sextro 1

Response

Ecology is optimistic that the Dungeness Water Exchange will have water available at rule adoption. In addition, the rule establishes reserves of water for domestic use to ensure that new residences can be built immediately after the rule takes effect.

Comment # 144

I believe Brian/DOE said last night that that between 100 and 200 residential use mitigation requests per year for new water rights were expected, but what about after rule initiation, would you not expect a "run" on the water bank of all the legal parcel owners (like us as we own two platted parcels near Sequim) say upwards of 500 or more to request an individual water right for each one of these legal parcels? I would assume that Clallam Cty can tell you/us how many undeveloped, but legal parcels are in WRIA 18, and if it is 500 or more how could the bank meet all these requests if the answer to my first question (water rights yet relinquishing [irrigators selling rights to the bank]) is NO?

Commenter

Bob Sextro 2

Response

It is up to the Water Exchange to decide on its priorities for selling mitigation credits. The Exchange may prioritize sales to buyers with pending building permit applications in the initial stages of its operation. However, as mitigation credits are created and it becomes apparent that the supply of mitigation is sufficient to meet new residential water users' expectations, the sellers caution and the buyers fears will likely meet somewhere in the middle. Over time, mitigation certificate sales priorities and prices may change to reflect temporary or permanent changes in both mitigation credit supply and the demand for them.

Comment # 145

What is the estimated operational cost of the non-profit water bank? What will be the cost to the people that need to purchase mitigation rights and also to the local governments? Will any shortfall be covered by property tax revenues?

Who will be entitled to financial statements for the operation of the non-profit water bank?

What are the appeal rights for determination of value of the mitigation to be purchased from the water bank?

If the public is not satisfied by the operation of the water bank, how can the leaders be voted out?

Who or what entity will be the successor to any profits or assets of the water bank should it fail to continue in existence?

Why is this done by a non-profit instead of a state agency?

How do open meeting laws apply to the proposed water bank?

How can the public review compensation for the employees and directors of the proposed water bank?

Who will provide professional services to the non-profit water bank? How will the contracts be allocated?

Commenter

Bruce Larsen 3

Response

The current estimate for the annual operating cost of the Dungeness Exchange is in the range of \$20,000-40,000 depending in large part how many transactions occur each year and what types of projects are used to generate mitigation credits.

Washington Water Trust's financial records are available to the same extent as any other non-profit organization incorporated in Washington. Washington Water Trust was selected by Clallam County through a competitive selection process.

The exchange does not set the mitigation value of projects. Ecology will determine the value through review of the mitigation plan received from the Exchange or a case-specific review of

the flow improvement project. Any aggrieved party can appeal Ecology's determination to the Pollution Control Hearings Board.

Governance or oversight of WWT or the Exchange is not accomplished under the Open Public Meetings Act or by the public directly. WWT is directed by an executive director and its Board of Directors. Clallam County is directed by a three commissioner board. Ecology is governed by a Director appointed by the governor. These three organizations took part in developing the Exchange.

WWT, the County, and Ecology may each choose to rely on its own professional staff or may choose to contract with professional hydrogeologists, engineers, or other professionals with skills the exchange might, from time to time, require.

Comment # 146

How will domestic use be examined for structures where use is alleged? What forms of proof will be required?

Commenter

Bruce Larsen 4

Response

In general, where a permanent residential structure exists prior to the rule taking effect, a domestic use will be assumed to predate the rule. Ecology will need to assess each case individually where a domestic use is claimed where there is no permanent structure. Various sources of information may be used to determine domestic use including: the building permit, metering data, the water use restriction recorded on the deed at the time mitigation is purchased, utility records, photos, and site visits.

Comment # 147

I agree that regulation, technology and development must be fostered to preserve, and in some cases enhance, stream flows in the Dungeness basin, and to guarantee recharge of the aquifer over the long term. Those who say we can continue withdrawing groundwater without limits are dangerously in denial, as nature's limits will be imposed in a very negative way if humans don't impose proactive limits.

However, I strongly disagree with the use of the exchange, and the trading of water rights, money and mitigation as the method to reach the important goals.

As the lead GIS staff person with Clallam County at the time of the formation of this process, I have seen how the basic assumptions and baseline data were generated. This comment is my own personal opinion, but has been informed by my county work.

As I see the issue, both qualitatively and quantitatively, I believe that the water rule and the exchange process being proposed are NOT the most effective way to reach the stated objective. Though I am a fan of using market mechanisms (as the exchange would do) for allocation of communal resources, such mechanisms are only appropriate if the transaction costs are minimal compared to the values being traded. Also, to be fair and effective, a market must also be inclusive of all those who receive benefits, or incur costs from the transactions in the market.

The proposed water rule fails both tests. It will have a large overhead cost compared to the value of the water rights being transacted. It also excludes many beneficiaries from the market, imposing those costs disproportionately on others.

Commenter

Tom Shindler 1

Response

Thank you for your thoughtful comment. Ecology respectfully disagrees with your assertion that the rule and Exchange are not the most effective way to reach the stated objective. Ecology believes it is, within the bounds of our legal authority, the most effective way to protect instream resources and existing water rights, and provide a water management framework that ensures water availability in the future.

Comment # 148

Some concerns regard complexities of mitigation procedures – and again the metrics needed for the accounting – seem overly burdensome.

Commenter

Judy M Larson, Protect the Peninsula's Future 5

Response

Thank you for your comment. Ecology agrees that providing mitigation is often complex. That is an important incentive for helping fund the Water Exchange for the Dungeness. The Exchange will greatly streamline the mitigation process for individual landowners. Also, Ecology has developed tools that will streamline the tracking and accounting processes.

075 – Mitigation plans

Comment # 149

I also find objectionable water banking or the use of NGO's which I hold to be disrespectful American law because such cannot be voted on by the citizens.

Commenter

Ken Morse 2

Response

Thank you for your comment.

Comment # 150

The public should only have to create a mitigation plan if they are obtaining water without the assistance of the water bank. I thought this was the reason for the creation of the bank. Why have impossible to achieve requirements?

Commenter

Leland Schwab 7

Response

You are correct, the public is not required to create a mitigation plan if they are obtaining water from the Water Exchange. If an individual prefers to mitigate without going to the Exchange they must develop a mitigation plan and meet the rule requirements on their own. The Exchange will develop a mitigation plan and submit it to Ecology for approval. Once approved by Ecology this will allow the Exchange to sell mitigation credits to individuals.

Comment # 151

New end users should not have to submit a mitigation plan. You already have empowered the water bank, make them responsible for submitting the plan.

Commenter

Scott Gordon 13

Response

Thank you for your comment. Please see the response to Comment # 150.

Comment # 152

Section (3) Financial assurance - Do away with this section, no new user in this area should have to provide Ecology and their employees access to their bank accounts, provide a letter of credit, cash deposit, give you a negotiable security or surety bond. If you want to apply this section to the water bank or exchange group fine, but not to end users. Why do you need additional financial assurance?

Commenter

Scott Gordon 14

Response

Thank you for your comment. Financial assurance is often necessary to ensure that a mitigation plan is implemented throughout the duration of the water use. This will not affect end users that buy mitigation from the Exchange rather than propose an individual mitigation plan. Please also see the response to Comment # 150.

Comment # 153

Ecology must respond to all applications within a reasonable period of time, like 60 days, or the application shall be granted by default.

Commenter

Scott Gordon 15

Response

Thank you for your comment. Ecology will not be the entity responding to applications to purchase mitigation credit. The Exchange is a separate entity, and not part of state government. Ecology will pass on this recommendation to the Exchange.

Comment # 154

DOE has a history mandating, mandating responsibilities such as processing water rights. The question that I ask: What is the time frame for processing these mitigation requests? Will it take as many years as it does for water rights? I've had one pending for 14 years, myself.

Commenter

Dennis Schultz, Olympic Stewardship Foundation H6

Response

Thank you for your comment. Please see the response to Comment # 153.

Comment # 155

Make the application process easy to understand and fill out. There is no reason why the water bank should be only people trained in how to effect the exchange.

Commenter

Scott Gordon 16

Response

Ecology agrees that the application process for purchasing mitigation should be easy to understand and fill out. Ecology will not oversee the application process, but will pass on this recommendation to the Exchange. In addition, anyone can start a water bank. They would need to comply with the provisions of the rule and the state water code.

Comment # 156

WAC 173-518-075, line 5: add after “ecology approval”, “which shall not be unreasonably withheld”.

Commenter

Pearl Rains Hewett 37; Randy Simmons 27; Kaj Ahlburg 25

Response

Thank you for your comment. Ecology acts deliberately in making decisions under relevant statutes, regulations, and case law. We believe the rule language is consistent with state law.

Comment # 157

WAC 173-518-075(3): delete in line 2 “, for any reason,” and add after “adequate” in line 3 “in its reasonable judgment”.

Commenter

Pearl Rains Hewett 38; Randy Simmons 28; Kaj Ahlburg 26

Response

Thank you for your comment. Ecology acts deliberatively in making decisions under relevant statutes, regulations, and case law. The rule language is consistent with state law and relies on RCW 78.56.110 as a model for construction.

Comment # 158

WAC 173-518-075(3)(g): add after “ecology”, “in its reasonable judgment”.

Commenter

Pearl Rains Hewett 39; Randy Simmons 29; Kaj Ahlburg 27

Response

Thank you for your comment. Ecology acts deliberatively in making decisions under relevant statutes, regulations, and case law. We believe the rule language is consistent with state law.

Comment # 159

Subsection (2)

Tightening of the requirements for a mitigation plan is essential. The rule currently states a mitigation plan must show that the proposed new water withdrawal with mitigation in place will not: 1) Impair existing water rights; 2) Be detrimental to the public interest; OR 3) Result in a net loss of water from a closed source greater than the applicable maximum depletion amounts." “[O]r” must be changed to “and.” Each of these three subparts of this section must be met, not simply one of them, to constitute mitigation that not result in loss or harm to an already water- short system.

Moreover, the term "result in a net loss of water from a closed source" should be replaced with "consume water from a closed source." Any consumptive use of water from a closed source has an adverse impact on that source and should be prohibited. The purpose of closing a water source is to protect it from further appropriation. Changing the rule to read “consume water from a closed source” would more be more likely to accomplish that objective.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 20

Response

Thank you for your comments. Regarding “or” vs. “and” in WAC 173-518-075 (2) Ecology appreciates your suggestion that the language as proposed could be misinterpreted. The rule language has been changed to improve clarity.

Ecology respectfully disagrees with your recommendation to replace “result in a net loss of water from a closed source” with "consume water from a closed source." A proposed water use may consume water from a closed source, however, if that consumptive water use is mitigated, as required by the rule, and there is no net loss of water from the closed source, then instream resources are adequately protected. The language change as recommended would unnecessarily restrict future new water use.

076 – Expedited processing

Comment # 160

Ecology should not be expediting the processing of a water permit application or request that is expected to “fully offset the impacts to surface water.” Expedited processing is only warranted for applications or requests that return water to the basin as set forth in subsections (2) and (3). Any water permit application or request that is only expected to fully offset impacts to surface waters should receive the same level of scrutiny as any other water permit application. There is too much uncertainty to the art of assessing impacts to surface water to allow expedited processing, especially weighed against the risk of exacerbating the insufficient flows throughout the Dungeness basin. Subsection (1) should be deleted from the final rule.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 21

Response

Thank you for your comment. Ecology respectfully disagrees with your recommendation to deny expedited processing to applications expected to fully offset impacts to surface water. Expedited processing does not mean that an application will receive less scrutiny or favorable treatment. Rather it determines the position in line for processing relative to other pending water right applications. We have changed the rule language to clarify this point.

Comment # 161

WAC 173-518-076 Expedited processing: Delete this paragraph or make it read “May or may not be expedited”. This is a useless paragraph unless it is included for the purpose of bribes or extortion.

Commenter

Warner J Litchfield 7

Response

Thank you for your comment. Please see the response to Comment # 160.

080 – Reserves of water for domestic use

Comment # 162

The Reserve for Cassalery Creek is too small, in the Draft Rule. It is 840 gallons per day, for the entire sub-basin. Currently ONE home can use up to 5,000 gallons per day, AND water up to 1/2 acre of lawn or garden, AND, provide stock water for their animals! There are legally created, undeveloped acreage parcels in the Cassalery Creek sub-basin. Many of these parcels do not have access to Dungeness River irrigation water.

This creek is a testament (along with the number of artesian wells in this area, and to the North of it) to the large volumes of water that come down from the mountains and the foothills, and flow underground, to our Valley. This Creek always has started up, in a field. It still does. It has far less flow than it did in the past--and, there is no wonder why. In the past, there was much more irrigation--and, the irrigation was not piped. There was an open, unlined ditch that flowed along Evans Road. Our soils here are loamy and rocky. They are VERY porous. That creek was fed by irrigation of farms in the neighborhood, and by the leaky ditches.

Many of us, in the Aaron Miller Tracts (Evans Road, Pond Lane, and Griffith Farm Road) had access to Cassalery Creek, for irrigation purposes. Some of us did not use it, to keep the creek going. Now, we no longer have the right to use the creek, as more than five years have passed by. Others have recently quit using the creek for irrigation, so they would be allowed to resume that use, or to sell the right to the Water Exchange.

Nevertheless, without the artificially enhanced water flow to Cassalery Creek, from irrigation flows (watering of the farms--like the Bergeron place, near the end of Pond Lane) and from the leaking irrigation ditches, this creek now has less water in it. We, the landowners in the sub-basin, did not do that.

You could say that some of the shallow wells, over on the Livengood property (used to be a farm--they watered a lot, too!!!) have also impacted the flow in the creek. However, to what degree? Certainly, the cessation of all the long-time irrigating of the Livengood Farm, from Dungeness River water, via irrigation ditches, helped the River more than the addition of the groundwater wells impacted it. Those irrigation uses were direct withdrawals. I do not know if Livengood also had access to use Cassalery Creek. He may have.

The point is this. Just as you are "allowing" wetlands that were created by ditch tailwaters and leaking irrigation ditches to dry up; and, the irrigators are mandating that many of the ponds that were off of the irrigation ditches, are cut off, and filled in (so that trees are dying, frogs, ducks, and bats are leaving, wetlands are drying up), so too, should Cassalery Creek be allowed to go back to its "natural state." What was the condition of that Creek, prior to any farms and irrigation usage? I know, from farmers and Sequim natives (like Cecil Dawley and Hill Holgerson, who have since passed on) that Cassalery Creek was augmented by irrigation water, and that farmers hogged out ponds in the creek, so their kids and friends could go swimming. They also let the irrigation water on the old Rose City Dairy (Aaron Miller Tracts) flow night and day, during the Summer. This was a common practice. Now that many of us use drip irrigation, and let our pastures go dry, we are being told to use even less water.

There should be some sort of an additional allowance for the Cassalery Creek sub-basin, so that "newcomers" (some already have their wells, and are waiting to retire, or to sell a house elsewhere) will be able to grow their own fruits and vegetables.

Commenter

Marguerite A Glover 4

Response

Thank you for your comment. Ecology agrees that the reserve of water for Cassalery Creek subbasin is the smallest of the reserves. The small size of the reserve is directly related to the small size of the creek. Ecology also agrees that water use has changed over the past century and those changes have affected the creek. Ecology respectfully disagrees with your suggestion that there should be an additional allowance [of water] in the Cassalery Creek subbasin. Flow levels in the creek are low in the late summer and early fall, impacting instream resources, and additional withdrawals will cause further detrimental impacts. There are practical and feasible mitigation projects to offset the impact of new water use in Cassalery Creek that should be implemented to prevent further impacts.

Comment # 163

Reserves of water would best serve the community by allocating state funds to procure enough water to allow all build out withing WIRA 18 scope. New users could be charged a simple fee to offset the cost, paid to the county building department or the County department of environmental health. This would reduce the cost of the entire system and still allow monitoring and exchange of water for mitigation.

Commenter

Scott Gordon 17, 25; Gail Sumpter 6

Response

Thank you for your comment. Ecology supports pursuing funding for a Dungeness water solutions package as a complement to this rule. Ecology is developing a budget proposal for the FY 2013-15 biennium that would offset the cost of domestic water use related to the mitigation requirement under the rule. It would also fund a variety of stream flow improvement projects recommended by the Local Leader Working Group. The legislature would need to appropriate the funds for these purposes.

Comment # 164

I support adoption of the proposed instream flow rule for the Dungeness River. However, I am concerned that the rule fails to adequately protect the Dungeness basin from the further over-appropriation of its water resources.

The proposed rule allows for withdrawals of water, in the form of reservations for future use. Allowing those future uses, even if partially mitigated, will keep the river from achieving the 180 cfs minimum flow in late summer the rule sets to sustain fish and the river itself.

I urge Ecology to adopt the rule but not the proposed reservations for future use until we know the minimum flow amounts will be met.

Commenter

John Townsell 2; James C McRoberts 1; Chuck Sparks 1; Fred Stuck 1; Larry Doyle 1; Eric E Matthews 1; Jan Sharar, Aqua Permanente' 1; W Thomas Soeldner 1; Don Schluter, Salmon and Steelhead Conservation Society 2

Response

Thank you for your comment. Ecology appreciates your support of the proposed rule. Ecology respectfully disagrees with your recommendation to eliminate the reserves from the rule. Ecology has a responsibility to protect water for domestic use and reserves are needed in this watershed to ensure water for domestic use is available as mitigation projects are phased in.

Each reserve is limited to no more than a 1 percent impact to habitat at the lowest flow time of year. In addition, to reduce that potential impact even further, mitigation will replenish most of the reserves over time. If and where mitigation does not replenish a reserve and it is eventually fully allocated, the rule clearly prohibits new water use that would impact that water body until additional mitigation is in place.

Comment # 165

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

Commenter

Shirley Nixon 16

Response

Thank you for your comment. Please see the response to Comment # 164.

Comment # 166

CELP strongly supports the adoption of an instream flow rule that that not only protects, but also restores and replenishes the Dungeness basin and associated aquifers. The proposed rule must be amended to achieve those essential goals. CELP objects strenuously to the creation of reserves of water for domestic use when mitigation is not available and the setting of so-called maximum depletion amounts for consumptive uses both from the reserves and mitigation plans. The reservations and the maximum depletion amounts undermine the very purpose of the rule: setting instream flows which Ecology itself defines as the "stream flow (amount of water) that must remain in the stream at a specified location and at a specified time to protect instream values.

CELP recognizes the tremendous pressure that Ecology and local government are under to find more water for domestic uses in the Dungeness. The greater Sequim area has experienced a 32% population increase since 2000. However, the population will continue to increase, and the proposed reserves, if adopted, will soon be used up. When that happens Ecology and local government will face renewed pressure to create additional reserves-as recent developments in the Skagit River basin prove. Reserves do nothing more than kick the can of dealing with water shortages down the road at significant cost to the sustainability of our water resources.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 2, 4, 5

Response

Thank you for your comment. Please see the response to Comment # 164. In addition to reserves, this rule establishes Maximum Depletion Amounts. Reserves coupled with maximum depletion amounts limit the maximum future impact to surface waters to 1 percent of low flow. If the reserve/maximum depletion amount is ever fully allocated, no new withdrawals are allowed without additional mitigation.

Comment # 167

WAC 173-518-080 Reserves of Water for Domestic Use

CELP strenuously objects to Ecology's current interpretation of "overriding concerns of public interest" (OCPI) as the basis for the creation of so-called reserves of water for new homes- which may not be or cannot be properly mitigated- for short-term, localized economic gain. Applying OCPI to the proposed Dungeness reserves allows the exception to be used for private interests: namely, new wells for private development. Ecology's current interpretation of the rule raises the question: if private development can be asserted to be a public interest, what remains as a "private" interest under Ecology's interpretation? CELP urges Ecology to return to the definition of OCPI it defended in *Auburn v. Department of Ecology*. PCHB No. 96-091 (1996).

It is not in the public interest to further deplete already over-appropriated stream systems and it is certainly not an overriding public interest. The proposed reserves allow consumptive use of water for domestic use irrespective of instream flow levels or closures established by the rule. The rationale for turning this rule into Swiss cheese is the generalized economic benefits of continued residential growth fueled by permit exempt wells from the proposed reservations. The relied upon economic analysis of development gain and fish losses for the Dungeness is localized. By contrast, the viability of the commercial fisheries- which are heavily dependent on the region's rivers-in Washington and British Columbia is of international concern. Ecology acknowledges that creating reserves in the Dungeness means the Dungeness will support less fish. As insupportable as this is in the Dungeness, the impact of this policy extends regionally.

If the Dungeness instream flow rule becomes final containing reserves, Ecology will be hard-pressed not to incorporate reserves into every new instream flow rule it proposes, and under some circumstances, to amend existing rules to add reserves. What Ecology's economic analysis fails to consider is the cumulative impact of diminished fish viability in rivers throughout Washington on the commercial fishery regionally. Moreover, the impact of the fishery cannot be measured wholly in dollars and cents: an imperative consideration is the central role of fisheries in the culture and viability of the region's tribes.

Additionally, it is inappropriate, if not legally foolhardy, to weigh localized economic benefit against the endangered Chinook, Chum, Steelhead, and Bull Trout in the Dungeness basin.

WDFW has long recognized that "[i]t is logical that increased stream flow results in increased production of anadromous salmonids." Hal Beecher, *Low Stream Flow and Steelhead Production*, Washington Department of Fish and Wildlife (1979). The converse is also logical; decreased stream flow results in decreased numbers of salmon and trout. CELP is very concerned that an ESA violation could arise from allowing reserves that would allow taking more water out of the main stem Dungeness and its side channels, without water for water mitigation at the same time and location and of the same quantity and quality when current flow levels frequently fall substantially below the levels recommended in the rule. The likely loss of flow and habitat accompanying implementation of the reserves could give rise to a potential ESA violation for failing to "resolve water resource issues in concert with the conservation of endangered species." 16 U.S.C. 1531(c)(2); 16 U.S.C. § 1532(3):1

The section on reserves should be deleted from the final rule.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 22

Response

Thank you for your comment. Please see the response to Comment # 164. Ecology respectfully disagrees with your assertion that we are weighing localized economic benefit against the endangered salmonids populations in the Dungeness watershed. Adopting this rule, setting instream flows and requiring mitigation for all new consumptive use of water will protect instream resources, including salmonids habitat, from future new withdrawals of water.

Comment # 168

I do not support adoption of the proposed instream flow rule for the Dungeness River. However, if adopted, the rules more than adequately protect the Dungeness basin from the appropriation of its water resources. The proposed rule allows for withdrawals of water, in the form of reservations for future use. Allowing those future uses will keep the river achieving the 180 cfs minimum flow in late summer to sustain fish and the river itself. I urge Ecology to take into consideration the above if a rule and the proposed reservations for future use is adopted. I have loved the land and the people of the Dungeness area all my life and my hope for the future of both is a balance of the harmonious existence of all species, our human brethren as well, many of the people of the area have worked hard to be excellent stewards of the land they love. This is evidenced by the continuing beauty of the lands where people live and work, sharing their bounty with their equally successful and thriving brothers, the salmon.

Commenter

Cindy Alia 2

Response

Thank you for your comment.

Comment # 169

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

Commenter

Craig A Ritchie, City of Sequim 27

Response

Thank you for your comment. The rule does not affect existing water rights and, therefore, does not apply to municipal water systems operating within their water rights. The rule does apply to future water rights issued to municipal systems; new consumptive uses will require mitigation.

Subsection (5)(d) does not increase the size of reserves. It allows adjustment in the amount of water deducted from the reserve if metering data indicates that the assumed consumptive amounts do not reflect actual use.

Comment # 170

I've seen this coming for a long time. I was actually involved in WRIA 17 with the Instream Flow Rule. I saw a lot of questions brought about reserves then. I thought I had a good handle on what reserves meant. My comment is: I don't believe we're playing a fair game here with reserves.

Commenter

Ed Bowen H1

Response

Thank you for your comment. Ecology respectfully disagrees. Ecology believes reserves of water are sometimes a necessary part of a water management framework to ensure water for new uses while protecting instream resources. Each rule and water management framework is tailored to the needs of the specific watershed.

Comment # 171

WAC 173-518-080, 2. paragraph, line 2: add after “supply”, “and outdoor irrigation of an area not exceeding ½ acre per residence”

Commenter

Pearl Rains Hewett 40; Randy Simmons 30; Kaj Ahlburg 28

Response

Thank you for your comment. Ecology respectfully disagrees with your recommendation to add outdoor irrigation of up to ½ acre to the reserves. Water is unavailable in this basin. The reserves established under this rule are not sufficient to supply water for irrigation and meet expected demand for domestic use. It is not possible to increase the size of the reserves since the Dungeness River and smaller streams in the watershed are flow limited and fish populations are threatened. The reserves are carefully crafted to allow for some uses, while protecting flows.

Comment # 172

Who formulated the Overriding Considerations of the Public Interest determinations?

Commenter

Pearl Rains Hewett 60; Randy Simmons 50; Kaj Ahlburg 48

Response

The determination to allow impairment of instream flows where overriding considerations of the public interest will be served lies with the Director of Ecology, in accordance with RCW 90.54.050(3)(a).

Comment # 173

Subsection (3) should read “... ecology shall take action under WAC 173-518-110. not "may take action..." If the reserves are to be implemented then Ecology needs to ensure that compliance is mandatory.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 23

Response

Thank you for your comment. Ecology respectfully disagrees with your suggested language change. Ecology reserves the right to exercise its enforcement authority.

Comment # 174

Subsection (5)

Ecology's method for debiting against the reserves is flawed. Neither Ecology, nor anyone else in Washington State, has comprehensively assessed ongoing consumptive uses in the Dungeness basin. Ecology bases its consumptive use assumptions on a USGS study conducted in the Great Lakes area. See Kimberly H. Shafter and Donna L. Runkle. *Consumptive Water-Use Coefficients for the Great Lakes Basin and Climatically Similar Areas*, pubs.usgs.gov/sir/2007/5197/pdf/SIR2007-5197_body_ptl.pdf [hereinafter USGS study] (indicating as a median a 15% consumptive use coefficient for areas climatically similar to the Great Lakes basin and 20% consumptive use as the 75th percentile). Ecology's reliance on the 15 gpd. representing the use of a coefficient in the 25th percentile is too liberal, at a minimum 22.5 gpd. or 20% consumptive use, would be more scientifically sound. *Id.*

Use of caution in calculation of consumptive use is not only realistic, it is required. Ecology after all is not obliged by law to permit new uses where, as in the Dungeness, there is no un-appropriated water, the new uses conflict with existing rights, or if the new uses threaten to prove detrimental to the public interest. RCW 90.03.290(3) (emphasis added). The Legislature's use of the word "threaten" calls for Ecology to invoke the precautionary principle in using consumptive use calculations to "find" new water, which is consistent with the agency's duty to retain "waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights." RCW 90.03.005.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 24

Response

This comment appears to be in regard to Ecology's decision to assume that 10 percent of indoor domestic water use is consumed. Ecology's analysis of consumption from indoor water use was performed by hydrogeologists licensed by the State of Washington in accordance with [Ch. 18.220 RCW](#). Their analysis considered published sources regarding climate, topography, soils, geology, typical practices in the area, septic design, water use, and population, as well as professional judgment, and other's use and consumption estimates. The analysis was completed prior to Ecology becoming aware of [USGS SIR 2007-5197](#) and was not based on this USGS publication. Ecology used this analysis to select standard indoor domestic values for use in the rule.

The indoor use value is intended to represent an average annual scenario. This scenario assumes a single family home using self-supplied water and an on-site septic system. Daily per-capita use of 65 gallons per day was selected for indoor domestic water uses. This value is near the mean value of published indoor use estimates. Household water use was calculated by multiplying the average number of people per household by the daily per capita water use. Ecology used [US Census data](#) for this analysis in 2008 before the 2010 Census data was available.

Ecology defines consumption as the amount of water that is removed from the local hydrogeologic system, primarily through evaporation into the atmosphere, absorption and transpiration by plants, and transportation out of the basin. Some consumption of water is known to occur through indoor domestic uses although this type of use is assumed to be mostly non-consumptive. Consumption of residential indoor water is likely to occur primarily as evaporation and transpiration (combined to be called evapotranspiration) from the septic drainfield. This consumption is highest during the growing season. There is also likely some consumption occurring through other indoor uses such as bathing, cooking, watering plants, and other uses. Ecology selected a value of 10% for the consumptive rate for indoor uses.

By contrast, [USGS SIR 2007-5197](#) provided estimates for self-supplied domestic water use, as is referenced in the comment. As noted on page 17 in the USGS report, “*self-supplied domestic water use is water used for drinking, bathing, food preparation, washing clothes and dishes, flushing toilets, and watering lawns and gardens that is not obtained from a public-supply facility (Solley and others, 1998). Domestic consumptive use occurs primarily during outdoor watering of lawns and gardens, sidewalk and car washing, filling and maintaining pools, and to a lesser extent, during indoor cooking, cleaning, showering, and clothes washing (Marilee Horn, U.S. Geological Survey, written commun. February, 2007)*”.

As noted in the comment, USGS reported a median consumptive coefficient of 15% for this category of use (see Figure 9 on page 24 of USGS SIR 2007-5197). And as noted above, the consumptive use that occurs in this category is primarily during outdoor water uses. Outdoor water uses are not included in Ecology’s indoor water use category. Because of this, Ecology respectfully disagrees that 15 percent is an appropriate or scientifically sound assumption for indoor domestic water uses.

Comment # 175

Some concerns regard where is the verification of referenced “reserves” and the metrics used for accounting.

Commenter

Judy M Larson, Protect the Peninsula's Future 4

Response

The sizes of the reserves established in this rule were developed using methods consistent with other rules adopted by Ecology and are based on limiting the amount of impact to habitat at the low flow time of year. Ecology has primary responsibility for tracking allocations from the reserves and will coordinate with the Dungeness Water Exchange and the County to get this done. The rule includes assumed consumptive use rates that will be used for tracking. The rule also allows adjustment of the amount deducted from the reserves based on actual measurements of water use. See also the response to Comment # 174.

Comment # 176

Pending water right applicants have been waiting for years, up to 20 years in some cases, for their application to be processed. The Rule does not provide a method to prioritize new versus existing applications which may greatly impact the "life" of the water reservations. The County does not want to find itself in a similar situation as in the Carpenter-Fisher basin in Skagit County, where the reserve was used up sooner than expected and the sub basin closed to new uses in 2011. We feel it is essential that mitigation projects be geographically focused to avoid the same problem, through simultaneous tracking of reservation use and mitigation demand by sub basin.

Commenter

Howard V Doherty Jr, Jim McEntire, & Michael C Chapman, Board of Clallam County Commissioners 11

Response

Thank you for your comment. The rule does not affect existing state laws on the processing of water right applications. Pending water right applications are processed in the order they are received. In some cases applications may be processed out of order if they meet criteria for priority processing of water rights found in Chapter 173-152 WAC. It is also possible for an applicant to pay for the cost of processing their application and any applications ahead of them in line through cost reimbursement.

Ecology agrees that it is essential to focus mitigation projects in subbasins with smaller reserves. Ecology will work with the Exchange to track reservation use and mitigation demand by subbasin.

Comment # 177

Ecology Must Clarify Language In Proposed Rule So It Is Clear That Mitigation Is Required For All New Uses

Ecology must clarify the rule language relating to when mitigation is required under the rule. Proposed WAC 173-518-080 paragraph 2 states that “based on this finding, ecology hereby reserves specific quantities of groundwater for future domestic supply only. These reserves are not subject to the instream flows established in WAC 173-518-040 or closures established in WAC 173-518-050.” Proposed WAC 173-518-080(2) then provides for three conditions for the use of groundwater from the reserves, which are (a) the water must be for domestic use; (b) water use shall meet conservation standards; and (c) such water use shall be measured and reported.

If new exempt well water use from the reserves is “not subject to the instream flows [or] closures,” how is there any authority to require mitigation for that water use? Or put another way, what is the purpose of establishing the reserves and declaring that the reserves are not subject to the instream flows and closure, if mitigation is still required? This is yet another example of how the proposed rule in the Dungeness Basin varies from other recent Ecology rules, including those in the Quilcene, Skagit, and Upper Yakima Basins. While it is appropriate for rules to address local considerations, Ecology is using a different legal standard that will be hard for landowners, local governments, and the real estate industry to understand.

Commenter

Bill Clarke, Washington Realtors/Sequim Realtors 9

Response

Ecology respectfully disagrees with your assertion that the rule is not clear that mitigation is required for new water use. WAC 173-518-080(1), third paragraph, clearly states consumptive water use associated with a new withdrawal of water that would impact closed surface water sources must be mitigated, and that reserves shall be debited when mitigation water is not available. The reserves serve to ensure water is available for domestic use while mitigation projects are phased in for all the streams in the watershed.

The water management framework in this rule is different from that in the Quilcene-Snow, Skagit, and Upper Yakima basins because each is tailored to the needs of the watershed. However, the legal standard, protection of instream flows and existing water rights, and compliance with the state water code, is the same in all rules.

Comment # 178

The limitations of consumptive use for property with a public sewer system seems too restrictive. It does not take into account the number of people who live in the home. Although I support family planning, I do not think limiting water usage is the appropriate method. We have low flow toilets. Washing machines use less water. There are many ways to conserve water. I lived through water rationing, water conservation, bricks in the toilet tank, and "if it's yellow, let it mellow." Due to health issues and physical limitations, bathing as opposed to showering may be a necessity, even though the water usage is higher. One hundred fifty gallons per day may not be adequate. It is not moral or logical to limit water usage when hygiene may be impaired. The cost of poor hygiene on emotional as well as physical health could be considerable.

Commenter

Marnee Foldoe 7

Response

The rule does not limit future new domestic use of water to 150 gallons per day. The 150 gpd amount is an assumed value that will be used for calculating mitigation requirements and tracking allocations from the reserves. It reflects the average amount of water used by typical households. Ecology recognizes that some households use more (or less) water than this.

085 – Maximum depletion amounts

Comment # 179

Further more I would like you to explain to me what you would do if a family expands do you plan to wait outside the maternity room door to get extra money from them to compensate for the extra water usage it takes as your family expands.

Commenter

Magan Waldron 3

Response

Thank you for your comment. Ecology has no such plan. The mitigation requirement for domestic water use associated with a residence is driven by the average in-home water use typical of the Sequim-Dungeness area, not based on the number of people in the home or the "occupancy rate." Ecology recognizes that existing uses fluctuate, and that sometimes existing uses may increase or decrease, for example as families grow or shrink. It is not Ecology's

intent to apply the rule to existing uses that merely fluctuate so long as that increase (or decrease) can be reasonably considered part of an established and existing use.

Comment # 180

If I start failing and need to do water therapy and existing pools are too cold around the county, can I purchase a hot tub/swim spa and be able to fill it for my medical use/physical therapy [from my existing domestic water right]?

Commenter

Alaine Reeves 3

Response

Ecology recognizes that existing uses fluctuate, and that sometimes existing uses may increase or decrease, for example as families grow or shrink. It is not the Department's intent to apply the rule to existing uses that merely fluctuate so long as that increase (or decrease) can be reasonably considered part of an established and existing use.

Comment # 181

In 2000, my husband and I bought a 2.5 acre parcel of land in Sequim, WA for our future retirement home. From 2000 to 2005, we cleared approximately one acre, installed a well, a pressurized septic system, and underground plumbing and electricity to the building site. Total costs for these improvements were \$25,000. We also seeded the property with hay and wildflowers to help deter thistle infestations. In 2005 we parked a 26 ft. 5th wheeler on our property which we have used as a "cabin" a few weeks every September and April. Over the years, we have had many friends and family stay with us on our property. We strongly feel that our property qualifies as "beneficial use".

Commenter

Beth Garrison & Randy Holtkamp 1

Response

To distinguish between permit-exempt uses that are subject to the rule and those that are preexisting and have established water rights, Ecology must determine when and to what extent beneficial use occurs, and every case will be fact specific. It is not possible to make a determination about applicability of the rule without site specific *water use* information. Please contact Ecology's Southwest Regional Office at (360)407-6300 for more information.

The permit-exemption for non-commercial irrigation use allows a total irrigated area up to ½ acre. If you planted your trees and garden and irrigated them for a reasonable period before adoption of the rule, your irrigation use would not be affected by the rule.

If you live on the property and started regularly using water in your residence before the rule was adopted, this is an existing domestic use and your domestic use is not subject to the rule.

Whether pre-existing camping and recreation use is a regular beneficial use is a legal question the statute doesn't directly answer and the courts haven't specifically ruled on. Ecology does not interpret intermittent camping and recreation as establishing a domestic water right under the groundwater permit exemption.

Situations can arise where you may need to show that you established your water use before the rule went into effect. The most certain way to do that is to install a meter to measure water use prior to the effective date of the rule. You might also be able to demonstrate your water use through power bills, dated photographs and affidavits.

Comment # 182

If a family adopts some kids, or they add on a bathroom, or add an orchard, or a business wants to expand, they will all have to mitigate, and spend money to buy additional water from the Water Exchange--if it is allowed and available. We don't even know for sure, how the Water Exchange will work, or what the costs will be!

Commenter

Marguerite A Glover 9

Response

Please see the response to Comment # 179 relative to domestic water use. If an existing use is expanded and it is not part of the original water use, then the expanded portion of the use would be a new use of surface water or groundwater and it would subject to mitigation requirement in the new rule.

Comment # 183

In WAC 173-518-085 (4) (c) you propose that 90% of outdoor water use should be assumed to be consumptive, compared to 10% for indoor use in a house served by a septic system. Instead of penalizing those who use their irrigation water efficiently, you should make allowances for the fact that much more water that flows through a drip system used at night returns to the aquifer, than, for example, would be the case for a sprinkler system used during the day. In fact, the recharge rate for an underground drip system should be no different than that for a

septic tank drain field. Your own internal correspondence refers to a recharge rate of about 75% for water in irrigation ditches. The rate should be even higher for water discharged underground by a buried drip system. Any average percentage must be based on scientific evidence and take into account different means of irrigating and different recharge rates.

Commenter

Pearl Rains Hewett 32; Randy Simmons 22; Kaj Ahlburg 20

Response

Thank you for your comment. Ecology is not penalizing efficient water use, but rather selected a consumptive rate that could be used to estimate consumption of water from outdoor irrigation, regardless of irrigation method.

The value chosen is 90 percent of what the [Washington Irrigation Guide](#) includes as the net water irrigation requirement. The net irrigation water requirement is defined as the water required by irrigation to satisfy crop evapotranspiration and auxiliary water needs that are not provided by water stored in the soil profile or precipitation. This is the amount of water the plant would absorb and consume if available, not the amount of water applied through irrigation. To account for inefficiencies, Ecology multiplies the net irrigation requirement volume by 90 percent to estimate total outdoor water use consumption. Ecology has chosen a value that is 90 percent of the consumptive water needs published in the Washington Irrigation Guide.

Irrigation efficiency is defined as the volume of water used and consumed by the plant divided by the volume of water applied. In a completely efficient system, all of the water applied would be used by the plant and consumption would be 100%. In practice, it is nearly impossible to be 100% efficient, efficiency varies and there is almost always some non-consumptive use. This is one of the reasons consumptive use estimates are based on what the plants need and use to thrive, not how much is applied through irrigation or an assumed irrigation method or efficiency.

Comment # 184

Pp. 20 – 21 of the CBA introduces the concept of “maximum depletion amounts”, which you admit “is new to instream flow rules”. On what section of the RCWs does Ecology base its statutory authority to create this new concept now and use it in a rule?

Commenter

Pearl Rains Hewett 47; Randy Simmons 37; Kaj Ahlburg 35

Response

The authority for maximum depletion amounts comes from Chapter 90.54 RCW, which requires the preservation of instream values and allows some impairment to those values where it is clear that overriding considerations of the public interest would be served.

Comment # 185

Subsection (3)

The first flaw in this subsection is its incorporation of the draft rule's definition of "critical period." As stated above under WAC 173-518-030, the current definition reflects neither reality nor the biology of the seven principal fish species in the Dungeness basin. Because of the truncated, arbitrary definition of critical period, the limit on maximum depletion in the proposed rule is far too short to protect the seven important Dungeness fish species.

Subsection (3) should be amended to make clear no new uses in excess of the maximum depletion amounts will be allowed, and any new uses later discovered to be in excess of the depletion amounts will be terminated, if not fully mitigated with water for water mitigation at the same time and location, and of the same quality and quantity.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 25

Response

Thank you for your comment. Please see the response to Comment # 20. Ecology believes that subsection (3) already clearly states that no new uses in excess of the maximum depletion amounts shall be allowed. Since no alternative language was proposed, Ecology has not changed the rule language. If later uses are discovered to be in excess of the maximum depletion amounts they will be subject to the enforcement provisions of WAC 173-518-110, and enforcement actions could include mitigation or termination of the use.

Comment # 186

Subsection 4(a) - (c)

As mentioned in, and in addition to, the comments to WAC 173-518-080(5)(a). CELP opposes the use of a 10% coefficient for indoor domestic use of water served by an individual or community on-site septic system and the use of a 90% coefficient for outdoor water use. First, the indoor domestic use should initially be set at a minimum of 15% and should be re-evaluated if new studies or a change in circumstances warrant.

Second, outdoor water use should be assumed to be 100% consumptive. The 100% coefficient is supported by the USGS study based on its coefficients for irrigation and livestock. Additionally, a 100% coefficient is justified because it encourages water conservation by irrigators. Nothing less than 100% efficiency in irrigation should be tolerated in an over-appropriated basin.

Third, CELP is very concerned about using "return flow" from septic systems to justify pumping more ground water from over-allocated groundwater systems. Septic return flow does not necessarily return to the same groundwater source from which household water was originally pumped, and frequently is returned in substantially lesser quality.

Therefore, Ecology should use the more conservative numbers presented in the USGS study because the basin is already over-appropriated and "return flow" from septic systems and irrigation is not a guarantee.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 26

Response

Thank you for your comment. In regard to your comments regarding consumption of indoor water use, Ecology respectfully disagrees that 15 % is an appropriate value to start with. Please see the response to Comment # 174 for more information.

In regard to your comments about outdoor irrigation, Ecology respectfully disagrees that 100% is an appropriate value to start with. Please see the response to Comment # 97, Comment # 98 and Comment # 183 for more information.

In regard to your comments regarding return flow from septic systems, the instream flow rule is intended to protect the volume of flow in certain surface water bodies. Because septic systems do return the majority of indoor water use back to the hydrogeologic system in which the water originated, only the consumptive volume of indoor water is debited. It is true, that the water is not returned to the exact location in which it was captured. However, the impacts from capturing and withdrawing that water, as well as the impacts from returning it to the groundwater system typically occur to the same surface water bodies which are the subject of the instream flow rule.

090 – Future maximum allocation for the Dungeness River mainstem

Comment # 187

WAC 173-518-090 – Future Maximum Allocation from the Dungeness Mainstem. It is important to include a flow regime designed to protect high flows, which have their own important ecological functions. This provision should remain in the rule.

Commenter

Shirley Nixon 17

Response

Thank you for your comment.

Comment # 188

WAC 173-518-090 Future maximum allocation from the Dungeness River mainstem. There needs to be an exception inserted for withdrawals during non-closure periods to off-channel storage for the purpose of mitigating during closure periods.

Commenter

Doug Nass, Clallam County PUD #1 8

Response

New storage projects for environmental enhancement or other uses consistent with the watershed plan could be allowed on a case-by-case basis (WAC 173-518-095). Such projects are potentially not subject to instream flows, but subject to a consultation process with the Tribes, Clallam County, WDFW, and NOAA Fisheries, as well as conditioning and monitoring.

095 – Storage projects

Comment # 189

Within the purpose of the rule, allowing water storage projects is mentioned, please begin work on a reservoir, it takes ten to twenty five years to complete, lets get started.

Commenter

Scott Gordon 2

Response

Thank you for your comment. The Dungeness River Management Team, as the watershed planning unit for East WRIA 18 has investigated storage options. State and local entities that are engaged in water management continue to explore project feasibility and funding options.

Comment # 190

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

Commenter

Craig A Ritchie, City of Sequim 28

Response

Under WAC 173-518-095 the potential for negative effects on fish, habitat, or hydrology would be of the most concern to Ecology. Biologists from each agency would consult with Ecology and discuss concerns with the project proponent. A storage proposal under this section from either the City of Sequim or Clallam County PUD would lead to them becoming directly involved in such a process.

New water rights and changes to existing water rights require public review. As water managers and Ecology's partners in the watershed, both the City of Sequim and Clallam County PUD would be notified of such an application.

Comment # 191

What storage options has DOE considered?

Commenter

Carol Johnson, North Olympic Timber Action Committee 5

Response

Several storage options have been discussed by the Local Leaders Work Group and Dungeness River Management Team. The largest, Atterberry reservoir, was evaluated during watershed

planning. The site is uphill of the Agnew Irrigation District main canal and would require pumping water to the reservoir when flows were available. If constructed, this reservoir could replace 6 cfs of irrigation diversion from the river for six weeks, or 8 cfs for four weeks. In late summer, this would represent a significant improvement in river flows. The \$9 - \$10 million dollar price is currently cost-prohibitive for the watershed, and issues regarding operating and maintenance costs also remain.

Funding has been requested to continue evaluation of smaller off-channel storage sites. The County's Aquifer Storage and Recovery Feasibility Study suggested trying aquifer recharge with the expectation of stream recharge rather than later extraction. Several sites for aquifer recharge (AR) are being considered for development in the near future.

Comment # 192

WAC 173-518-095 Storage Projects

This provision allows Ecology to authorize storage projects for "environmental enhancement and other beneficial uses." This open-ended authorization undermines the incentives to find mitigation water to accomplish the purposes of the rule. It is in the public's interest to rely on conservation and mitigation measures to restore flows to the river: storage projects are massively expensive by comparison for each drop of water captured. This provision should be rewritten to require that all opportunities for conservation are fully exploited and implemented before Ecology and local governments turn to additional storage, especially if additional storage is achieved by dams. Dams have consistently been shown to have adverse effects on wildlife and the surrounding ecosystem as a whole. Given the imperiled state of several ESA listed species in the watershed, the effect of any storage project on salmonids should be at the forefront of what shall be considered if the implementation of a storage project becomes a consideration.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 27

Response

Thank you for your comment. Ecology appreciates the challenges presented by the development and operation of storage projects. The Dungeness River Management Team, the watershed planning unit for East WRIA 18, identified off-channel storage of high winter/spring flows as a possible way to provide water during low flow periods and offset irrigation diversions. Storage may enable fish flow requirements to be met during low flow periods and improve the reliability of water supply for existing water rights. The watershed plan calls for exploring large and small storage reservoirs, in-line reservoirs on ditches, and farm ponds. The plan specifically recommends against on-channel storage in the Dungeness river or other WRIA 18 rivers and streams.

Ecology respectfully disagrees with your recommendation to fully implement conservation before considering additional storage. While conservation can greatly reduce diversions, it cannot eliminate impacts from the irrigator's diversions during the late summer and usually has little effect on the amount of consumptive water use.

100 – Lakes and ponds

Comment # 193

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

Commenter

Craig A Ritchie, City of Sequim 29

Response

Thank you for your comment. This provision in the rule is drawn directly from statutory language found at RCW 90.54.020(3)(a).

Comment # 194

The title of this subsection misleadingly gives the impression that RCW 90.54.020(3)(a) applies only to lakes and ponds. Ecology's duty under the statute is to enhance rivers and streams, where possible, which the reservations set forth in the proposed rule do not.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 28

Response

Thank you for your comment. Ecology recognizes that RCW 90.54.020(3)(a) includes language that broadly applies to perennial rivers and streams of the state. The provision in the rule specifically implements the language in RCW 90.54.020(3)(a) applicable to lakes and ponds.

110 – Compliance and enforcement

Comment # 195

Fines end venue - Ecology has a long and positive history of working with people to help them get into compliance before fining them. Please codify fines, # of contacts needed before fining, and make sure that the venue for paying fines, hearings & appeals should be in the County in which the violation occurred.

Commenter

Leland Schwab 4

Response

Thank you for your comment. Ecology will consider your recommendation to codify enforcement procedures relating to fines, hearings, and appeals of enforcement orders.

Comment # 196

Department of ecology employees stated that violation of the rule could result in fines of up to \$5,000 per day. Please have a specific standard for fines, based on volume and time. Fines are also supposed to be affordable and not cost someone their home. Most people in this community could not afford a \$5,000 fine.

Commenter

Scott Gordon 4

Response

Thank you for your comment. Please see the response to Comment # 195.

Comment # 197

Venue - all fines, must be payable within the county where the violation took place. All hearings or challenges to fines and notices of violation must be heard within the county where the violation took place. Residents cannot afford to fight the department of ecology if they have to traveling to Olympia.

Commenter

Scott Gordon 5

Response

Thank you for your comment. Please see the response to Comment # 195.

Comment # 198

There appears to be no mitigation enforcement mechanism other than through the building permit process. This means that application of this rule will be uneven and unfair as there is no building permit process required for many new uses (i.e. watering a lawn or garden, filling an above ground temporary swimming pool, etc.)

Commenter

Glenn Bingham 5

Response

Thank you for your comment. Ecology understands that our agency may not always have the information or resources to enforce all requirements of the water code and rule, however, individuals are still responsible for following state laws and rule requirements. In addition to enforcement, education in the community about water management and the provisions in the rule will be important for successful implementation.

Comment # 199

WAC 173-518-110(3), line 3: add after “causing”, “material”.

Commenter

Pearl Rains Hewett 41; Randy Simmons 31; Kaj Ahlburg 29

Response

Thank you for your comment. Ecology respectfully disagrees with your recommendation to focus immediate enforcement on violations causing “material” harm. The provision in the rule is based on the language in RCW 90.03.605.

Comment # 200

Subsection (2)(a)

Ecology is a regulator, tasked to protect the state’s waters. It is wholly inappropriate for Ecology to limit its ability to enforce, without resort to voluntary compliance, to "egregious cases," an undefined term with no basis in statute. Undoubtedly, if that language remains in the final rule, Ecology will be constrained from enforcing against an impairment of instream flows because the violation was not sufficiently harmful to be egregious or the overtures at procuring compliance inadequate. Ecology always has the discretion to seek voluntary compliance. Its enforcement authority should not be limited by rule.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 29

Response

Thank you for your comment. The rule language is intended to capture and affirm the intent of RCW 90.030605, and is consistent with standing agency enforcement policy.

Comment # 201

Repeated legislative cuts have significantly diminished Ecology's enforcement capabilities and efforts. Absent funding for Ecology's employment of a dedicated full time water master for WRIA 18, the proposed compliance and enforcement provisions are likely to prove toothless. We therefore recommend that a private right of action to enforce violations of instream flows be established with an attendant attorney's fee provision.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 30

Response

Thank you for your comment. The enforcement provision you recommend is outside of Ecology’s authority and requires legislative action.

120 – Regulation review

Comment # 202

WAC 173-518-120: add a subsection (3) reading “Ecology shall initiate a review, and if necessary amend, this rule if requested by the Clallam County government at any time more than five years after its implementation.”

Commenter

Pearl Rains Hewett 42; Randy Simmons 32; Kaj Ahlburg 30

Response

Thank you for your comment. Ecology respectfully disagrees with your suggested addition to the rule.

Comment # 203

WAC 173-518-120 Regulation review. Explain the rationale for (2).

Commenter

Doug Nass, Clallam County PUD #1 9

Response

Ecology believes that achieving the target flow of 105 cfs may result in a significant enough change in river conditions to assess whether new instream flow or other technical studies are warranted.

Comment # 204

Are there performance assessments that could be added to the Rule (and/or implementation mechanisms) such that after a period - perhaps five years- its effectiveness could be determined (in terms of protection of senior rights, stream flows, and continued availability of water for future development)?

Commenter

Howard V Doherty Jr, Jim McEntire, & Michael C Chapman, Board of Clallam County Commissioners 12

Response

Thank you for your comment. Ecology appreciates the value of assessing the effectiveness of instream flow rules. Given the wide range of variables affecting stream flows and the long period over which changes become apparent, it is difficult to measure rule effectiveness. Ecology, subject to available resources, is working to assess the effectiveness of all rules adopted to protect instream flows and existing water rights, and manage water for future uses.

Comment # 205

But the other thing that I learned was that, I've attended several meetings and in spite of all those meetings, the rule is still moving forward and the rule will come in one way or the other. What I don't see in this is an undo button. What happens if all of these models, all of these suppositions, all of these forecasts, all of these "we thinks" don't work in the real world, what is the process to undo this thing? Look at how much it's taken just to get it to this stage. What happens at six, eight, ten months down the road we find it's not working? It's going to cost \$15,000 or \$20,000 to buy a water right. We don't know.

But what happens when that does happen where we find that the rule, as well-designed as it might be today, isn't working what we experience. I think that before this group even consider it, it be rewritten to include a set of criteria that says if these things happen this way, we'll undo it or we have to revisit it or it's not working.

We talked about the Advisory Committee. One of my professions, if you will, is management consulting. And when you give a job to 17 or 18 or 19 people, you basically get nothing; if you don't want anything done, just give it to a committee. And once we start putting things in the hands of committees, we're going to run into some bureaucratic procedural issues.

So, again, I do not support the rule as written for a lot of the reasons that were mentioned previously, and what I would encourage is that there be an undo function included in that with criteria.

Commenter

Francisco De La Cruz H2

Response

Thank you for your comment. WAC 172-518-120 contains a provision for reconsidering the rule. Please also see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

140 – Maps

Comment # 206

Why aren't Johnson and Jimmiecomelately creeks in WIRA 18 as opposed to WIRA 17? Both go through the Sequim Valley and drain into Sequim Bay I also understand the WIRA 17 doesn't regulate that area but....will in the future?. Does that mean it will be regulated after future development has already taken place in that area?

Commenter

Pamela Cameron 5

Response

The boundaries between Water Resource Inventory Areas (WRIAs) were established through adoption of Chapter 173-500 WAC in 1976. Dividing the whole State into watersheds can result in some seemingly arbitrary divisions, however, the WRIA boundaries are the established water resource management units in this state.

You are correct that the water resource management rule for WRIA 17, the Quilcene-Snow Watershed, does not apply to the drainages east of Bell Creek that flow into Sequim Bay. Ecology has postponed rule adoption for that area. This will mean that current development in that area will not be subject to a future rule.

Comment # 207

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

Commenter

Craig A Ritchie, City of Sequim 30

Response

Ecology agrees that this is not a map of WRIA 18, the Elwha-Dungeness Water Resource Inventory Area. It is a map of the Dungeness watershed of WRIA 18, and the area of application of this rule. Ecology has changed the title of the map to clarify this distinction.

Comment # 208

Where in state law is the area affected by this rule, constituting only a portion of WRIA 18, defined?

Commenter

Pearl Rains Hewett 46; Randy Simmons 36; Kaj Ahlburg 34

Response

Ecology has defined the area affected by this rule in this rule, WAC 173-518-010(1).

Comment # 209

Why is rule limited to the Dungeness Valley water system?

Commenter

Charles Blood 8

Response

During the watershed planning process for the Elwha-Dungeness Water Resource Inventory Area #18 (WRIA 18), the watershed planning unit chose to establish two planning teams: the Dungeness River Management Team and the Elwha-Morse Management Team. This rule implements the Watershed Plan recommendations for the Dungeness portion of WRIA 18. Dam removal on the Elwha River is delaying setting instream flows on the Elwha.

General

Comment # 210

I STRONGLY support your efforts to establish a sensible/sane water resources policy for the Dungeness (WRIA 18) Watershed. A policy strongly resisted by local developers, realtors and pandering politicians.

Commenter

Harley M Oien 1, 2

Response

Thank you for your comment.

Comment # 211

It is shameful that DOE is planning to implement instream flow rules and water rights restrictions for us local residents under the sham of it being good science. If you proceed call it what it is, a political solution to a perceived problem.

Commenter

Richard G Kott 2

Response

Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 212

Why has your Department not put forth a beneficial plan which would meet the needs of the community and the environmental necessities by application of good stewardship programs and waste reduction efforts?

You should be focusing on helping people succeed in supporting and contributing to a sound local ecology

Commenter

Steve Gale H9, H10

Response

Thank you for your comment. Ecology, the Dungeness Watershed Planning Unit, the Local Leaders Work Group, and the Washington Water Trust have looked at many options to provide water supply for future uses, and protect existing water resources and existing water rights. Please also see the response to Motivation and authority for adopting the rule.

Comment # 213

I've had a look at the way that conservation things in agriculture is done in saving and conserving water and stuff, and now they are looking for more things to do. And I've used this expression down in my area, "it's another slap in the face for the good stewards," and I don't like that part of it.

It's all about -- my bumper stick says, "It's not about salmon, it's not about water; it's about control of the weakest link that's out there."

Commenter

Roger Short H4, H7

Response

Thank you for your comment. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 214

Your plan of the water resource inventory area is in different strategy than the state. It appears to be a divide and to conquer strategy, which usurp our freedoms, money, property access to divide. I have great concern due to the Department of Ecology's proposed new rule making.

It is my opinion that the proposed new rule making is a failure of your department. Your plans fail to recognize the rights of citizens; indeed, your plan's a failure of your department to give anything more than dismissive consideration to the rights of the people. As failure in that, it is contrary to the intent of the permanent exempt well statute, a failure widely in your economic justification you offered that you could take a right which has not been yet exercised. Your department's action is just that you can take the water rights of people where they have not previously established that right is nothing short of absurd and preposterous.

A failure in natural planning is intently ambiguous to details, consideration criteria, and logic. Your plan is based upon subjective, unrestrained decision criteria in that it's evasive discussion on a scheme of mitigation.

I believe this proposal rule is nothing but a scam in an effort to scam the people of their rights. The people should not be allowed -- excuse me -- this plan should not be allowed to be enacted.

You should be focusing on helping people succeed in supporting and contributing to a sound local ecology; instead, you have sought to implement a plan to usurp our freedoms, our rights, and put restraints on our property. The only thing this plan would accomplish is a feeling of bureaucratic imperative of creating an overbearing government agency with the agenda of taking water rights, property rights, and diminishing our prerogative for free use and enjoyment of our land.

Commenter

Steve Gale H1, H6, H7, H8, H10, H11

Response

Thank you for your comment. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Groundwater permit exemption, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 215

Why the DOE would subject the citizens of Dungeness Valley to pay \$42 million in mitigation costs for no proven benefit -- and I'm honored to follow Dr. Crittenden, who pointed out that the basic science is completely flawed. It's worse than junk science. Whether the benefit is supposed to be for fish or habitat, both bogus reasons, much less benefit to the people is, to me, beyond belief. I'm just getting warmed up.

Commenter

Jacques Dulin H3

Response

Thank you for your comment. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 216

I have concluded that this Rule has nothing to do with fish – especially based on the above – and that it is a power grab of the people's right to use their own property. The DOE is an agency out of control, should be reduced tremendously in size (currently over 1600 employees) and required to stay within the confines of the Washington State Constitution.

With science conducted like their economic impact statement and assumptions that don't hold water, what we're witnessing is a naked power grab by an out of control agency. Their real ambition appears to have nothing to do with fish populations. Honest discussion of these issues cannot occur with a deceptive, disingenuous, and devious agency like the Department of Ecology.

Commenter

Sue Forde 7; Steve Marble 10, H10

Response

Please see the general responses to Motivation and authority for adopting the rule and Science/fish.

Comment # 217

I do not trust the federal government or their agencies any more to have the good of the people and environment their top priority. Probably they are just looking for control to extend their power . . . that is their historical legacy and getting worse daily.

Commenter

CM Muller 5

Response

Thank you for your comment. Please see the response to Motivation and authority for adopting the rule.

Comment # 218

We have participated in the east WRIA 18 Executive Committee process and the Local Leaders Work Group process by invitation of the governments involved. We have offered our thoughts and ideas as we have considered the same from others. We appreciate the effort that the Department of Ecology has made to develop the proposed rule and the hard work accomplished by the staff and policy representatives from all entities involved in the rule development. Everyone involved did a good job and should be proud of their contributions.

Please do what is necessary to adopt the water resource management rule for the eastern portion of WRIA 18, the Dungeness watershed. We look forward to helping implement the rule. We look forward to the many opportunities to restore flows as allowed by the rule.

Commenter

Scott Chitwood, Jamestown S'Klallam Tribe 11

Response

Thank you for your comment.

Comment # 219

We are opposed to the DOE Rule being crammed down throats of our valley citizens in spite of extensive, knowledgeable opposition from PABA, The Dungeness Valley Association, Red Ink Revolt.org, CAPR, City of Sequim, Realtors groups, and individuals.

We as Basin residents add our voice, and vote, against the Rule, and the total lack of statutory due process in your cram-down rush to expropriate our water rights. This is nothing more than a raw exercise of bureaucratic power contrary to the wishes of the affected citizens.

Commenter

Jacques M Dulin 1

Response

Please see the responses to Comment # 211 and Comment # 232.

Comment # 220

This is not an exercise of government of, by and for the people – this is arrogant politics. The rule, and DOE's incompetence in its rulemaking process in violation of state law and the APA, and leaving stakeholders out of the process (Sequim and small farmers to name two groups), is top-down waste of taxpayer money.

DOE needs to be repurposed from expropriation and taxation via unnecessary rulemaking, to finding other sources of water, if, as it claims but cannot prove, we are short and must close the Basin, contrary to your authority and State Law. The alleged Basin over-appropriation is merely on paper, and our work on tight-lining has shown that we can conserve without interference from DOE.

Anyway, please withdraw the rule. It's in our best interest.

Commenter

Jacques M Dulin 4, 9, 12, H7, H9

Response

Please see the responses to Comments #163 and #755, and also the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, the Groundwater model, and Public outreach. The proposed rule is consistent with state law, including the Administrative Procedures Act.

Comment # 221

The objective of the entire project is to reduce water use and protect resources while allowing continued use and development. The easiest way to accomplish this is to have the state purchase the mitigation water, have some entity, ie water bank or PUD to metering and monitoring of use and accept payments from the public for the mitigated water, and lastly do not worry about how the public uses their water. I understand how and why ecology controls water use for irrigation, but once it is set aside for a household to use, that should be the end of control.

Commenter

Leland Schwab 1

Response

See the response to Comment # 220.

Comment # 222

Just one more person tired of not being able to answer my clients (and my own) questions about using a well. Come on! Let's try and rise above typical government procedures and practices. (Make a law and worry about the consequences later). please

Commenter

Jim Newton, Jace Real Estate Co 1

Response

Thank you for your comment. Please see the general response on the Groundwater permit exemption and Effects on future homebuilders.

Comment # 223

I don't believe it is in anyone's best interest to take away probably the most basic ingredient for survival: water.

Commenter

Cathy Reed 2

Response

Please see the response to Comment # 261.

Comment # 224

I have many concerns regarding the proposed rules for WRIA 18 E. Our area has suffered a continuous onslaught of rules and regulations which threaten the use of my land, water, my business, and my financial security. I DO NOT want to destroy or misuse land, water, or air. I DO want to use that which I have purchased on good faith. These rules are unacceptable. These rules should be tossed.

Commenter

Aloma Blaylock 1, 5, 8

Response

Please see the response to Comment # 261. Please also see the general responses regarding Prior appropriation: what's fair? and the Groundwater permit exemption.

Comment # 225

I am appalled by the arrogance of the DOE and this attempt to ban, restrict, meter, control and charge for a god given staple that is necessary for the existence of all life. Many rural landowners are not connected to water systems because it is not necessary. Our land provides this. No public system to pipe anything from anywhere. Private property owners are on private systems, from their private water resource from their private property. Rural areas pay for their private wells and pumps, maintenance and power to draw the waters off their own properties. DOE refers to this as a Commodity? WRONG.

The water world did fine before the DOE created itself to create model projections, from model science, that create false alarms around false needs. But then this allows DOE to stay in business and plunder the ones who are the REAL conservatives on water usage, Right?

God gave us Water. The DOE did not. Water is not a commodity. It is the necessity for life. Without it we can't exist. DOE is saying you must Pay or Die? Is DOE denying "we the people" who live rural do not have the right to live without collection? May I remind you western Washington is not the desert? Rivers do not resemble the San Diego. The DOE are meddlers of the worst kind, destroyers for the benefit of the Urbanite destroyees.

I would suggest that the DOE might want to remove the pencils from their ears, remove themselves from their projected computer graph designer programs and look at reality. Proving what model science claims, is impossible and ridiculous. The future is unpredictable and projections are near fantasy until proven true. Denying that good clean rural living is the cause of urban created problems, pollution and shortages is untrue, unjustified. It is an unconstitutional and ungodly revenue grabbing scheme, along with a whole lot of hogwash.

One size does not fit all. Enough is enough! Your way outta line on this one folks! Action needs to be taken to stop this in it's tracks. This "rule" is in direct violation of human rights. The majority of Olympic Peninsula citizens vs DOE? DOE is out numbered according to my polls so I would say the polls speak for themselves. No proof positive is a no go. A waste of time and money. Before long DOE will come up with a private air breathing tax. Will DOE then create a "rule" that we all wear air cosumption meters? with a monthly bill attached? Pathetic.

Commenter

Brooke Dorhofer 1, 3, 5

Response

Please see the general responses regarding Prior appropriation: what's fair?, the Groundwater permit exemption, Mitigation: who pays?, and the response to Comment # 220.

Comment # 226

This rule is an overreach of power by well intentioned people. Please delay the rule so that you have time to weigh the benefits vs. the harm it will cause.

Commenter

E Michael McAleer 2

Response

Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 227

I would like to register my utter disgust at your attempt to control the water use of the people in this county and eventually the state. This is nothing more than a Stalin-esque technique of controlling the people and taxing us into poverty.

SHAME ON YOU!!! We the people will not stand for this!

Commenter

Kerry Hooks 1

Response

Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 228

HEY, Department of Ecology, here's a plan for ya. Create a 100 foot setback on Lake Washington, the Duwamish River, the Montlake Cut, and ANY other waterway/wetlands within the Seattle city limits before you mess around with land control on the Olympic Peninsula.

Commenter

Keith Olson 1

Response

Thank you for your comment.

Comment # 229

As, a voter & WE THE PEOPLE , I am urging you to vote NO on Chapter173-518 WAC - and stop taking owner RIGHTS away from us!!!!!!!!!!!!!!!!!!!!

Commenter

Ross Krumpe 1

Response

Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model, and Comment # 232.

Comment # 230

Please leave the people's water alone and stop interfering with tax payer's lives. You are going beyond the limits of acceptance for a state regulatory agency.

Commenter

Robert Fowler 1

Response

Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 231

If half of what I read about what you are trying to do up in the Dungeness country is true, you are way out of line. Chapter 173-518 WAC Water Resources Mgmt. program for the Dungeness portion of the Elwha-Dungeness – Water Resources Inventory Area (WRIA 18) – New Rule, is extremely disappointing. You people are way out of line. I, as well as the DOE, served on a committee to write the Smoke Mgmt rules for Silvicultural Burning 25 years ago. The DOE was out of control, trying to control, then, as it is with this new rule.

Maybe you should contribute to Planned Parenthood and try to improve on the real cause of most of these “problems”. OR. Go to the greatest ecologically impacted areas of the state and start cleaning up those disasters and getting rid of all the people. Here's a few examples; Bellingham, Seattle, Tacoma, Olympia.

No questions, just a nay vote for the “New Rule” for WRIA 18.

Commenter

Rick Trudeau 1

Response

Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model, and Comment # 232.

Comment # 232

I believe that this effort oversteps the authority of the government organizations and their appointees. Most of the data that I have seen has been distorted to support their claims. This is not government by and for the people - more like government over the people.

I believe far more voter input should be gathered before any decisions are made. More meetings should be held during times that working folks and out of area property owners can attend.

It is unacceptable to have rules/regulations as important as this decided by a few rather than by a democratic vote for the property owners.

Commenter

Liz Phelps 1; Florence E Blay 3

Response

The Washington State Legislature guides all state rule-making through a law known as the Administrative Procedure Act (APA), Chapter 34.05 RCW. All state agencies must follow the requirements of the APA. The APA does not authorize Ecology to hold an election to determine whether to adopt a proposed rule. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 233

I believe the D.O.E. and this project affecting WRIA's in Clallam County should be voted on by the people of Clallam County.

Commenter

Richard Hale H2; Melvina Worman H2, 8

Response

Thank you for your comment. See the response to Comment # 232.

Comment # 234

Ecology and Health ought to try to fix things that are not broken. To me it seems like a Socialist way to collect MY money and start out by calling it Mitigation. What a way to ruin a nice place to live!!!!!!!!!!

Commenter

Tony and Mary Jo Storm 1

Response

Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, the Groundwater model, and Mitigation: who pays?.

Comment # 235

Just what part of Russia in Eastern Clallam County? Where do you people have the right to even think of this kind of stuff. I suppose the Tribes will be able to have all the water they need to do whatever they want to use it for. We use about 1-2 % of the available water in the valley and you people are just looking for a way to bring more government rags into our lives. you all need to get a life. I have a well and have had one for some time, you say it will not effect me, I don't believe you. Down the road you will want more, Big Government always does. I will not be here for the BIG meeting, but I think you get my drift on my feeling on this issue.

Commenter

Ronald J Casscles 1

Response

Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 236

Your proposal for the Dungeness portion of the Elwha-Dungeness Water Resource Inventory Area (WRIA), of restricting new water use to 120-150 gallons/day, with additional restrictions on livestock and irrigation is a major move to the Communism that the current administration has being forcing on this Country for over three years. I only must assume this plan in in conjunction with your Nazi plan to move everybody off of the peninsula and allow it to return to nature.

Just because we have a Socialist/Communist in the White House now does not mean he will be there forever. Perhaps you are counting on him creating a dictatorship before his next four years are up, and you will not have to return to realism. In any case, your plans are right out of the Nazi play book, and you may find that the citizenry will not tolerate it.

Commenter

LESTER Stu 1

Response

This rule does not limit domestic use to 120-150 gallons per day. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 237

My husband and I attended the meeting last week at Sequim Community Church and after listening to testimony, and reading many e-mails and media report, we are asking for Department of Ecology to stop the process of closing our basin down. We have lived here for 43 years and want to finish out our years here.

Commenter

Barb & Dennis Butcher, John L Scott 1

Response

Thank you for your comment. Ecology is required by RCW 90.82.130 to propose and adopt rules that implement obligations accepted during the Watershed Planning Process. Continuation of your existing water use under a valid water right claim, permit, or certificate or under the groundwater permit exemption will not be affected by the proposed rule.

Comment # 238

What we all can look forward to?

The brand new, state controlled "DOE deprivation of Water to the PUBLIC Dept."

Appointed DOE takes all of our water, including private and municipal water districts.

Appointed DOE restricts our private water right usage.

They have a new Appointed DOE agency, financed by charging us with inflated fees to meet DOE'S cost to run their NEW deprivation to the Public Water Dept.

Who will the Appointed DOE sell our WATER to? the highest bidder? California? Japan?

Who will reap the profits? The Appointed DOE.

What will Appointed DOE use the profits for? To expand the Appointed DOE.

Is there any benefit to the residents/taxpayers/ citizens? NO.

Physical DOE Commodity Trading

Why do commodity houses exist? They exist for the same reason that hedge funds exist--they provide increased liquidity and someone decided to start trading commodities with their own money that eventually became a large operation. They also invest in and build storage capacity which they use in their operations or can rent out. At the end of the day, they exist for the reason that any corporation exists....because they can make money.

What if there was an initial public offering (ipo) of public water?
An initial public offering (IPO) or stock market launch.

If Washington state water was a stock market commodity?
Everything DOE is doing would be illegal.

What Does It Mean To Corner The Market?

When somebody tries to manipulate the market by illegally hoarding a particular commodity, it means that he is trying to 'corner the market'. In this process, the buyer tries to stockpile the maximum amount of that commodity available, to create an artificial shortage and drive up the price before selling the commodity back into the market.

Front running is the illegal practice of a stock broker executing orders on a security for its own account while taking advantage of advance knowledge of pending orders from its customers. When orders previously submitted by its customers will predictably affect the price of the security, purchasing first for its own account gives the broker an unfair advantage, since it can expect to close out its position at a profit based on the new price level.

By front-running, the broker has put his or her own financial interest above (or in front of) the customer's interest and is thus committing fraud. In the U.S. he or she might also be breaking laws on market manipulation or insider trading.

Price fixing

Physical Commodity Trading

Why do commodity houses exist? They exist for the same reason that hedge funds exist--they provide increased liquidity and someone decided to start trading commodities with their own money that eventually became a large operation. They also invest in and build storage capacity which they use in their operations or can rent out. At the end of the day, they exist for the reason that any corporation exists....because they can make money.

Is it legal to "Corner the Market on water?" by a US or state government agency?
Is "Front running on water" legal for a US or state government agency?

How does "Cornering the market on water" and "Front running on water" apply to the Dungeness Water Rule?

read on if you are interested

What Does It Mean To Corner The Market?

InvestorGuide University > Subject: Investing > Topic: Investing Basics > What Does It Mean To Corner The Market?

by InvestorGuide Contributor (Write for us!)

When somebody tries to manipulate the market by illegally hoarding a particular commodity, it means that he is trying to 'corner the market'. In this process, the buyer tries to stockpile the maximum amount of that commodity available, to create an artificial shortage and drive up the price before selling the commodity back into the market.

The attempt by the buyer to corner the market depends a lot on his financial strength and knowledge about market trends. Apart from legal problems, he might also find himself in a mess if his intentions are exposed. He will then have other traders trying to oppose his move and make it difficult for him to sell back the commodity at the high price that he would have hoped to get. In some cases, other traders might actually benefit from the buyer's mistake.

One of the early examples was the cornering of the silver market in the 1970's where two brothers, William Herbert Hunt and Nelson Bunker tried to corner the silver market by buying silver in huge quantities. They managed to buy around 200 million ounces, which at that time was about half the world's silver, before being check mated. They had managed to raise the price of silver from 2 dollars per ounce to 54 dollars per ounce. They were forced to sell the silver back into the market at a substantial loss in the 1980's and eventually went bankrupt.

One more example of cornering was the conviction and 8 year sentence for Hamanaka, who tried to corner the Copper market in 1996, which resulted in the loss of 1.8 billion dollars to Sumitomo Corporation. Some large corporations have run into trouble with trying to corner the market. BP was ordered to pay a fine of over 300 million dollars in exchange for dropping the civil suit and criminal investigation against it for illegally trying to corner the U.S. Propane market in February 2004 and previously in April 2003. Unfortunately for BP, it got cornered by the CFTC and The Department of Justice.

Cornering the market is similar to buying stocks or shares of a particular corporation with the sole intent of raising the prices of those stocks artificially, before selling them off to make a huge profit. According to the U.S. Government Statute, no person can attempt to manipulate the price of any commodity or the commodity futures market. If the person is found guilty, he may be imprisoned or force to pay monetary damages. Cornering the market was widespread in the 1900's when there were hardly any regulations in place, but now with the CFTC keeping a watchful eye it has become very difficult for traders to engage in such malpractices. Also, with the advent of computerization, it is very easy for traders and authorities alike to keep an eye on the prices of all commodities. The markets also have circuit breakers in place, i.e. if the price of any commodity fluctuates beyond set price parameters or if there is a high fluctuation in the

price of any commodity as compared to the previous day's price, then trading in that commodity is immediately suspended, till the cause of the fluctuation is found out. Even though cornering is illegal, there will always be someone trying to grab a major chunk of the commodities market with the hopes of increasing their return.

Physical Commodity Trading

Why do commodity houses exist? They exist for the same reason that hedge funds exist--they provide increased liquidity and someone decided to start trading commodities with their own money that eventually became a large operation. They also invest in and build storage capacity which they use in their operations or can rent out. At the end of the day, they exist for the reason that any corporation exists....because they can make money.

Front running

From Wikipedia, the free encyclopedia

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This article is about the financial practice. For the practice as applied to domain names, see domain name front running.

This article includes a list of references, but its sources remain unclear because it has insufficient inline citations. Please help to improve this article by introducing more precise citations. (February 2011)

Front running is the illegal practice of a stock broker executing orders on a security for its own account while taking advantage of advance knowledge of pending orders from its customers. When orders previously submitted by its customers will predictably affect the price of the security, purchasing first for its own account gives the broker an unfair advantage, since it can expect to close out its position at a profit based on the new price level. The front running broker either buys for his own account (before filling customer buy orders that drive up the price), or sells (where the broker sells for its own account, before filling customer sell orders that drive down the price).

Allegations of front running occasionally arise in stock and commodity exchanges, in scandals concerning floor brokers and exchange specialists.

Pearl Rains Hewett

Freedom of speech in the United States is protected by the First Amendment to the United States Constitution

Explanation

For example, suppose a broker receives an order from a customer to buy a large block of 400,000 shares of some stock, but before placing the order for the customer the broker buys 20,000 shares of the same stock for his own account at \$100 per share, then afterward places the customer's order for 400,000 shares, driving the price up to \$102 per share and allowing the broker to immediately sell his shares for, say, \$101.75, generating a significant profit of \$35,000 in just a short time. This \$35,000 is likely to be just a part of the additional cost to the customer's purchase caused by the broker's self-dealing.

This example uses unusually large numbers to get the point across. In practice, computer trading splits up large orders into many smaller ones, making front-running more difficult to detect. Moreover, the U.S. Securities and Exchange Commission's 2001 change to pricing stock in pennies, rather than fractions of no less than 1/8 of a dollar, facilitated front running by reducing the extra amount that must be offered to step in front of other orders.

By front-running, the broker has put his or her own financial interest above (or in front of) the customer's interest and is thus committing fraud. In the U.S. he or she might also be breaking laws on market manipulation or insider trading.

Other uses of the term

Front-running may also occur in the context of insider trading, as when those close to the CEO of a firm act through short sales ahead of the announcement of a sale of stock by the CEO, which will in turn trigger a drop in the stock's price. Khan & Lu (2008: 1) define front running as "trading by some parties in advance of large trades by other parties, in anticipation of profiting from the price movement that follows the large trade". They find evidence consistent with front-running through short sales ahead of large stock sales by CEOs on the New York Stock Exchange.

While front-running is illegal when a broker uses private information about a client's pending order, in principle it is not illegal if it is based on public information. In his book *Trading & Exchanges*, Larry Harris outlines several other related types of trading. Though all these types of trading may not be strictly illegal, he terms them "parasitic".

A third-party trader may find out the content of another broker's order and buy or sell in front of it in the same way that a self-dealing broker might. The third-party trader might find out about the trade directly from the broker or an employee of the brokerage firm in return for splitting the profits, in which case the front-running would be illegal. The trader might, however, only find out about the order by reading the broker's habits or tics, much in the same way that poker players can guess other players' cards. For very large market orders, simply

exposing the order to the market, may cause traders to front-run as they seek to close out positions that may soon become unprofitable.

Large limit orders can be "front-run" by "order matching" or "penny jumping". For example if a buy limit order for 100,000 shares for \$1.00 is announced to the market, many traders may seek to buy for \$1.01. If the market price increases after their purchases, they will get the full amount of the price increase. However, if the market price decreases, they will likely be able to sell to the limit order trader, for only a one cent loss. This type of trading is probably not illegal, and in any case, a law against it would be very difficult to enforce. Harris still considers it "parasitic".

Other types of traders who use generally similar strategies are labelled "order anticipators" by Harris. These include "sentiment-oriented technical traders," traders who buy during an asset bubble even though they know the asset is overpriced, and squeezers who drive up prices by threatening to corner the market. Squeezers would likely be guilty of market manipulation, but the other two types of order anticipators would not be violating any US law.

Hostile takeovers

A hostile takeover allows a suitor to take over a target company whose management is unwilling to agree to a merger or takeover. A takeover is considered "hostile" if the target company's board rejects the offer, but the bidder continues to pursue it, or the bidder makes the offer directly after having announced its firm intention to make an offer.

A hostile takeover can be conducted in several ways. A tender offer can be made where the acquiring company makes a public offer at a fixed price above the current market price. Tender offers in the United States are regulated by the Williams Act. An acquiring company can also engage in a proxy fight, whereby it tries to persuade enough shareholders, usually a simple majority, to replace the management with a new one which will approve the takeover. Another method involves quietly purchasing enough stock on the open market, known as a creeping tender offer, to effect a change in management. In all of these ways, management resists the acquisition but it is carried out anyway.

The main consequence of a bid being considered hostile is practical rather than legal. If the board of the target cooperates, the bidder can conduct extensive due diligence into the affairs of the target company, providing the bidder with a comprehensive analysis of the target company's finances. In contrast, a hostile bidder will only have more limited, publicly-available information about the target company available, rendering the bidder vulnerable to hidden risks regarding the target company's finances. An additional problem is that takeovers often require loans provided by banks in order to service the offer, but banks are often less willing to back a hostile bidder because of the relative lack of information about the target available to them.

Commenter

Pearl Rains Hewett 1

Response

The proposed rule has nothing to do with commodity trading and associated market practices you describe. Please see the responses to Comment # 220 and the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 239

DOE Dungeness Water Rule - Government monopoly - Coercive monopoly

According to economist Murray Rothbard

"A coercive monopolist will tend to perform his service badly and inefficiently."

Debt of US Postal Service US: \$15,724,907,364,995 - as of June 2012

Debt of FEMA \$18,000,000,000 under water (will be doubling rates 100% in 4 years)

In economics, a government monopoly (or public monopoly) is a form of coercive monopoly in which a government agency or government corporation is the sole provider of a particular good or service and competition is prohibited by law. It is a monopoly created by the government. [1] It is usually distinguished from a government-granted monopoly, where the government grants a monopoly to a private individual or company.

A government monopoly may be run by any level of government - national, regional, local; for levels below the national, it is a local monopoly. The term state monopoly usually means a government monopoly run by the national government, although it may also refer to monopolies run by regional entities called "states" (notably the U.S. states).

In addition to the Dungeness Water rule, the DOE intends takeover of 80 private and municipal water districts. The Dungeness Water Rule is an appointed state agency looking for a business opportunity, it will provide the DOE with unconstitutional authority and we the people will be leaving ourselves open to all of the following.

Anti-competitive practices

- Monopolization
- Collusion

- o Formation of cartels
- o Price fixing
- o Bid rigging
- Product bundling and tying
- Refusal to deal
 - o Group boycott
 - o Essential facilities
- Exclusive dealing
- Dividing territories
- Conscious parallelism
- Predatory pricing

Examples

In many countries, the postal system is run by the government with competition forbidden by law in some or all services. Also, government monopolies on public utilities, telecommunications and railroads have historically been common, though recent decades have seen a strong privatization trend throughout the industrialized world.

In Scandinavian countries some goods deemed harmful are distributed through a government monopoly. For example, in Finland, Iceland, Norway and Sweden, government-owned companies have monopolies for selling alcoholic beverages. Casinos and other institutions for gambling might also be monopolized. In Finland, the government has also a monopoly to operate slot machines.

Governments often create or allow monopolies to exist and grant them patents. This limits entry and allow the patent-holding firm to earn a monopoly profit from an invention.

Health care systems where the government controls the industry and specifically prohibits competition, such as in Canada, are government monopolies.[2]

Coercive monopoly

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In economics and business ethics, a coercive monopoly is a business concern that prohibits competitors from entering the field, with the natural result being that the firm is able to make pricing and production decisions independent of competitive forces.[1] A coercive monopoly is not merely a sole supplier of a particular kind of good or service (a monopoly), but it is a

monopoly where there is no opportunity to compete through means such as price competition, technological or product innovation, or marketing; entry into the field is closed. As a coercive monopoly is securely shielded from possibility of competition, it is able to make pricing and production decisions with the assurance that no competition will arise. It is a case of a non-contestable market. A coercive monopoly has very few incentives to keep prices low and may deliberately price gouge consumers by curtailing production.[2] Also, according to economist Murray Rothbard, "a coercive monopolist will tend to perform his service badly and inefficiently." [3]

Advocates of free markets say that the only feasible way that a business could close entry to a field and therefore be able to raise prices free of competitive forces, i.e. be a coercive monopoly, is with the aid of government in restricting competition. It is argued that without government preventing competition, the firm must keep prices low because if they sustain unreasonably high prices, they will attract others to enter the field to compete. In other words, if the monopoly is not protected from competition by government intervention, it still faces potential competition, so that there is an incentive to keep prices low and a disincentive to price gouge (i.e., competitive pressures still exist in a non-coercive monopoly situation).

Competition law

Basic concepts

- History of competition law
- Monopoly
 - Coercive monopoly
 - Natural monopoly
- Barriers to entry
- Herfindahl–Hirschman Index
- Market concentration
- Market power
- SSNIP test
- Relevant market
- Merger control

Anti-competitive practices

- Monopolization
- Collusion
 - Formation of cartels
 - Price fixing
 - Bid rigging
- Product bundling and tying
- Refusal to deal
 - Group boycott
 - Essential facilities

- Exclusive dealing
- Dividing territories
- Conscious parallelism
- Predatory pricing
- Misuse of patents and copyrights

Enforcement authorities and organizations

- International Competition Network
- List of competition regulators

This box:

- view
- talk
- edit

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Commenter

Pearl Rains Hewett 2

Response

Neither this rule, nor Ecology, provides a barrier to any party wishing to enter the mitigation credit sales market. The rule provides a framework for sellers with reliable, senior water rights to sell to new water users who need reliable water rights. After three years, the number of mitigation certificate sellers in the Upper Kittitas Water Exchange has increased from one to four. Two to four more sellers will soon begin operations.

Potential sellers of mitigation certificates would not need to enter the market under the belief they could possibly create a monopoly. How could they? The highest value demands (domestic use) expected over the next 20 years constitutes about 2% of the potential supply of water rights that could meet the demand. Instead, sellers must believe a stable marketplace exists where they can realize greater value by transferring their asset (a water right or flow improvement project generating the mitigation credit) to customers who can support a higher value than the current use of the asset. If there is confidence in that marketplace, sellers will present themselves.

Comment # 240

My question to you and your team is this: If you were being totally HONEST about your opinion on what is in the best interest of our valley you would not be in favor of this rule. AND, if you were living here I bet you would be more than a little outraged at how the tax money has been spent for the past 10 years.

Commenter

Cathy Reed 5

Response

Thank you for your comment.

Comment # 241

In these hard financial time your agency ought to be cutting back on programs and employees the way citizens and the private sector has to, instead of spending millions on projects of questionable value to the taxpayer.

Bottom line is that I am a retired FBI agent and was involved as a participant on several public corruption cases and I have spoken with six other retired Federal, State and Local investigators in our county about what is going on within "our" Dept. of Ecology. The consensus of their opinion is that if WRIA18 is put in place, we intend to look into the matter at our own expense,

turn the light of public scrutiny on any results we achieve and then and only then, we provide the results to the media WA AG and every logical federal agency.

Commenter

Robert C McGonigel 3

Response

Thank you for your comment. Please see the general response to Motivation and authority for adopting the rule, and Comment # 620.

Comment # 242

I find that the proposed rule, by controlling new uses, is far too intrusive into private life. It makes too many decisions for individuals and for how they may use their private property. The name for this is "totalitarian." That is certainly unnecessary, it can be expected to remove much of the pleasure of living, and it can not reasonably be expected to advance the legitimate objectives of the rule. Furthermore, it is entirely contrary to our legal traditions and heritage.

Commenter

Dr Robert N Crittenden 28

Response

Thank you for your comment. Ecology expects the rule will protect existing stream flows to support existing aquatic habitat, it will provide an opportunity for new uses of water, and it will protect existing water rights from impacts due to future new uses of surface water and groundwater.

Comment # 243

The Center for Environmental Law and Policy (CELP) is a Washington non-profit conservation organization devoted to ensuring clean flowing waters for the state. CELP has long advocated for the adoption of an instream flow and water management rule for the Dungeness River basin. CELP thanks the stakeholders in the Dungeness River basin and the Department of Ecology for the long hours devoted to developing the proposed rule. Given the imperiled state of many rivers and streams in Washington it is encouraging to see a draft rule for the Dungeness published.

CELP strongly supports the adoption of an instream flow rule that not only protects, but also restores and replenishes the Dungeness basin and associated aquifers.

CELP supports the closures and instream flows in the proposed rule. CELP however objects to the proposed reserves, as they will, if enacted, exacerbate the over-appropriation of the basin. The reserves, if used, will further degrade habitat critical to a number of commercially and culturally significant species of fish and fail to meet the mandate of “conservation” under the ESA. Additionally, CELP supports the use of the median coefficients found in the USGS study to measure consumptive use. Anything less could fail to offset the inevitable habitat loss resulting from the implementation of the rule.

CELP strongly encourages Ecology to strengthen the rule and meet its obligations to the public by incorporating the aforementioned revisions in the rule.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 1, 2, 31

Response

Thank you for your comment. With regard to consumptive use coefficients, Ecology’s analysis of groundwater recharge from septic systems and outdoor irrigation was performed by hydrogeologists licensed by the State of Washington in accordance with Ch. 18.220 RCW. Their analysis considered published sources regarding climate, topography, soils, geology, typical practices in the area, septic design, water use, irrigation requirements, and population, as well as professional judgment, and other’s use and consumption estimates. Use of this analysis was considered by Ecology managers who then selected standard indoor domestic values and outdoor consumptive rates for use in the rule.

The indoor use value is intended to represent an average annual scenario. This scenario assumes a single home using self-supplied water and an on-site septic system. Daily per-capita use of 65 gallons per day was selected for indoor domestic water uses. This value is near the mean value of published indoor use estimates. Household water use was calculated by multiplying the average number of people per household by the daily per capita water use. Ecology used US Census data for this analysis in 2008 before the 2010 Census data was available.

Ecology defines consumption as the amount of water that is removed from the local hydrogeologic system, primarily through evaporation into the atmosphere, absorption and transpiration by plants, and transportation out of the basin. Some consumption of water is known to occur through indoor domestic uses, although this type of use is mostly non-consumptive. Consumption of residential indoor water is likely to occur primarily as evaporation and transpiration (combined to be called evapotranspiration) from the septic drainfield. This consumption is highest during the growing season. There is also likely some consumption occurring through other indoor uses such as bathing, cooking, watering plants,

and other uses. Ecology selected a value of 10 percent for the consumptive rate for indoor uses.

Outdoor domestic water use is assumed to be primarily for the purpose of irrigation of lawn and garden. Because the purpose of irrigation is to provide water that can be absorbed and used (consumed) by plants, the most efficient systems have the highest rate of consumptive use. Outdoor water that is not consumed either runs off as surface water or contributes to groundwater recharge.

The amount of irrigation needed each month is dependent on the location and type of plant being grown. Monthly irrigation requirements can be found in the [Washington Irrigation Guide](#). Because the volume of water consumed by irrigation is highly dependent on the size of the area being irrigated, the amount of outdoor water consumed will vary from one parcel to the next.

Comment # 244

We were once known to be "The land of the free and the home of the brave". The land still exists but the free are being destroyed in record numbers by out of control government agencies such as the Dept. of Ecology. We are still the home of the brave.

You state that a "water right" is a legal authorization to use a certain amount of public water for a designated purpose. What is an air right? Will government soon decide that it is best for everyone to stop all sport activities that raise our heartbeats to a certain level because we are consuming more than our share of oxygen ?

It's been said that the definition of insanity is to keep doing something in the same way over and over but expect to get different results. You have heard testimony on the negative results of WRIA 17 and yet the Dept. of Ecology proceeds in the same way over again with WRIA 18 and expects different results.

It is disturbing because I believe this is about government and those deemed worthy control; wrapped up as a gift to ourselves for our future.

In reality "We the people" are the endangered species. It's been said that what is right is right no matter who is against it. What is wrong is wrong no matter who is for it. What is legal is what politicians and lawyers decide more people are for than against.

Politicians often mistake or disregard what people are for or against and that can be changed by "We the people."

Commenter

R Doreen Emerson 1, 3, 12

Response

Thank you for your comment. Please see response to Comment # 303.

Comment # 245

Nelson and Carol Topper as citizens of the State of Wa., are totally against the control approach to the water that WRIA 18 will be mandating in the Dungeness Valley.

Commenter

Nelson & Carol Topper 4

Response

Thank you for your comment.

Comment # 246

The Point No Point Treaty Council (PNPTC) supports the adoption of the proposed water resource management rule for the eastern portion of WRIA 18, the Dungeness watershed. The PNPTC urges the Department of Ecology to adopt, implement and enforce the proposed rule.

Commenter

Thom H Johnson, Point No Point Treaty Council 1

Response

Thank you for your comment.

Comment # 247

We object to the Dungeness Water Management Plan (DOE), and the "Rules" projected by DOE. The process for the project is not credible nor based on true science. It is laced with much pseudo science.

The money spent between the Dungeness/Quilcene Project and the Chelan Agreement, (from late 80's) , linking our Peninsula, via the Dungeness River Management Team (DRMT) has

been astronomical and we do not need to continue supporting your DOE staff, which has cost us thousands of dollars and millions are still projected.

We do not want and do not need your very expensive, "Rules" experimental project. We can and always have successfully done our own resource management.

Please consider our comments. We agree with June 28th testimony, in Sequim, with Dick Pilling, Steve Marble, Marguerite Glover, and Kaj Ahlburg and many of those who testified against this process, which was recorded by DOE.

Commenter

Dan & Lois Perry 1, 5 ; Ross Krumpe 7, 11

Response

Thank you for your comment. Please see general responses to Science/fish and the Groundwater model.

Comment # 248

It seems to me that all this is headed towards is a money grab by some one.

Commenter

Dick Sutterlin 4

Response

Ecology does not profit from the adoption of this rule. The rule establishes a framework where instream flows and existing water rights are protected by requiring mitigation of new consumptive water use. The mitigation requirement creates an incentive for those water users with existing, reliable water rights to sell some or all of their water rights to new users requiring mitigation. Please also see the response to Comment # 239.

Comment # 249

The idea of selling water rights in order to drill a well is nothing but a clear-cut government money grab, plain and simple. We're sick of the government at all levels bleeding us dry. Enough is enough. You people in the government are like my dog and her food. No matter how much food the dog gets it's not enough, and with you government busy-bodies no matter how much money you get it's never enough. Could you please do something productive for society for a change instead of harassing us hard working, tax paying citizens with our own money.

Commenter

Greg & Joanna Carroll 6

Response

The payments related to mitigation go the holder of existing water rights willing to sell or to parties willing to develop and operate projects and activities to improve flow to the small stream or Dungeness River water to offset the impacts of new groundwater uses. The funding does not go to Ecology.

Comment # 250

Most private property owners on the Olympic Peninsula have, for the past several years, questioned the integrity of your agency. It is about time that we now see our elected officials doing the same.

Trust me; this is going to be a much more common occurrence statewide when your agency oversteps its jurisdiction in the future. And as taxpayers we cannot afford to pay for both voodoo science and questionable economic facts from the DOE.

Before your department attempts to impose any further restrictions on ANY land within Clallam County OR Washington state you had better get your ducks in a row before coming to us with more of this gobbledegook!

Hopefully with a new governorship we will be able to trim both your staff and your funding.

Commenter

Keith Olson 3, 5 ; Ross Krumpke 13, 15

Response

Thank you for your comment. Please see general response to Science/fish and Comment #620.

Comment # 251

When I got word of this issue I immediately thought of the over-reaction to perceptions about global warming, and the need to pass Obamacare so we can know what is in it.

Commenter

Mark & Jackie Bragdon 1

Response

Thank you for your comment.

Comment # 252

Maybe seek a more rational approach to the perceived problem? Or maybe there isn't even a problem? Or maybe there's a power grab? Hummm?

Commenter

Terri & Milo Walker 4

Response

Ecology believes the approach is rational, it follows state law with respect to the watershed planning process, and it protects both existing water rights and flows in perennial streams within the East WRIA 18 area. Please see general response to Motivation and authority for adopting the rule.

Comment # 253

We strongly support adoption of an instream flow rule for the Dungeness River (and all rivers and streams minimum flows) in WA. State. This river has for many years needed these protections to keep water in the Dungeness sustainable for both people and for fish and wildlife. We look forward to seeing Dept. of Ecology meeting your public trust obligations in adopting this rule into law.

Commenter

Don Schluter, Salmon and Steelhead Conservation Society 1, 4

Response

Thank you for your comment.

Comment # 254

Please don't drink the water.

"Life is good"

Commenter

Richard Wolf 1

Response

Thank you for your comment.

Comment # 255

I am greatly concerned over this plan and what the effects will be on my efforts to sell my primary residence, which is being served adequately by a well serving 3 households.

What is Ecology's opinion of the effect of this proposed rule on my ability to sell my private residence, as follows:

- A) No effect
- B) Negative effect
- C) Positive effect

For any selection above, please offer your rationale for that selection

If the rule does what I believe it will do, ie severely limit my ability to use water from the well, which of the following is true:

- A) Clallam County Property Assessor will lower the assessed value of my property, if 1.0 (B) above was true
- B) Clallam County Property Assessor will raise the assessed value of my property, if 1.0 (C) was true

Commenter

Charles Blood 1, 4, 5

Response

Continued use of existing water rights, including water rights established through the use of a permit exempt well are not affected by this rule. The rule is not likely to affect your ability to sell your residence.

Comment # 256

It seems to me that we are going back in time where whoever owned the water had the power to dictate prices and uses for everyone. I really hate to see this step backwards. Property owners should be allowed to use water to enjoy their properties. Systems are in place for conservation and are working.

Please reconsider this new rule.

Commenter

Deb Kahle, Windmere Sunland 2

Response

Whoever holds the water right, absent a condemnation action provided by RCW 90.03.040, has the ability to establish the price at which he or she is willing to sell. The law has not changed in this regard since 1917. Conservation does not always reduce consumptive use. Most often it reduces the total water demand for an existing use by reducing non-consumptive use or extends the use of the same amount of water among additional water users.

Comment # 257

I am asking that you please follow the provisions and stop implementation of this action.

Commenter

Bill Hermann 1

Response

Thank you for your comment.

Comment # 258

"First, do no harm" is one of the principle precepts of medical ethics and means, given an existing problem, it may be better not to do something, or even to do nothing, than to risk causing more harm than good."

If this philosophy is good enough for physicians, it should be good enough for you.

Commenter

RA Pilling, Clallam County Republican Party 11, H11

Response

Thank you for your comment. Ecology has found that doing nothing will cause harm. Continuing new, unmitigated withdrawals of groundwater hydrologically connected to surface water reduces flow in streams and harms aquatic habitat.

Comment # 259

The Port Gamble S'Klallam Tribe is writing in support of the management rule for instream flows in the Dungeness watershed.

Commenter

Paul McCollum & Dave Fuller, Port Gamble S'Klallam Tribe 1

Response

Thank you for your comment.

Comment # 260

I hope Ecology will take another look at this proposal, and delay enactment until an outside source, agreed upon by not just the water users group, the tribe, and ecology, but Clallam County as well.

Commenter

Doug Hale, Coldwell Banker Town & Country 6

Response

Thank you for your comment.

Comment # 261

I would urge you to not move forward on this decision until a reasonable plan to help landowners like myself retain the value of their property. We have invested over \$200,000 in this land. There is a substantial risk to the State if that value is compromised as a result of your water policy rulings. My wife and I stand up against this ruling and ask you not to move forward with it.

Commenter

Kent Johnson 2

Response

Thank you for your comment. This rule ensures the availability of water for new domestic uses. As explained in the Cost Benefit analysis for this rule, adopting this rule to manage

future new water uses will greatly reduce the risk of a lawsuit that could halt all future development in the watershed, or require existing junior water users (including existing homes that rely on the groundwater permit exemption) to curtail their use during a drought.

Comment # 262

I spoke with you about 3 years ago and the Dungeness Bridge meeting concern the proposed in stream flow rule. I had to step away due to frustration at the process and the reasoning behind it. However, I want to again voice my concern at the overreach of government on private property and the consequences it will have. I have been a real estate appraiser (not agent) for 20 years in Sequim so I do represent another industry that has a strong knowledge of the needs of home owners in my city. I am very familiar with the history of the valley and the importance of our wells with family dating back to 1870. The piping of the ditches will have long term affects to our wells and was ill-advised, however, this new rule will destroy the lives of the families that have lived in their homes expecting water in this valley as many have invested money in future parcels and more regulation will only tie their hands.

If public water was available I still would still disagree with government telling private property owners what they can and cannot do with their property. However, at least there would be an option.

The citizens of Sequim and I am sure other areas are not interested in your political agenda and do not agree with the science behind it. I asked that you would revisit your decisions for this flow rule in Clallam County. The net gain will be far less than the enormous cost to our community. These decisions need to be made by the stakeholders of our community and not Olympia.

I know you have heard all the data that we have supplied supporting our viewpoint so in order to keep this brief I am simply stating my opinion as you likely know my reasoning.

Commenter

Nathan Funston 1

Response

This rule is founded on a locally developed plan using fisheries science and hydrologic principles that are well established. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model; and Comment # 261.

Comment # 263

I believe the state of Washington is on its way to yet another decision to restrict people's rights to use their private property, the Dungeness Water Rule.

The policies and regulations in this rule leave people holding the title to their land and paying the property taxes, but losing their rights without compensation of any kind.

Commenter

Jo Anne Estes 1

Response

Thank you for your comment. Please see the response to Comment # 261 and the general response to Mitigation: who pays?.

Comment # 264

Your proposal to extract huge sums of money from people just for the privilege of using water is a huge money grab. You are asking for a mechanism to:

- 1- discourage people from buying and using land and
- 2- creating a huge money pot which apparently will profit your agency - or do you have some special interest in mind to receive that money?

That piracy is simply outside the scope of your agency - and most likely outside the scope of state government itself.

I call your attention to the analysis by Marguerite Glover, who seems to have studied the situation more than your staff has

Commenter

J Marvin Chastain 3

Response

Please see the responses to Comment # 248 and Comment # 256, and general response to Motivation and authority for adopting the rule.

Comment # 265

Your agency has One Billion dollars of our tax money to spend. Can you not find anything to do with it other than to harass the taxpayers who are funding you? Perhaps you should return half of it to the state. Of course you won't, but maybe if enough people complain, the next

meeting of the legislature will do that for you. Do you not understand that it is landowners who pay the taxes that you are spending to harass and discourage folks from becoming land owners?

Commenter

J Marvin Chastain 5

Response

Thank you for your comment. Please see the response to Comment # 261 and the general response to Motivation and authority for adopting the rule.

Comment # 266

EPA power grab to regulate ditches, gullies on private property
“It’s time to get EPA lawyers (and the DOE Dungeness Water Rule and SMP) out of Americans’ backyards,”

EPA power grab unleashes bipartisan backlash

By: Audrey Hudson

Human Events

6/11/2012 08:05 A

Lawmakers are working to block an unprecedented power grab by the Environmental Protection Agency to use the Clean Water Act (CWA) and control land alongside ditches, gullies and other ephemeral spots by claiming the sources are part of navigable waterways.

These temporary water sources are often created by rain or snowmelt, and would make it harder for private property owners to build in their own backyards, grow crops, raise livestock and conduct other activities on their own land, lawmakers say.

“Never in the history of the CWA has federal regulation defined ditches and other upland features as ‘waters of the United States,’” said Rep. John Mica (R-Fla.), chairman of the House Transportation and Infrastructure Committee, Rep. Nick Rahall (D-W.Va.), the ranking committee member, and Rep. Bob Gibbs (R-Ohio), chairman of the Subcommittee on Water Resources and Environment.

“This is without a doubt an expansion of federal jurisdiction,” the lawmakers said in a May 31 letter to House colleagues.

The unusual alliance of the powerful House Republicans and Democrat to jointly sponsor legislation to overturn the new guidelines signals a willingness on Capitol Hill to rein in the formidable agency.

“The Obama administration is doing everything in its power to increase costs and regulatory burdens for American businesses, farmers and individual property owners,” Mica said in a statement to Human Events. “This federal jurisdiction grab has been opposed by Congress for years, and now the administration and its agencies are ignoring law and rulemaking procedures in order to tighten their regulatory grip over every water body in the country.”

“But this administration needs to realize it is not above the law,” Mica said.

The House measure carries 64 Republican and Democratic cosponsors and was passed in committee last week. A companion piece of legislation is already gathering steam in the Senate and is cosponsored by 26 Republicans.

“President Obama’s EPA continues to act as if it is above the law. It is using this overreaching guidance to pre-empt state and local governments, farmers and ranchers, small business owners and homeowners from making local land and water use decisions,” Sen. John Barrasso (R-Wyo.) said in announcing their measure in March. “Our bill will stop this unprecedented Washington power grab and restore Americans’ property rights.”

“It’s time to get EPA lawyers out of Americans’ backyards,” Barrasso said.

Republicans say the proposal is peppered with loopholes. It suggests that roadside and agricultural ditches will be excluded; however, it also notes several exceptions, such as a connection to navigable or interstate waterways, ditches “that have relatively permanent flowing or standing water,” or a “bed, bank and ordinary high water mark.”

The EPA and Army Corps of Engineers drafted the new guidelines to implement Supreme Court decisions in the Solid Waste Agency of Northern Cook County case in 2001 and the Rapanos case in 2006 after the decisions removed some waters from federal protection and caused confusion about what remained protected.

However, the lawmakers say the jurisdictional limits set by the court are being ignored in order to justify the expansion of the agencies’ control.

The new language is intended to protect smaller waters that could potentially feed pollution downstream to larger bodies of water, but because it is not a formal rule, it cannot be enforced in the courts.

“Although guidance does not have the force of law, it is frequently used by federal agencies to explain and clarify their understandings of existing requirements,” the new guidelines say.

Commenter

Pearl Rains Hewett 6

Response

Thank you for your comment. The U.S. EPA and Army Corps of Engineers have nothing to do with this rule.

Comment # 267

This proposition is too vague, too clouded, too ambiguous. There are not specific items to grab on to here so that I will know what I will or will not be able to do.

Is like the "Health Care Bill"; it has to be passed before we know what's in it and how it really affects us?

We already do as much as we can to save water usage. I grew up on a ranch in Arizona. I know how to do that, especially when the well dries up for a week or so or the pump motor fails.

I definitely have BIG problems with the proposal and definitely am against this proposal.

Commenter

Alaine Reeves 5, 7

Response

The rule is quite specific with regard to the water management framework it sets up. Please see the general response on Effects on future homebuilders. Thank you for conserving water where you can.

Comment # 268

Don't think for one minute that a private well on undeveloped property is safe from the DOE.

While the DOE can calmly sit and admit to their incompetence on the 20 or more years of backlogged requests for permits/water rights, They are ever moving forward to control, regulate, medigate, penalize, charge and seize more rights to OUR water and asking at the same time, for more funding for, more then the 1616 employs, and the billion dollar budget they have now, to catch up on the backlog.

They actually say, "If you got the Money Honey step to the front of the line."

When asked who will enforce this new RULE? Wow, not one mention of the "Water Master". The Neighborhood watch can now be known as the "DOE Neighborhood Water Watching Whistle Blowers". (actually the DOE and the state)

Sheila stood up for private property owners, let Clallam County take care of it's self. New County Commissioner Jim McEntire made points for us too. Mike Doherty asked for BRIEF public comments. (there weren't any)

Commenter

Pearl Rains Hewett 10, 12

Response

A significant part of the reason there is a backlog of applications in WRIA 18, is that Ecology must make four affirmative findings before it is authorized by the Legislature to issue a permit to the applicant:

- (1) Water is proposed to be put to a beneficial use.
- (2) Water is available for the proposed use.
- (3) Proposed use of water will not impair existing water rights.
- (4) The proposed water use will not be detrimental to the public welfare.

The proposed rule will change that because it includes specific provisions to resolve questions of water availability and impairment that have prevented approval of water right applications in the basin.

Comment # 269

I will just encourage you in the strongest terms to remove this rule from consideration in its current form at this time. It is counter-productive, damaging, punitive, and due largely to bad science and inaccurate assumptions it will not improve the salmon situation and instream flows significantly. It will only create chaos, devalue thousands of acres of land needlessly and take from our citizens their investment and future plans.

Please heed all this input and stop this rule at this time. Any future attempts in this direction must have a more accurate foundation and support.

Commenter

Alan Barnard, Windermere Real Estate 1

Response

Please see the responses to Comment # 261 and the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 270

As I stated on the 28th, your Rule making initiative is not an exercise of government of, by and for the people – it is arrogant politics. The Rule, and DOE's incompetence in its rulemaking process in violation of state law and the APA, and leaving stakeholders out of the process (Sequim and small farmers to name two groups), is top-down waste of taxpayer money. It has been a 10-year exercise of governmental mismanagement – bureaucratic make-work by remote, un-affected government workers who ignore the inconvenient truth, that the Rule does not stand the smell test, much less the maximum net benefits test and is clearly discriminatory.

Commenter

Jacques M Dulin 21

Response

Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model. The rule and the process used to adopt it are consistent with RCW 90.03, RCW 90.44, RCW 90.82, and RCW 34.05.

Comment # 271

It appears the process that produced these rules is flawed and again the DOE is putting mandates and rules ahead of logic and common sense.

Commenter

Susan Bauer 3

Response

Please see the response to Comment # 270 and general response to Motivation and authority for adopting the rule.

Comment # 272

We have concerns about your cost/benefit analysis, metering, the water bank and the fact that DOE finds it necessary to close the basin. We do not see the need to mitigate for water when it is a fact that area residents have a history of reduced water use over decades and combined with the small impact of new water use, your actions are indefensible. As one of your own employees said "This rule is way too over-engineered!"

Commenter

Carol Johnson, North Olympic Timber Action Committee 11

Response

Thank you for your comment. Please see the response to Comment # 261. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model. The rule and the process used to adopt it are consistent with RCW 90.03, RCW 90.44, RCW 90.82, and RCW 34.05.

Comment # 273

There are many more legal questions that need to be answered regarding this rule. I and many others request that this rule not be implemented until you have proven that you have the Statutory and Constitutional authority to do so. Further, please do not implement this rule until you have proven that you have fulfilled all of the requirements with regard to this rule such as the CBA, SBEIS, Environmental justice, and impartial reviews of all studies (list not exhaustive).

Commenter

Helen L Watkins 10

Response

Thank you for your comment. Please see the response to Comment # 261. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model. The rule and the process used to adopt it are consistent with RCW 90.03, RCW 90.44, RCW 90.82, and RCW 34.05. See also the final Cost Benefit Analysis and SBEIS for this rule.

Comment # 274

Your science is flawed, your statutory authority lacking, and your economics completely incompetent.

We, the people of the Dungeness Valley, have risen up with one voice and one command - STOP!

This rule-making process must not continue. It is clearly a waste of time and money. Money we the taxpayer must pay you, even if it's a big boondoggle. It has now become a moral issue. We need less of your presence in our lives, not more.

Commenter

Bob Forde 2, 4

Response

Please see the general responses on Science/fish and the Groundwater model.

Comment # 275

I hope you understand this letter as a passionate call to you and your Department to reconsider what you are proposing and the true effect economically, environmentally and on the rights of American citizens. I would also strongly recommend you look to outside sources who would give accurate scientific, and economic analyzes instead of suspicious in house data that even some of your own do not agree with.

Commenter

Randy Simmons 2

Response

Thank you for your comment. Please see the response to Comment # 261, and the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model. Ecology has been authorized by the Legislature (an elected body) to regulate water rights.

Comment # 276

We agree with the City Council, the Sequim Gazette editorial staff , the Businessmen's Association, and general citizens, that the management rule as written must be re-done. The

timeline is too constrictive since the information we're given is sketchy and incomplete—some which may even be outdated.

We are property owners who have lived here for 16 years. We use water responsibly, but at some date we may have to sell our nearly 2 acres. We believe a sale would be restricted and/or reduced by the intimidating procedure regarding water rights. We believe property sales, especially for small gardeners and farms, would be severely impacted. This rule is introducing negatives that don't currently exist. Why fix what isn't broken? Except to break it first!

According to the commentaries we have read, the answers to their questions were vague and situationally dependent. That's not good enough!

Please stop the rulemaking timeline now. An independent study needs to be done first. Considering the complaints from Jefferson County after the fact, this current rule is very harmful to our community.

Commenter

Jim & Bea Muir 7

Response

Please see the response to Comment # 303, and the general responses on Motivation and authority for adopting the rule and Effects on future homebuilders.

Comment # 277

Has the DOE imposed water rules in eastern Washington where the rain fall is lower?

Commenter

Richard & Jill Pinder 7

Response

Yes. Rules have been adopted in WRIAs 32 (Walla Walla), 39 (Upper Kittitas), 45 (Wenatchee), 46 (Entiat), 48 (Mehtow), 49 (Okanogan), 55 (Little Spokane), and 59 (Colville), as well as the Columbia and Snake rivers.

Comment # 278

What benefit would the DOE have in deceiving the citizen of Clallam County?

Commenter

Richard & Jill Pinder 20

Response

None.

Comment # 279

Further to my letter of June 28, we add our voice to the letter of Kaj Alburg of Port Angeles dated July 5, 2012.

The following are some additional comments and some questions for you to answer that we did not have a chance to state at the Hearing on June 28 due to the time limitations. Please include this letter in the public comments and opposition section of the Hearing records. Please answer the questions, and state whether the answers are binding on the DOE and enforcement officers?

Commenter

Jacques M Dulin 15

Response

The responses to comments received during comment period are part of the rule record. The rule record is the evidentiary basis for litigation in the event the rule is appealed by an aggrieved party once it is adopted by Ecology.

Comment # 280

Your timeline should be delayed until after the first of the year 2013.

Commenter

Carol Johnson, North Olympic Timber Action Committee 13

Response

Thank you for your comment. Ecology respectfully disagrees with your suggestion. The recommendation to adopt instream flows for the Dungeness river has existed in some form since 1994 ; further delay is not appropriate.

Comment # 281

Questions are usually given answers. Am I to surmise that the statements are true and no answers will be given? My personal experience is that people with the fortitude to speak up when wrong is being done are dealt with harshly.

Commenter

John Mackay 5

Response

Ecology is responding to all comments received on this rule in this document, the Concise Explanatory Statement. This formal response to comments is a requirement of Chapter 34.05 RCW, the Administrative Procedures Act, which is the law that state agencies must follow to adopt rules. Ecology did respond promptly to many informal questions during the public comment period and at the open house and Q&A session preceding the public hearing on June 28. These questions were outside the formal public record.

Comment # 282

My comments are on the order of our experience with WRIA 17, the Quilcene-Snow Watershed. Three years ago, we were at this stage when they were writing the rule. The first thing you have to understand is that DOE is not accountable to anybody for their actions. They interpret the state laws the way they want to in order to meet their goals. An example, this 350-gallon-a-day in-house limit that they imposed in parts of our watershed. The State Attorney General issued an opinion that that was illegal, but they went ahead and did it anyway.

They will respond to comments made here tonight at a later date, just before the rule becomes final. The comments we make will probably not affect any changes in the rule per se, but they're very important because they become the basis of suing DOE over this rule.

What we really need is some kind of a legislative overview of the Department of Ecology. Right now, they don't answer to anyone. The only recourse citizens have who are unhappy with their actions is to take them to court. If we don't like what we hear tonight, then be prepared to financially support the organizations that will take them to court.

Commenter

Dennis Schultz, Olympic Stewardship Foundation H1, H3, H7

Response

Thank you for your comment. Please see the response to Comment # 281.

Comment # 283

The Supreme Law in the State of Washington is the State Constitution. May I simply remind you that Article I, Section 1, states: all political power rests in the people, and governments derive their just powers from the consent of the governed, to protect and maintain individual rights.

The framers of the 1889 constitution must have thought this was of supreme importance, making it the very first words they penned. Not public safety, not public unity, not patriotism, not clean air, water, or even public education. No. Individual rights! That is first! You exist by the consent of the governed. Please try to remember that is your first requirement.

Commenter

Bob Forde 3

Response

Thank you for your comment.

Comment # 284

The proposed rules are flawed legally, are illogical, and of a punitive nature. They smack of an anti-development policy on the part of the DOE.

Commenter

Elaine & George Chandler 5

Response

Ecology disagrees. Specifically, if a water right permit is required as part of a new development, the rule identifies what is required for Ecology to issue a permit. For the part 15 years, lacking this information, Ecology has not been able to process water right applications. Please also see the responses to Comment # 261 and Comment # 268.

Comment # 285

Because of past and continuing practices, ecology has a deserved reputation of being, untrustworthy, unreasonably controlling, dictatorial and taking without compensation. Ecology has a long way to go to by trusted by citizens living in rural areas. Ecology takes away our livelihood, take away our land and make us pay more so that they can better monitor

and control us. Right now Ecology is trying to force three separate programs on us in Clallam county. 1) Mandatory Frequent Septic system testing (\$20 million cost in 10 years) paid for by 20,000 private home owners; 2) Increase restricted use set-backs for all waterfront property (started out wanting 75-100 feet, it became 150 feet, now Ecology want 200 feet; 3) Water use management: We all know that 10 years from now, Ecology will want all private wells to have water meters and that we will be paying a use fee. Is this long term objective?

Commenter

Warner J Litchfield 16

Response

Thank you for your comment. The Department of Ecology, along with other state agencies, carries out responsibilities as directed by the State Legislature. Please see the general response on Metering.

Comment # 286

The Dungeness Water Rule is part of the giant overreach by the current regime to monopolize a public resource. This is being done using a scheme of creating an artificial crisis with a predetermined solution whose objective is to transfer more power and control from the rightful holders, the citizens, to a malignant overgrown central government. They are using the pretext of protecting the environment while using pseudo-science which does real damage to the environment and the citizens of the County, State, and Country.

We are in an economic crisis. The contrived regulatory controls of the Dungeness Water Rule will make this problem much worse. At the same time the much less urgent ever-present real environmental problems are being neglected. The public treasure is being squandered by these surrogates of the ruling party and regime. Citizens lives and discretionary time are being wasted protecting their property and rights from this out-of-control incompetent corrupt over-paid agency the DoE. These are resources that will never be recovered.

As a true environmentalist, I see that we need to recycle the current group of bureaucrats and their agents and agencies. The Dungeness Water Rule needs to be set aside until we have sane adults in the roles of public service who are acting along Constitutional lines in the best interest of 'we the people'.

Commenter

Karl Spees 1, 2, 3

Response

Thank you for your comment. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model, and Comment # 239

Comment # 287

You should all hang your heads in shame. We are your parents, grandparents, great grandparents who have worked hard and saved only to be treated thus. once again thank you not very much.

Commenter

Sandra K & Nick L Larson 6

Response

Thank you for your comment.

Comment # 288

So much has been written and so many comments have been logged proving that Ecology's position in the creation of this proposed rule is, in many cited instances, neither factual nor unbiased. It has been said that this rule is a "solution looking for a problem". That would be treating it kindly. This plan, like others we have seen around the state, is obviously a creation of agenda driven NGOs that operate outside the confines of our legislative process and bear neither responsibility, nor liability for the unintended consequence of their actions.

With attention given to the recently publicized comments from Director Sturdevant regarding Ecology's ideological push to harness American citizens with U.N. Agenda 21 dictates in the name of "environmental justice", it is time to suspend adaptation of this rule and go back to square one where we can form an honest participatory process giving taxpaying citizens and businesses a fair and equal voice in our own defense. Doing so will save endless and costly litigation and further separation of factions along with the growing contempt for government

Commenter

Jim Boyer, Citizens Alliance for Property Rights 1

Response

Thank you for your comment. Please see general responses on Public outreach and Motivation and authority for adopting the rule.

Comment # 289

The Department of Ecology (DOE) is proposing a number of significant limitations on water usage in our area. A phone call to your office revealed that staff is completely unaware of the details of this ruling. It's sort of like the "We have to pass it before we read it" logic of speaker Pelosi. We know how well that sits with the public.

Commenter

Roger Clark 1

Response

Thank you for your comment. The agency is well aware of this rule, although only the staff and managers directly involved are familiar with the details. This rule does not set a limit on water usage, the rule provides a pathway for securing reliable water supplies for future development in the Dungeness basin.

Comment # 290

Thanks for your work on this rule as I believe it is our responsibility to conserve and protect the Dungeness stream flows from now into the future, but also not put local citizens in a position where their legal land could be come worthless as they have no right to the water below it.

Commenter

Bob Sextro 3

Response

Thank you for your comment. Please see the response to Comment # 261.

Comment # 291

However, while our members support protecting instream flows and fish species in the Dungeness Basin, we do not support Ecology's proposed rule. Like other water resource rules adopted by Ecology in recent years, the proposed rule creates a regulatory scheme that is overly complicated and costly relative to the actual impact of future exempt well withdrawals in the Dungeness Basin. While the proposed rule would utilize a mitigation bank to provide water supply, the details of this mitigation have yet to be determined as part of the proposal.

Further, we do not believe that much of the legal or economic analysis underlying the rule is factually or legally correct.

For these reasons, REALTORS® join the Clallam County Department of Planning and other concerned citizens in requesting that Ecology delay adopting this or any water resource rule in the Dungeness Basin.

Commenter

Faye Nelson, Washington Realtors 2; Heidi Hansen, Sequim Association of Realtors 2

Response

Thank you for your comment. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model. The rule and the process used to adopt it are consistent with RCW 90.03, RCW 90.44, RCW 90.82, and RCW 34.05. The recommendation to adopt instream flows for the Dungeness River has existed in some form since 1994, further delay is not appropriate

Comment # 292

Finally, as I listened to the testimony in Sequim last week, I felt that government credibility is on the line here in a very consequential way. As a government employee trying to fairly and helpfully administer development regulations, I know the damage that is done by governmental over-reaching, even if the reasons are well-meaning. The backlash to this proposal as written could be worse than the no-action alternative. We need the citizens of Clallam County to continue to trust government action, and this proposal, when other alternatives are available, will seriously damage that trust, making all future efforts to protect our environment more difficult.

Commenter

Tom Shindler 4

Response

We appreciate your concern about overreach of government with this rule and the potential for backlash or loss of trust in government if Ecology goes forward with this rule. In conjunction with the Dungeness Local Leaders Group, we have evaluated a number of alternatives to the rule proposal including the no action alternative. As explained in the Cost Benefit Analysis, adopting this rule to manage future new water uses will greatly reduce the risk of a lawsuit that could halt all future development in the watershed, or require existing junior water users (including existing homes that rely on the groundwater permit exemption) to curtail their use

during a drought as has happened in other watersheds in the state. Given the risks to the community without a rule in place, it would be irresponsible for us to not to go forward with the rule.

Comment # 293

I have been reading the comments from our association members. I have to say how disappointed in the ecology I am, the way you are trying to take the people in Sequim down a road to despair. When there are easier ways to handle the issue. The state should buy the water, fix a low fee, have public organization do the monitoring, and stop trying to tell us how to use our water. Are you going to install cameras to watch us.

Commenter

Zoe Horlick, Schwab Realty 1

Response

Thank you for your comment. Please see the responses to #163 and #755, and the general response Mitigation: who pays ?.

Comment # 294

From my observation the majority of the citizens that affected by these rules support them. Accordingly, I request that you implement these rules as soon as possible. In CWI's opinion these rules are logical, lawful, and beneficial both ecologically and environmentally.

Commenter

Anne Shaffer, Coastal Watershed Institute 5

Response

Thank you for your comment.

Comment # 295

I have reviewed the letter/comment and attachments sent to your office on July 7, 2012 by the Association of Washington Realtors. Our family supports the comments and views in that letter.

Commenter

Lisa Donaldson, Carlsborg Village Properties Inc 1

Response

Thank you for your comment. Please see the responses to Comment # 12, Comment # 66, Comment # 177, Comment # 312, Comment # 348, Comment # 480, Comment # 560, Comment # 561, Comment # 562, Comment # 563, Comment # 564, Comment # 617, Comment # 682, Comment # 698, and Comment # 755

Rule is Flawed/Unfair

Comment # 296

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

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

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

authorized voting entities negatively affects Sequim when the basin is limited to the Dungeness and other basins where the City of Sequim would have been a voting member.

Commenter

Craig A Ritchie, City of Sequim 1, 3; David Kruth H1

Response

Thank you for your comment. Ecology does not agree with your alleged defect in the rule. Neither this rule nor the watershed planning process redefined the boundaries of WRIA 18. The planning process conducted addressed the entire watershed and adhered to the requirements of RCW 90.82, the Watershed Planning Act. The adopted plan covered the entire WRIA. The City of Sequim participated in watershed planning, and did not petition the state Legislature to split WRIA 18 for the purpose of watershed planning as was done in WRIA 29.

Comment # 297

The well usage in the Sequim-Dungeness Valley has very little to do with stream flow, in the creeks, or in the River. The focus should be on irrigation usage, and large withdrawals, such as the City of Sequim and the PUD. But, this has obviously become a political issue. One that, if successful, will take rights from many citizens, to use their water beneficially, for gardens and domestic use.

Commenter

Marguerite A Glover 25

Response

The rule applies only to new uses of surface and ground water. Landowners who do not have an existing use of water do not have a right to begin using public surface water or ground water. Existing water users that have a right to water have a right to continue that use of water, not to expand or alter that use. Please see the general responses for Prior appropriation: what's fair?, Small impacts, and the Groundwater permit exemption.

Comment # 298

This rule making of the DOE is not an exercise of government by the people of the people and for the people, rather, it's arrogant politics. The rule and DOE's mismanagement of its rule making process is in violation of state law and the EPA, as beautifully set out in the letter by Craig Ritchie of the City of Sequim, and other people here. I won't state the titles, the citations to the statutes, but it's there. It's arrogant politics, as I say.

The rule and the rule-making process is in violation of state law and the Administrative Procedures Act in leaving stakeholders out of the process. You've heard about Sequim, and you've heard about small farmers today, two groups. It's top-down waste of taxpayer money.

I would like to know just how much money that they have spent on doing this rule-making exercise over ten years. Ten people are here from DOE today. What is their take-home pay? While we have a recession, they have a cushy job to make a rule that we don't need.

Commenter

Jacques Dulin H4

Response

Thank you for your comment. Please see the response to Comment # 296, and the general response on Public outreach. In response to your question about how much has been spent developing this rule, the estimate is about \$1,125,000. The Dungeness is a significant watershed in Washington and Ecology has participated in watershed planning for water resources in the Dungeness since the early 1990s and we will continue to participate in water planning and management in the Dungeness into the future. The cost estimate includes developing the Dungeness water management rule, guidance, the water exchange, and the MOU we are working on with Clallam County to implement the rule. The cost estimate does not include the more generalized work we do in the Dungeness with respect to watershed and water supply planning.

The estimated costs for the proposed Dungeness are higher than for other flow rules we have adopted around the state. Because of the complexities of the issues in the Dungeness, the amount of community interest, and the consequences of not being successful with this rule we worked hard to expand our public outreach to obtain as many points of view as possible and to respond to as many concerns as possible.

We disagree with your conclusion that the proposed rule is in violation state law and the APA. Please see the response to Comment # 220.

Comment # 299

If this is such an important issue to all of us why are a small minority of landowners being impacted the most? How about spreading the pain? How will this hurt you??

Commenter

Ed Sumpter 3

Response

Ecology's rule cannot affect existing rights. Consequently, the rule only affects prospective users of groundwater and surface water. Please also see the general responses regarding Mitigation: who pays? and Prior appropriation: what's fair?.

Comment # 300

So over the years, significant resources of time, staff, and taxpayer money has been invested in meeting the requirements of RCW 90.82.020, 90.71.010, and 90.74.010. I believed the proposed final administrative rule is seriously flawed. There are parts and questions that have yet to be addressed that are of utmost importance to our community.

Commenter

Michael & Michael E McAleer H1

Response

Thank you for your comment. Please see the response to Comment #298 and the general responses on Mitigation: what's understood and Effects on future homebuilders.

Comment # 301

An unfair situation would arise in the requirement of metering or mitigation costs for new wells versus existing ones. This is a common divide and conquer ploy to weaken opposition. After all, the rule can be amended later if the touted benefits fail to materialize, and expanded to wells now exempt.

While the effort to look ahead to a growing population and the possibility of changing precipitation patterns and temperature variation at high altitudes that could affect snow pack duration is all commendable, in order to gain wide-spread acceptance and compliance it must be seen to be fair. Priority of use based on type is sensible. A farm needs more water than a residence, but two users of the same type (e.g. two residences) should be treated the same regardless of when they got there. To issue permission to subdivide for residential development and a permit to a buyer to drill a well and then tell them "Sorry, you can't take any water from it" is simply not acceptable under any test of reason.

If, as I understand, you are constrained by this century-and-a-half old water rights law, I think you have to find a way to work around the inequitable results that accrue from it before promulgating anything.

Commenter

Raul M Perez 2; Richard Jepson 1

Response

The rule cannot affect existing water rights. Please see the general response to Prior appropriation: what's fair?. Ecology is charged with working within the bounds of state law. Water law may be 150 years old, but it is the Legislature that determines whether it should be changed and not the executive branch of government.

Comment # 302

I own three separate 1-acre lots, already subdivided for their final use, that I purchased about two years ago. I fell in love with the Sequim area and want to have the ability to build a home in the next few years and perhaps homes for my children as well in the future. I am now very concerned about how the proposed rule may affect my ability to do so, and if my purchase was a wise investment for my future or if it will all be for naught.

Please keep in mind the tremendous concerns that you are hearing from property owners whose lifetime investment may appear to be at risk. If indeed a rule is necessary, please do what you can to develop a fair rule that respects individual property rights while providing for the long-term health of the basin, and please keep in mind that you have the moral and legal responsibility to do the former as well as the later.

Commenter

Juan C Perez 1, 5

Response

Thank you for your comment. Ecology agrees that a water management rule must respect individual property rights while providing for the long-term health of the basin. This rule helps protect existing water rights and establishes a water management framework for new uses of water.

Comment # 303

Once again the Department of Ecology is trying to impose a water rule on the citizens of a watershed that they don't want or need. They are misusing their power to enact a Rule that is flawed, in the same way they did in WRIA17 (WAC 173-517).

In “Findings – Purpose 1997 c 360 § 1” in connection with RCW 90.03.255 the legislature found that “It is the goal of this act to strengthen the state's economy while maintaining and improving the overall quality of the state's environment.” The draconian restrictions on water use your draft rule in WRIA17 have reduced land values, caused lost jobs, restricted agricultural growth and construction. Now you are planning on imposing similiar restrictions on the Dungeness Watershed.

Section 90.82.005 of the RCW states that “The purpose of this chapter is to ... provide local citizens with the maximum possible input concerning their goals and objectives for water resource management and development.” And Section 90.82.010 states that “The local development of these plans serves vital local interests by placing it in the hands of people who have the greatest knowledge of both the resources and the aspirations of those who live and work in the watershed; and who have the greatest stake in the proper, long-term management of the resources.” And finally, in “Findings -- 2003 1st sp.s. c 4 § 1” in connection with this RCW 90.82.040 the legislature stated that "The legislature declares and reaffirms that a core principle embodied in chapter 90.82 RCW is that state agencies must work cooperatively with local citizens in a process of planning for future uses of water by giving local citizens and the governments closest to them the ability to determine the management of water in the WRIA or WRIsAs being planned.”

In 2005 the residents of WRIA17 stopped DOE from implementing a terrible water rule. At that time Joe Stohr, representing the Director of DOE promised WRIA17 that DOE would work closely with the community in writing a new rule. DOE was repeatedly asked in the WRIA17 Watershed Planning Group meetings, "When would DOE work with the community?" DOE repeated ignored these requests and wrote the rule without any community input. Now they have ignored the requirement in formulating WAC 173-518.

Please cancel this proposed WAC and rewrite it, jointly with the community it affects.

Commenter

Ross Krumpe 2, 6; Dennis Schultz, Olympic Stewardship Foundation 1, 5, 6

Response

Ecology agrees that Jefferson County has experienced reduced property values. Information from the Jefferson County Assessor’s Office¹ indicates a steady decline in real estate transactions from 2005 to 2009, consistent with the nation-wide decline in the economy. In 2010, the decline leveled off and there was a slight increase in transations in 2011. The value of new construction starts in Jefferson has declined annually since 2006. This economic decline was reflected in reduced assessed land values in 2011.

¹ <http://www.co.jefferson.wa.us/assessors/pdfs/ABSTRACT2012.pdf>

It is clear that the economic decline in Jefferson County began well before the 2009 adoption of the Water Resource Management Rule. Ecology does not agree that this economic decline is a result of adoption of Chapter 173-517 WAC. The commenter has not provided any information to indicate that this reduction in property value is a result of adoption of the rule.

In WRIA 17 Ecology adopted the instream flow levels that were approved by the WRIA 17 Planning Unit. In this rule Ecology is adopting a rule consistent with the adopted Elwha-Dungeness Watershed Management Plan.

Please also see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 304

East Jefferson saw its Environmental Impact Statement. It said we would get 819 new jobs in Jefferson County. That's just ludicrous. If anything, we've lost jobs, we've lost business opportunities, and people have made the decision not to move there or build there.

Commenter

Dennis Schultz, Olympic Stewardship Foundation H5

Response

Thank you for your comment. Please see the response to Comment # 303.

Comment # 305

I find the wording, not the intent, of the law to be burdensome, and intrusive on the public. The cost of WIRA 18 and Ecologies intended management scheme are not cost effective, nor do they represent best management practices.

We have all seen what happens with over regulation - many people on water front do not get permits for dock repair or for new Buoy's due to the prohibitive cost and long delays, and relatively low probability of being caught or fined.

This community was founded on independence and self reliance. The irrigation companies have made extensive voluntary reductions by piping the lines. This intrusive rule/law is not in the public's best interest and the cost for the 3.5 CFS to accommodate a total build out and its administrative costs far exceed the benefits. As proposed the rule will increase the likelihood of law suits against the Department of Ecology by this community. The State has already spent

MILLIONS on Salmon restoration, reducing irrigation utilization, improving the efficiency of irrigation and on research to substantiate the rule.

It seems to me that If the State could secure 3.5 CFS of water from all of the irrigators in concert then none of the rule, possible suits for takings, etc. would happen along with the burdensome tax payer expense.

Commenter

Leland Schwab 8

Response

Thank you for your comment. The rule provides a framework for managing new water uses and for protecting the many millions in public investments to restore salmon habitat and improve Dungeness River instream flow. The rule does not preclude the use of public funding sources to offset prospective homeowner costs and smooth the transition to the mitigation requirement for new water users under the proposed rule. Ecology's available funds to assist water users are very limited in the current biennium. To offset the cost of domestic water use related to the mitigation requirement under the rule, Ecology can only commit funds the legislature has appropriated for the current biennium. To extend the transition beyond the current biennium, which ends June 30, 2013, the legislature would need to appropriate funds to support the domestic water use mitigation program.

Comment # 306

My recommendation is that this rule is flawed beyond redemption and should not be adopted.

Commenter

Steve Marble 11, H11

Response

Thank you for your comment.

Comment # 307

Time to get back to government by the people for the people - WRIA 18 is a flawed rule ... makes no logical sense and is not wanted by the majority of the people. In listening to the "experts" on your team I found them unable to answer way too many important concerns of the people who actually live here.

Commenter

Cathy Reed 3

Response

Thank you for your comment.

Comment # 308

The water rule that you and your staff have worked so hard on is headed for problems for your staff and for the property owners of WIRA 18. There are so many inconsistencies in the proposed application of the rule that I don't think it will possibly accomplish what your department has intended it to do, preserve water rights for future users.

Commenter

Diann Dickey, John L Scott 1

Response

Ecology disagrees with your claim of many inconsistencies. The rule is consistent with the law, it is internally consistent, and we believe it will accomplish the intended purposes.

Comment # 309

We have owned property in Clallam County for over eleven years. This property has an artesian well and double wide mobile home on it. We have had someone living there until June 2010. We had planned to build on this property but our plans changed and the property is for sale. We had the power turned off to the property in June 2010.

We don't believe our well rights should be jeopardized by a rule that economically and possibly constitutionally flawed. Since our well is a free flowing artesian well, we don't want to lose our rights due to it not being used right now.

Commenter

Jim & Cathy Drescher 1

Response

The rule does nothing to jeopardize your existing water rights. If your mobile home was occupied and groundwater was regularly used, an existing water right for that use was established. Unless that use is discontinued for more than five years without one or more of the

exceptions or sufficient causes for non-use, then you will continue to enjoy that existing water right.

Comment # 310

Your proposals are eminently unfair and harsh on existing landowners who may be looking to build in the future. And what will all this accomplish in the real world - absolutely NOTHING of any productive or useful purpose.

Commenter

Greg & Joanna Carroll 5

Response

Ecology disagrees. Please see the general responses related to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, and Science/fish.

Comment # 311

We had a deep well drilled a few years ago so we would have that out of the way for us or future builders on the lot.now you are taking away more of our property rights/values by metering/mitigation tactics and punishing those of us who planned ahead, to avoid problems of bureaucracy in the future. Well, there that goes. Situations such as ours should be exempt from the new ruling. We are not businesses that use huge amounts of water.most of us are retirees who have no more than two persons using water in a dwelling. We also have access to an "underground" irrigation pipe with water share rights. You need to quit going after the little guy and regulate in a logical /common sense way.grandfather us in and leave us the heck alone. Oterwise you've devalued our property once again.

Commenter

Sandra K & Nick L Larson 2, 3

Response

Please see the response to Comment # 261 and the general response related to Prior appropriation: what's fair?.

Comment # 312

While Washington's water code is statewide, variances are developing at the watershed level through rules adopted by Ecology. While some variation is desirable to reflect local conditions, Ecology's analysis and regulatory positions have varied throughout the state. This is of concern to REALTORS® who seek to maintain statewide consistency in areas such as real estate seller disclosure, real estate agency law duties, and buyer feasibility inquiries. A comprehensive review of recent and earlier Ecology instream flow rules is beyond the scope of this comment letter, but for purposes of including these other related documents in the administrative record for this rulemaking, REALTORS® incorporate by reference the following documents:

Ecology Rulemaking Documents for:

WAC 173-503 – Skagit Basin Instream Flow Rule

WAC 173-517 – Quilcene/Snow Instream Flow Rule

WAC 173-539A – Upper Kittitas County Ground Water Rule

WAC 173-532 – Walla Walla Basin Instream Flow Rule WAC 173-505 – Stillaguamish Basin Instream Flow Rule WAC 173-545 – Wenatchee Basin Instream Flow Rule

Commenter

Bill Clarke, Washington Realtors/Sequim Realtors 16

Response

Thank you for your comment.

Comment # 313

Another issue I am unhappy about is the fact that existing wells will not be metered at all, and existing homeowners are not held accountable at all for the amount of water that they use. A new homeowner would have to be restricted for their outside use while the existing neighbors have free rein over how much water they are allowed to use. This is inequitable and unfair. I encourage the Department of Ecology to implement some kind of standard to existing well owners to conserve on their water usage.

Commenter

Debi Munro 2

Response

Ecology already has a statewide rule, adopted in 2001, establishing who must meter their water, how they measure it, and how frequently it must be reported to Ecology. That rule was developed in response to the Legislature's directive in RCW 90.03.360. More than 80% of all

current water use in the Dungeness basin is measured and reported in accordance with WAC 173-173.

Comment # 314

I believe the same objectives can be met more simply and equitably with the following proposal. I urge you to consider offering the citizens of Clallam County the OPTION to accept an alternative like this instead:

1. Secure agreement from Clallam County to limit future development in this basin to that which is presently allowed. This will limit the additional water needed to supply this future development to about 2 CFS, which is an amount of water use that can practically be mitigated.
2. Establish an Aquifer Protection District within the boundaries of the proposed water rule area. Enable this district to assess a small charge to each property to fund a basin-wide mitigation fund. Match that money with State funds, since significant benefits will return to all the citizens of the state.
3. Use this fund to create the projects envisioned for funding by the mitigation process within the current water rule proposal.
4. Lobby the legislature to scale back the amount of water use allowed by an exempt well. 200-500 gallons/day would be more than enough. Anything more should require water rights. 5,000 is absolutely unnecessary, especially in light of the draconian measures envisioned in the water rule.

The above measures form my POLITICAL alternative to the currently proposed Water Rule. I believe it would accomplish at least as much as the proposed rule, with less public and private cost, and a fraction of the political strife.

Commenter

Tom Shindler 2

Response

Thank you for your comment. Your proposal represents an alternative way to fund and implement a mitigation program for certain new development, which is outside Ecology's directive and authority (see the general response to Motivation and authority). The funding element would require creation of a taxing district by local government and requires a vote of the people within that district. The Legislature would be required to amend RCW 90.44.050 to reduce the amount of water that could be used without a permit.

Comment # 315

Most of the proposed Rule is about limiting exempt well usage in the Dungeness Valley. How would new wells or new water uses, to the North, impact wilderness lakes, like Gladys Lake or Moose Lake or Moose Lake? I would think that most of their water would come from snow melt and rainfall in the mountains and foothills.

Commenter

Marguerite A Glover 34

Response

Gladys and Moose Lake are located in the National Park or on USFS land. Unless development occurred high in the basin, or the lake were altered to serve as water storage for downstream uses, the headwaters lakes and streams would be unaffected by new wells or new water uses.

Balance Needs

Comment # 316

The proposed rule is the result of extensive study, analysis, and deliberation about water management and the fish in the Dungeness River Basin. The Department of Fish and Wildlife, including its predecessor agencies, has participated for many years in these efforts along with many other interested parties.

The collaborative process that led to the watershed plan on which the rule is based is an example of successful community problem-solving and forward thinking. It was highlighted by the Instream Flow Council as one of eight such examples across the United States and Canada. The cooperation of the agricultural community, local government, state government, federal agencies, and treaty tribes have led to a proposed rule that will support salmon recovery and maintenance of fish and wildlife while accommodating other values and interests.

Commenter

Hal Beecher, Washington Dept of Fish & Wildlife H2

Response

Thank you for your comment. Ecology agrees that sufficient study, analysis, and deliberation has gone into this rule.

Comment # 317

Water in this state is owned by the public. Recent policies allow harvesting of rainwater but water that flows in our rivers and streams as well as water that is contained in the aquifers underground, is a public resource. Individuals do not own the water they use. Federal, state and local governments are charged with regulating access and use of the public's water. Because water is a public resource its use must be balanced among all aspects of the public's interest. Water is not only needed by people but by the other resources that these same federal, state and local governments are responsible for. Balance is the key.

Commenter

Scott Chitwood, Jamestown S'Klallam Tribe 5

Response

Thank you for your comment. Ecology agrees.

Comment # 318

I do hope that a solution can be reached that will be the best for all involved, people and fish!!

Commenter

Wendy Bonham 3

Response

Thank you for your comment.

Comment # 319

Ecology's internal e-mail correspondence (Tryg Hoff, Dave Nazy) on the rule making process shows that the estimated impact of permit-exempt well water withdrawals on the Dungeness is relatively de minimis – as little as 0.77cfs, an amount so small that is inside the error of measurement of the stream flow gauges used. This needs to be kept in mind when balancing the advisability of imposing severe restrictions on land use, development, and availability of affordable housing (restricting supply drives up price) against the benefits for fish habitat that might be achieved.

In "Findings – Purpose 1997 c 360 § 1" in connection with RCW 90.03.255 the legislature found that "It is the goal of this act to strengthen the state's economy while maintaining and improving the overall quality of the state's environment." The draconian restrictions on water use your draft rule would impose in the Dungeness Valley are directly contrary to the

legislature’s mandate in the Water Code to balance environmental protection against strengthening the state’s economy. These restrictions also violate the maximum net benefits rule in RCW 90.54.020(2), which mandates that allocation of water resulting in maximum “total benefits less costs including opportunities lost ... for the people of the state” (and not the fish of the state, whose interests have to be balanced with, and can not override, the interests of the people).

Commenter

Pearl Rains Hewett 29; Randy Simmons 19; Kaj Ahlburg 17

Response

The estimated *annual average* impact (0.77 cfs) referenced in the email is not the impact due to all permit-exempt groundwater use that would occur over the next 20-years without this rule. Please also see the general response on Small impacts.

Comment # 320

We support this plan which will help to ensure sensible and sustainable water resource management that balances the needs of people with that of fisheries habitat requirements during periods when water is most limited.

Commenter

Doug Morrill & Matthew Beirne, Lower Elwha Klallam Tribe 4

Response

Thank you for your comment.

Comment # 321

Water is a precious resource. Water is a limited resource. Water is a public resource. Water is critical and essential to the Tribes’ right to fish, hunt and gather in the Dungeness watershed as reserved by treaty. We must be wise and we must make choices as we strive to balance the use of available water in the Dungeness watershed. The proposed rule achieves a good balance.

The PNPTC appreciates the comprehensive work done by Department of Ecology staff and the collaborative efforts of policy representatives from all entities involved in the rule development. The proposed rule will begin the process of managing the public’s water in the Dungeness watershed for the benefit of people, fish, and wildlife.

Commenter

Thom H Johnson, Point No Point Treaty Council 2, 3

Response

Thank you for your comment.

Comment # 322

We understand the necessity to manage our important water resources for both natural resource needs and our societal needs for growth, jobs, and all the benefits that come with that. We also understand that the Dungeness River could be over-appropriated, that late-summer stream flows sometimes run short, and that climate change will likely worsen that seasonal problem. That said, our concerns are centered on the impact of the Rule on the County's present and future residents in the Dungeness area.

Clallam County has a long history of leadership on water issues in this watershed, particularly through the Dungeness River Management Team. We recognize that the development of an instream flow rule for the area is highly important but contentious, due to the long-lasting effects on current landowners, future residents, and County government. The Rule must protect senior and current residents' water rights and provide predictability that water will be available for future development, at least for the next 20-year planning horizon. The Rule should also protect existing stream flows so that threatened fish populations in the basin do not further decline in numbers.

We look forward to our continuing cooperative efforts to ensure that the rule-making process is transparent, the issues are clear and well explained, and implementation from the County's perspective is fair, reasonable, and not overly burdensome.

Commenter

Howard V Doherty Jr, Jim McEntire, & Michael C Chapman, Board of Clallam County Commissioners 2, 14

Response

Thank you for your comment.

Comment # 323

Don't let environmental extremists and fear mongers overrun actual data and state mandates for balanced use.

Commenter

Dr. Diane Johnson, Chimacum Grange No. 681 H4

Response

Thank you for your comment. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 324

We are all aware these flows are necessary for the integrity of the watershed as a whole, to meet the need of all water users including fish and wildlife.

The Dungeness watershed has been a key focus for water management for many of us since, in particular, the Chelan pilot project in the 1990's. The Dungeness - Elwah Watershed Plan (WRIA 18) was completed in 2005. It is time for the instream flow rule to be completed. We have worked directly with the Department of Ecology on the WRIA 17 instream flow rule and indirectly through our related Tribes on other rules. None of the rules are perfect or provide what everyone desires in water quantity; however it is incumbent on the Washington State Department of Ecology to set the flows in rule to stop the loss of fish and habitat, and provide benchmarks for constructive restoration and sharing of this vital resource.

We look forward to your adoption of the rule. We further look forward to the many opportunities to implement the rule and restore flows as allowed.

Commenter

Paul McCollum & Dave Fuller, Port Gamble S'Klallam Tribe 2, 4

Response

Thank you for your comment.

Comment # 325

I am a 22 year resident of Clallam County. I am for a balanced approach to protecting our earth and environment.

Commenter

Jo Anne Estes 3

Response

Thank you for your comment.

Comment # 326

I am writing as a concerned citizen of Clallam County regarding the proposed Dungeness Water Management Rule.

I support protecting instream flows and fish in the Dungeness and appreciate the hours of time and effort spent working on the draft but do not agree with Ecology's proposed rule.

Throughout the process, citizens of Clallam County have been told by Ecology Staff that the rule balances the needs of people, farms and fish.

In fact, this statement appears in some form or another in many of Ecology's publications regarding the Dungeness Water Management Rule.

The quote below comes from Ecology Publication #10-11-018-A Guide to Water and How We Use It in the Dungeness Watershed, page 1:

"The water management rule is one of many efforts in the watershed to protect the long-term economic health and vitality of your community by ensuring water supplies now and into the future for people, farms and fish."

This proposed rule does not provide balance but is a complex regulatory scheme that will be enormously costly and for what benefit?

Commenter

FaLeana Wech 1

Response

Thank you for your comment. As explained in the Cost Benefit analysis for this rule, adopting this rule to manage future new water uses will greatly reduce the risk of a lawsuit that could halt all future development in the watershed, or require existing junior water users (including existing homes that rely on the groundwater permit exemption) to curtail their use during a drought.

Way of Life

Comment # 327

Many families are moving into this area to help support farming. Through a home based industry or through Sequim's Lavender tourism, they are part of a group that sells farm-related products (soaps, oils, wreaths and other products), encouraging a lifestyle specific to this region.

Commenter

Sheila Roark Miller, Clallam County 6

Response

Thank you for your comment. Ecology appreciates the rural character of the Dungeness Watershed and the importance of farming to the community. This rule helps protect the water rights held by the farming community, and establishes a water management framework that makes new farm-related water uses possible

Comment # 328

For many, living on the Olympic Peninsula in a rural or semi-rural lifestyle [growing food and raising animals] is the ONLY way life is financially possible.

Commenter

dhupfer 3

Response

Thank you for your comment. Please see the response to Comment # 327 and Comment #333.

Comment # 329

We speak for ourselves and for many others in the Dungeness Valley who are attempting to preserve open spaces and grow organic crops on our small farms, farms of from 5 – 20 acres or so.

Indeed, we note that the issue of preservation of farms has not only not been addressed by the Rule, but that a subtle, unannounced change in the language and interpretation of the proposed Rule forecloses development of small and organic farms in the valley.

Commenter

Jacques M Dulin 16

Response

Thank you for your comment. Ecology does not agree that the rule forecloses development of small and organic farms. Please see the response to Comment # 327 and Comment #333.

Comment # 330

In our opinion, the proposed Dungeness Water Rule is flawed and has too many unknowns. The quality of life for all residents in the Dungeness Valley would be negatively affected if the proposed DWR takes effect. We hope you will reconsider.

Commenter

Beth Garrison & Randy Holtkamp 3, 8

Response

Thank you for your comment. The rule's intent is to protect the quality of life in the basin, by allowing future development, while protecting the rights of existing water users and stream flows needed by fish populations and other environmental values. See also general response on Effects on future homebuilders.

Comment # 331

I attended the hearing on the proposed water rule on June 28, and was absolutely astounded at some of the things that I heard. In a response to one of the questions, the DOE representative stated that this was about water and not land. That is ridiculous. Land is dependent upon water and without water, land is useless, which is why water was brought into the valley approximately 113 years ago.

Commenter

Roland Miller, Coldwell Banker Town & Country 2

Response

The proposed rule very specifically addresses water resources. It is, of course, true that water and land are bound together by any water-dependent use of the land. Land without a water supply is not useless, but there are fewer potential uses that can be made of it in arid areas.

Comment # 332

Don't let environmental extremists and fear-mongers override actual data and the state mandate for balanced use. High fees for mitigation and use of water will kill farming and small agriculture. (As you know, farmers are a lot like starving artists--they usually operate on a shoestring.)

The Chimacum Grange asks that you consider carefully the unintended consequences of your decisions on such a critical sector of water users. They are critically important to the well-being and even the sustainability of the citizens who live here. Please make a rule which will support the continued presence and success of our farmers in feeding us all.

Commenter

Dr Diane Johnson, Chimacum Grange #681 4

Response

Thank you for your comment. Please see the response to Comment # 327.

Comment # 333

I'm here to represent a voice of caution on behalf of agriculture in the Dungeness Basin. This basin, like the Chimacum Creek Basin, has some of the absolutely best soils in the world for agriculture. The agricultural base has already been decimated by urban residential growth leaving only a fraction of the former open space available for cultivation, all at a time when we see a resurgence of an interest in activity in consumers for eating local for the health benefits of fresh or nutritious food, once again making agriculture profitable.

At the same time, fuel prices have quadrupled making foods from there far more expensive, and traveling there to shop becomes more difficult making food from here much more attractive. Ultimately, maintaining the wherewithal that it's the farmland and farmers who grow enough food to feed ourselves locally seems like a better and better idea.

Safety and health are not the only positives. We are seeing small farm agriculture growing for local or nearby markets become an economic driver in Jefferson County. I know that Clallam County is experiencing similar growth in this sector. There are tremendous opportunities for economic development increasing the tax base of businesses that serve agriculture and the creation of jobs in a small area.

None of this can happen without water. Closing the basin to new development in the Chimacum Valley has killed the opportunity to develop new uses for old Ag land and new small-niche growing operations on rural residential, five, ten, and twenty-acre parcels.

High fees for mitigation and use of water will kill farming and small Ag. And, as you know, farmers are a lot like starving artists, they operate on a shoestring. They can't afford high mitigation fees.

The Chimacum Grange asks that you consider carefully the unintended consequences of your decisions on such a critical sector of water usage. They are important, critically important to the well-being and even the sustainability of the citizens who live here. Please make a rule which will support the continued presence and success of our farmers in feeding us all.

Commenter

Dr. Diane Johnson, Chimacum Grange No. 681 H1, H5

Response

Thank you for your comment. There are seven irrigation districts and companies that collectively hold senior water rights that allow irrigation of up to 7,000 acres in the Dungeness watershed. Representatives of these irrigation districts and companies recently signed a Memorandum of Agreement with Ecology that helps ensure adequate water supplies for the agricultural economy in the Sequim area.

Comment # 334

Country living will certainly take on a new normal for newcomers to the valley: No outside watering and rationed indoor use.

Commenter

Steve Marble 5, H5

Response

This rule does not set limits on new water use for outdoor watering or indoor use. It does require the effect on surface water caused by new water use to be mitigated.

Comment # 335

The Department of Ecology (DOE) is proposing a number of significant limitations on water usage in our area. I am concerned that these limitations will deprive citizens of the right to use their land in keeping with traditions established over many years.

Commenter

Jeremy Fodge 3; Alan Barnard 3; Barbara Bentley 3; Mark & Jackie Bragdon 5; Danni Breen, John L Scott Sequim 3; Ron Carlson 3; Roger Clark 3; Rhonda Curry 3; Pat Davis 3; Jerald R Dow 3; Gene Farr 3; Nancy Louise Froh 3; Daniel E Gase, Coldwell Banker Uptown Realty 3; Deborah Groesbeck & Bob Conklin 3; Richard & Ruth Hale 3; Donald & Ella Hoffeld 3; Kelly Johnson, Windermere RE Port Angeles 3; Sarah Kincaid 3; Lee Lawrence 3; Colleen & David Lyons 3; Harvey & Margaret Martin 3; Jim Mitchell 3; Mary Mitchell 3; Jim & Bea Muir 3; Terry Neske 3; John & Morgan Nolan 3; Virginia A O'Donnell 3; Julia Opeka 3; Patricia J Orella 3; Maureen Pfaff, Olympic Peninsula Title Company 3; Lynda Rathman 3; Doc Reiss, City of Port Angeles Planning Commission /Windermere Real Estate 3; Ardyth Schaumburg 3; Susan Sparks Smith, Silpada 3; Janet Stevenson 3; Linda L Wishart 3; Richard Wolf 4; M Worman 3; Carol Yearout 3; Maxwell Anderson 3; Jim & Bea Muir 3; Nola Judd 1; Ray Gruver 4; Richard & Martha French 3; Carol Rutledge 4; Carolyn Money 3; Ross Krumpe 18; Neville & Gayle Aitken 3

Response

Thank you for your comment. This rule adopts a water resource management framework that is consistent with recommendations in the locally developed watershed plan. As a governmental agency that participated in watershed planning, Ecology is obligated by RCW 90.82.130(3) to adopt a rule to implement the plan approved by the watershed planning unit and adopted by the Clallam County Board of Commissioners.

This rule helps protect senior water rights that are part of the traditional way of life established in this watershed over many years. This rule also establishes reserves that ensure water will be available for new domestic water use, and provides for other water uses through mitigation.

As explained in the Cost Benefit analysis for this rule, adopting this rule to manage future new water uses will greatly reduce the risk of a lawsuit that could halt all future development in the watershed, or require existing junior water users (including existing homes that rely on the groundwater permit exemption) to curtail their use during a drought.

Comment # 336

Perhaps more important, [the limitations in the proposed rule] will deprive citizens of the right to use their land in keeping with traditions established over many years.

Commenter

RA Pilling, Clallam County Republican Party 3, H3

Response

Ecology disagrees. The proposed rule does not affect existing rights to water. To the extent that landowners seek to change the use of their land in ways that establish a water use, they will be required to comply with the rule's requirements. Please also see the response to Comment # 335.

Comment # 337

You say I cannot water my [existing] garden? But I use my garden to sustain life, limit my expenses in a financially difficult time, eat healthy food and share with my neighbors. This proposal will curb my ability to sustain our food production?

Commenter

Alaine Reeves 1

Response

Please see the response to Comment # 336.

Comment # 338

At some point, environmental concerns must mesh compatibly with humanity and our quality of life - not crush it.

Commenter

W David Sharman 7

Response

Thank you for your comment. Ecology agrees.

Comment # 339

Residents are able to afford to live and grow food and raise animals under the protection of the constitution, without government control of water. No one owns the water and no one should have to pay the government for the use of well water!

Commenter

dhupfer 2

Response

Water has been under the control of government since the Northwest Territory became a possession of the United States. At no time in history in Washington State has the theory you advance actually been a part of territorial law, state law, or the constitution.

Comment # 340

The River, its fish and habitats, are very important. Equally important, should be the continued life and livelihood of large farmers, hobby farms, and all the people who live in the Sequim-Dungeness Valley. All of them trying to enjoy our beautiful rural lifestyle, complete with fresh eggs, organic vegetables, fruit, beef, and other animals--nourished by water.

Commenter

Marguerite A Glover 20

Response

Ecology agrees that water resources should be managed to accomplish multiple benefits, and to individuals and society in general.

Comment # 341

I am a biometrician and do consulting. That has occasionally included medical questions. --- Several years ago, I was asked by a local physician, why there was such a high cancer rate in Clallam County. She showed me, among other things, the blood and hair sample data for her patients. Most of them had very high levels of uranium. I also talked with several cancer patients. One particularly relevant fact that emerged was that when the patients stopped buying food at the grocery stores, but grew it in their own gardens, their cancer never recurred. Next, I spent several days at the medical school's library at the University of Washington. What I found was essentially complete agreement on what the non-military source of the uranium was. They said that it was added to fertilizer. That was how it got into the food supply.

The US Toxic Substances Act allows the EPA to certify alternative uses for industrial wastes. In particular, the uranium mining and manufacturing industry has a lot of contaminated phosphoric acid they need to dispose of. Uranium is soluble in phosphoric acid and that is how they extract it from the ore. The EPA allows them to add it to fertilizer. It is an excellent source of phosphorus, a broad-spectrum insecticide, and also increases the shelf-life of vegetables. They even certify it as "organic." The Washington State Department of Ecology, also, allows this to happen.

I bought a modern Geiger counter and measured radiation levels in foods that I bought in the local grocery stores. Almost all of them were significantly above the background rate. However, they were only moderately radioactive, mostly around one-and-a-half to two times the background rate.

What I did, as my personal response to this knowledge, was buy a piece of property, with good soil and irrigation rights. My intention has been to grow vegetables, dairy and meat, that are free from that insidious source of contamination, and sell them, particularly to local cancer patients. I have spent the last few years developing the land, improving the soil, and learning how to grow these products.

Now, this proposed rule might be used to prevent me from doing, what I have invested in and spent several years of my life developing.

However, the worst impact is that PUD #1 intends to build a sewage treatment facility only a few hundred yards from me and infuse their treated water into the aquifer that my well goes into. The department of ecology would not allow them to infuse it into the creek, apparently because they are concerned of harm it might do to the fish. They insist that they use it to recharge the aquifer, instead.

However, the sewage treatment that is planned doesn't remove heavy metals (including uranium), some prescription drugs, viral spores, micoplasma, nor various other harmful microorganisms. Furthermore, this is a huge point source that can be expected to eventually contaminate all three of the aquifers in the local area.

That would make everything I have worked for and invested in futile.--- During the irrigation season, I primarily use irrigation water but, after the season ends, I use well water to irrigate both my personal and commercial gardens. I also use it for stock watering and domestic uses. That well water during the late summer and fall is essential to maintaining a fall and winter garden. That is when fresh pure vegetables are in short supply.

Commenter

Dr Robert N Crittenden 25

Response

Thank you for your comment. The rule will not affect existing irrigation under a legal water right, including through a permit exempt well if in compliance with the limits of the groundwater permit exemption. New uses will require mitigation under the rule. This rule does not regulate sewage treatment.

Comment # 342

To outlaw outside well water use will mean landscaping on new construction will be extremely limited. We built our house in this area eight years ago and I can assure you that without watering our landscaping virtually none of it would survive since Sequim only gets about 12-15 inches of rain each year. But there is plenty of water flowing down the river from the snow melt year round.

Commenter

Greg & Joanna Carroll 2

Response

The rule does not outlaw the use of outdoor water. Please see the response to Comment # 336. Many years, the Dungeness River does not have adequate flow in the August – September period to meet the needs of existing irrigators and the resident and anadromous fisheries native to it.

Comment # 343

This will have a negative impact on existing land. Just recently we learned of a vacant 1.8 acre lot on our own street that a couple from outside of Washington purchased several years ago with the intention of building a home and retiring here soon. But upon hearing of the coming restrictions they have decided to sell and locate elsewhere.

Commenter

Greg & Joanna Carroll 3

Response

Thank you for your comment. Ecology's CBA has evaluated the economic impacts of the rule and determined that, overall, benefits exceed the costs. That does not mean, however, that individuals will not make choices based on their own situation.

Comment # 344

This rule discourages landscaping and gardening. Landscaping adds value to property. Trees can provide protection from wind, insulate from heat and cold, and mitigate the need (and cost) for heating and cooling. The cost of food keeps increasing, while the taste of produce keeps diminishing due to the depletion of minerals in soil. People should be encouraged, not discouraged, to grow their own food and landscape their property. There are financial and health benefits to both, and detriments to letting landscaping die or not providing landscaping.

Commenter

Marnee Foldoe 6

Response

Ecology agrees that landscaping adds value to property. It is reflected in the cost benefit analysis.

Comment # 345

The Department of Ecology (DOE) is proposing a number of significant limitations on water usage in our area. Lastly, and perhaps more important, they do NOT deprive citizens of the right to use their land in keeping with traditions established over many years.

Commenter

Anne Shaffer, Coastal Watershed Institute 3

Response

Ecology agrees. Please see the response to Comment # 336.

Comment # 346

I have been very concerned for some time as I have watched the DOE trying to subtly erode the private property and constitutional rights of U.S. citizens. I have also experienced first hand intimidation tactics and illegal trespass by DOE employees while conducting business as a General Contractor. Thankfully I had done everything according to the BMPs for the projects and was willing to stand up for my rights and assured the DOE agents that I was willing to take legal action against them and the DOE if the harassment, threats and inaccurate accusations did not stop immediately. Fortunately, the DOE acknowledged their wrongful actions and lack of accurate record keeping, after 2 years everything was resolved.

All of this to say that the Dungeness Water Rule is another example of the same tactics only on a larger scale. It looks like it's time to take a stand again, this time along with many other outraged land owners. We see this as another taking of personal property rights and putting an amazing hardship on the community and future generations who would desire to own property and a home. This not only effects home owners, but anyone who desires to live in a rural area in the future. This has been a fundamental right since the founding of this country. This is what our forefathers fought for since 1776 on our soil then, but mostly overseas. The battle has come full circle back to fighting for our own soil, on our own soil.

Commenter

Randy Simmons 1

Response

Ecology disagrees. No aspect of the proposed rule takes private property without condemnation or violates constitutional rights. Please see the general responses related to Prior appropriation: what's fair? and Federal Reserved Water Rights.

Comment # 347

I'm just a local person that's been a small homebuilder here living in this area about 22 years now. All of you people that I've talked with, Ann Wessel, you've been very professional and helpful. And I appreciate that -- and some of you people are in the hot seat tonight -- and also you're assistance as well.

You must have some empathy for what you see in front of you because you're not the elected representatives -- I think they're mostly gone now -- and they're the masters of what you guys are doing. But I can't understand how any of the political masters -- although, I was talking to Steve Tharinger out in hall, and he still seems to think that it is just a hypothetical that a homeowner or property owner could lose their property rights.

So if you have a lot, a building lot with a good functioning well, 25 gallons a minute or something, near McDonald Creek, up in the McDonald Creek area, it's very possible, in fact, likely, that you won't be able to build on that lot because -- not because of any rule, you pay taxes on that thing for 10 or 20 years preparing for your retirement, but because the Department of Ecology deems that it needs more in McDonald Creek.

But there's no actual evidence that we can do anything about that creek because the Department of Ecology's own research shows that one home uses about the same water as 75 -- excuse me -- 75 homes use the same water as one irrigated acre of farm land. So this whole thing makes no sense because all the burden is placed on homeowners and future homeowners, and they're the ones that use the least water. There is no more efficient water use than the homes that are on individual septic systems.

So the Department of Ecology, or the state, could easily obtain the irrigation rights to 10 acres, and they would have equal water for 750 homes in the future creating \$15 million in sales tax to the state, creating 3,000 employee years, because each home is equal to about 3.8 years of employment on average. So all these economic costs aren't just to you people out here, we're going to feel them immediately, but it affects all of us in the state. And it's just a shame to see this.

I know you guys are good people and you're enforcing something that, if you think about it, can't make sense.

Commenter

Ivan Sorenson H1

Response

Thank you for your comment. Please see the response to Comment # 346 and the general responses on Small impacts and Mitigation: who pays?.

Comment # 348

This is my comment on the moral issue of the DOE Dungeness Water Rule.

It is a outrage, when a government agency (DOE) controls Job 36:27,28 even the collection of the small drops of water: that pour down rain according to the vapour thereof: That the clouds do drop and distil upon man abundantly.

God.Ecclesiastes 1:7 - All the rivers run into the sea; yet the sea is not full; unto the place from whence the rivers come, thither they return again.

As Brooke Dorhofer has written in her comment on the Dungeness Water Rule, I too, am appalled by the arrogance of the DOE and this attempt to ban, restrict, meter, control and charge for a GOD given staple that is necessary for the existence of all life.

1 Peter 5:8 - Be self-controlled and alert. Your enemy the devil prowls around like a roaring lion looking for someone to devour

Psalm 104:14-21 - You cause the grass to grow for the cattle, and plants for people to use, to bring forth food from the earth, and wine to gladden the human heart, oil to make the face shine, and bread to strengthen the human heart. The trees of the LORD are watered abundantly, the cedars of Lebanon that he planted. In them the birds build their nests; the stork has its home in the fir trees. The high mountains are for the wild goats; the rocks are a refuge for the coney. You have made the moon to mark the seasons; the sun knows its time for setting. You make darkness, and it is night, when all the animals of the forest come creeping out. The young lions roar for their prey, seeking their food from

Jeremiah 51:16 - When he utters his voice, there is a multitude of waters in the heavens; and he causes the vapours to ascend from the ends of the earth: he makes lightnings with rain, and brings forth the wind out of his treasures.

Job 37:6 - For he says to the snow, Be thou on the earth; likewise to the small rain, and to the great rain of his strength.

Psalm 1:3 -They are like trees planted by streams of water, which yield their fruit in its season, and their leaves do not wither. In all that they do, they prosper.

Psalm 24:1-2 - The earth is the Lord's and all that is in it, the world, and those who live in it; for God has founded it on the seas, and established it on the rivers.

Psalm 65:5-13 - By awesome deeds you answer us with deliverance, O God of our salvation; you are the hope of all the ends of the earth and of the farthest seas. By your strength you established the mountains; you are girded with might. You silence the roaring of the seas, the roaring of their waves, the tumult of the peoples. Those who live at earth's farthest bounds are awed by your signs; you make the gateways of the morning and the evening shout for joy. You visit the earth and water it, you greatly enrich it; the river of God is full of water; you provide the people with grain, for so you have prepared it. You water its furrows abundantly, settling its ridges, softening it with showers, and blessing its growth. You crown the year with your bounty; your wagon tracks overflow with richness. The pastures of the wilderness overflow, the hills gird themselves with joy, the meadows clothe themselves with flocks, the valleys deck themselves with grain, they shout and sing together for joy.

Commenter

Pearl Rains Hewett 66

Response

Thank you for your comment. State law establishing authority to regulate the use of publically owned water is found in Chapters 90.03 and 90.44 RCW.

Implementation Questions

Comment # 349

There is a lack of particulars on how the Rule will actually be implemented i.e. there are too many details left out that need to be worked out before - not after - the Rule takes effect.

Commenter

Pamela Cameron 1

Response

Thank you for your comment. In fact, there is an extraordinary amount of ‘particulars’ about how the rule will be implemented. There are draft agreements between Ecology and the County and between Ecology and the Dungeness Water Users. There is a draft mitigation plan for operation of the Dungeness Water Exchange. Washington Water Trust developed a Feasibility Report and strategy for the Dungeness Water Exchange in 2009. Ecology’s website hosts many questions and answers that have come up over the past three years. See also the general responses Mitigation: what’s understood and Effects on future homebuilders

Comment # 350

Additionally, it is not apparent that DOE has the administrative mechanism to "hit the ground running" in the event of it's implementation.

Commenter

W David Sharman 3

Response

Thank you for your comment. Each rule we adopt must be accompanied by an implementation plan. See also the response to Comment # 349.

Comment # 351

How would this proposed rule affect Snowbird property owners who may only be here in the county for six months?

Commenter

Richard & Jill Pinder 21

Response

The rule affects only new water users. It does not affect existing water rights whether they are seasonal or year-round rights.

Comment # 352

If I have property with a well that is in use, yet have not built my home on the property, will I be exempt from the rule or is the building of a home considered a new use, if there is no change in the usage of the well?

Commenter

Richard & Jill Pinder 22

Response

If your existing use of water does not change, you would have not be considered a new use of groundwater. The proposed rule only applies to new surface water and groundwater uses.

Comment # 353

I own 5 acres at the end of community lane off Woodcock Rd in Sequim (Parcel 7 Survey V3P21 N2SWSWNW 5.01A) owner ID 22545.

The 15 pages acquired off the internet is such an overview of vague, non specific, generalization it leaves an affected property owner unable to determine the actual impact.

I have no problem with the need to address the water issues of the area but when government impacts a landowner there is a responsibility to indicate precisely that impact.

If I wished to build a single family dwelling on the above property to include a modest summer garden just exactly what I would need to do and what it would cost. For your information my neighbor has an artisian well. My 5.0 is the only plot that size, has no well but does have an orchard.

Commenter

Dale A Durrwachter 1

Response

If your current orchard is irrigated using a surface water source and you have a water right for that irrigation use, then you could continue that existing irrigation use and you would not be affected by the rule. Assuming your 5-acre parcel has no relationship to other homes or lots and their development, construction of a home on the property would be a new water use. You would be required to meter your use and your would need to mitigate (offset) the impacts to streams resulting from your consumptive water use. Also see the general response to Effects on future homebuilders.

Comment # 354

Recently we spoke with a woman who lives in the Lost Mountain area. They purchased their property several years ago, they put \$25,000 in drilling a well. They use The property for

vacation purposes and bring a recreation vehicle here part of the year. She is extremely concerned whether she will be able to use her Very expensive well once the rule is in place.

Commenter

Don & Patty Brueckner 4

Response

Please see the responses to Comment # 351 and Comment # 352.

Comment # 355

How are we going to get the money to implement this.....more taxes!!!????

Commenter

Julia Opeka 6

Response

Thank you for your comment. Typically, public funds to implement the rule come from Ecology's budget, and to a lesser extent the County's budget. Staff from both agencies will incorporate rule implementation into the work and processes they use to manage water rights and land use development. In addition, new water users will pay for mitigation, covering the cost of the Dungeness Water Exchange's mitigation program.

Need More Information

Comment # 356

Time appears to be the factor here. I believe DOE needs more time to ethically reevaluate more verified data obtained by experienced area-knowledgeable experts. It is my experience that a small modification or correction in just one area of an evaluation can vastly change the final outcome. Governing a natural resource for the people is a huge responsibility, and one definitely worthy of whatever amount of time is needed to get it right. Moving forward ignoring many legitimate concerns voiced by experts in the field just seems reckless when dealing with such an important resource as our water.

Commenter

Deborah Norman 4

Response

Thank you for your comment. Extensive studies and modeling have been completed for the basin. See general responses on Fish/science and Groundwater model. The recommendation to adopt instream flows for the Dungeness River has existed in some form since 1994, further delay is not appropriate.

Comment # 357

I thoroughly support Commissioner McEntire letter objecting to the water policy proposal that your department is suggesting. I am not going to go into any further details on my own, reasons why I do not agree with the plan, the studies, etc, because I believe Commissioner McEntire has explained our concerns. The last paragraph in his letter states that more information is needed to determined the impact on the community, economic and social. In other words it time for the DOE to coordinate with the local government and the public.

Commenter

Randy Hatfield 1

Response

Ecology has coordinated with local governments, the watershed planning unit, and the public in a variety of processes since the pilot planning process was initiated in the early 1990s. (See general response to Public outreach.) What the rule does is adopt the recommendations and decisions pertaining to water resources management from those planning processes.

Please also see the general response Motivation and authority for adopting the rule.

Comment # 358

It is my strong belief that WRIA should definitely be studied further before going ahead. An impartial scientific study in regard to impact on our economy, our environment, and the private citizen. I want this measure to be postponed immediately!!!

Commenter

Pat Farren 1

Response

Please see the response to Comment # 357.

Comment # 359

The analogy that came to my mind as I was thinking developed and you went to your doctor and he gave you that pill and said, try this. And as you were about to take it, you began to find out through your resources that the people who developed that very drug that you're about to take, found that there were numerous loss and that other technology companies that knew of that developing drug, also were able to point out numerous loss. Would you take that pill?

I think we're all here tonight because we're not going to take the pill and you want to do something about it. And I think, for the record, it needs to be known that everything that's been stated tonight goes to prove that the pill that they're trying to give everybody to cure something has tremendous loss. It needs to be stopped; it needs to be studied.

Commenter

Kathi Larsen H2

Response

Thank you for your comment. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights,-Science/fish, and the Groundwater model.

Comment # 360

I spent several hours one day looking through the Department of Ecology website to gather the information on this. And I probably am not alone in saying that it was like you have got to be kidding me. I ended up with about a three inch pile of paper, much of it I printed because I thought I could read it at home in the evenings.

And I don't think this is an issue that has been well-explained by Ecology. And I know that they put out newsletters and there's reports and there's 50-page documents, but I have not yet then able to find the Cost Benefit Analysis. I did find the small business one, but not the other. So I think that proceeding with this rule, given the lack of knowledge that those of us that will be impacted are going to have to deal with when it's almost virtually impossible to understand it, it just seems like we have to find a way to slow the rule and get more people involved in understanding the impacts of this.

I have prepared written comments with a number of questions, which I will get answered through this process, but NOTAC is actually asking that the Department of Ecology delay the decision on the final rule until more education has been done to the citizens that will be impacted.

Commenter

Carol Johnson, North Olympic Timber Action Committee H1

Response

Thank you for your comment. Please see the general responses on Mitigation: what's understood and Effects on future homebuilders.

Comment # 361

I am very concerned about this pending water rule as there are still too many questions for which there are no answers. It seems as though this is a “throw it against the wall and see if it sticks” notion.

From all the information I am reading it seems pretty obvious that this law is not ready to go into effect. Too many questions by too many people have been left unanswered.

From what I am understanding you are proposing to take away the right of property owners to be in a position to obtain water. I do understand that measures need to be taken to protect our water –How is it that you preserve the right of a landowner to not be burdened with a property that is land locked but can even suggest that an issue like water that is just as important if not more is being denied on some properties - doesn't make any sense.

Please extend the time frame on this issue and allow time for all major questions and concerns to be answered. I believe most have been addressed but unless I missed something many have not been answered.

Commenter

Kathi Larsen 1; Cathy Reed 1

Response

Please see the general responses Prior appropriation: what's fair?, Groundwater permit exemption, Mitigation: what's understood, and Effects on future homebuilders. People intending new uses of surface or groundwater have no water right, therefore no property right is taken away. To reduce the burden on most prospective water users, Ecology, Clallam County, and Washington Water Trust have worked together to develop the Dungeness Water Exchange to make water available for new uses.

Comment # 362

Questions regarding this [estimates on jobs created by the rule] and other outlandish presumptions were raised by many voices in the proposed Rule process in WRIA-17, by JCAR as well as other organizations and individuals. Information to qualify or quantify the reasoning behind these presumptions was never made available. Clear questions were asked, stemming from the need to provide information back to our members on matters that were, and continue to be, very difficult to understand and explain.

The Concise Explanatory Statement that is required from questions raised in the hearing process is not provided until Rule adoption, with the CR-103. We believe this practice needs to be changed in statute so that formal answers are provided during the hearing process and the CR-102, to allow time for responsiveness modification for the proposed Rule prior to the end of the formal comment period.

We ask that you withdraw the proposed Rule and go back to the drawing board for WRIA-18 to develop more information that is understood and available.

We need answers. I've heard people say that they've asked questions and they need answers. I would like to suggest that the Administrative Procedures Act be changed for rule making so that the responses, in concise explanatory statements, be provided as part of CR-102 hearing process in a timely manner so that people can get answers before the end of the hearing.

Commenter

Teren MacLeod, Jefferson County Association of Realtors 3; Teren MacLeod, Government Affairs in Jefferson County H4

Response

RCW 34.05, the Administrative Procedure Act dictates the process Ecology must follow when adopting rules. It provides that an agency propose a rule, take comment, and then respond to comments prior to adoption. You suggest that an agency should respond to comments they have not yet received, or to have two rounds of comment. In either case, the Legislature would first need to amend RCW 34.05.

Please also see the general responses to Mitigation: what's understood and Effects on future homebuilders.

Comment # 363

There are too many questions which are still unanswered. We need the answers BEFORE the Rule is in place, not after.

There are far too many questions that need to be answered and for Ecology to adopt this rule without addressing the concerns raised by the Clallam County Commissioners, City of Sequim, WA Realtors, Port Angeles Business Association and many others would not serve the public well.

Please take the time to get answers to questions before the rule is in place.

Commenter

Marguerite A Glover 36 ; FaLeana Wech 3

Response

Thank you for your comment. Please see the general responses on Mitigation: what's understood and Effects on future homebuilders.

Lack of Support

Comment # 364

The Clallam County Commissioners are not in favor of this rule as presently written.

Commenter

Dan Shotthafer 2

Response

Thank you for your comment.

Comment # 365

An estimated 300 people attended the public hearing in Sequim on June 28th. There were over 35 speakers voicing opposition. The only person at the hearing who spoke in favor of the new proposed rule was another state employee. The City of Sequim, Sequim Association of Realtors and Port Angeles Business Association are all opposed to the proposed rule. The overwhelming majority of both people in attendance at the meeting and general population are clearly against the proposed rule.

I believe that the Department of Ecology needs to responsibly listen to and represent the wishes of the People. I urge the Department of Ecology to do the right thing and dismiss the proposed rule.

Commenter

Andee Sallee 6

Response

Thanks you for your comment. The majority of people who attended the public hearing on June 28th were clearly against the proposed rule. However, this does not mean the majority of the citizens that will be impacted by the rule are emphatically against the rule. It is not likely that the majority of the citizens that will be impacted by the rule were in attendance at the hearing.

Comment # 366

I noted that of all the people that gave testimony (30 – 40?), only one person was in favor of the rule. That should be a wakeup call to DOE that the rule should not proceed as planned. Because of all the flaws and illegalities in the proposed rule, I believe that it is time for DOE to go back to the drawing board and come up with a rule that makes sense for the Dungeness watershed, even if that means starting all over again.

Commenter

Roland Miller, Coldwell Banker Town & Country 3

Response

Thank you for your comment. The recommendation to adopt instream flows for the Dungeness River has existed in some form since 1994, further delay is not appropriate. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 367

I am a full time resident of Sequim. I am a Real Estate Broker and business owner in downtown Sequim. I believe respecting our environment and protecting our natural resources is imperative. I have endeavored to better understand how this proposed water rule and new mitigation process will benefit my family, my clients and the community which I serve.

As a result of attending the June 28th meeting I have concerns with the numerous issues brought to the table regarding the legitimacy of the CBA, the lack of the rule's constitutional integrity, and the overall benefit this plan will actually provide for the residents of our communities after its implementation.

Is this rule being pushed through without a true voice from those it is clearly intended to serve?

DOE, now is the right time for you to correct this, not later.

I would ask that you take time to complete the work on this before re-approaching us with a governmentally controlled sunny forecast, only a chance of a brighter future, and costly water mitigation fees moving over the horizon. Beyond the issues of mitigation fees on the homeowner, isn't the protection of this natural resource far too valuable to allow a flawed system to move forward without bona fide proof of success. After all, this is our water we're talking about. Can DOE provide better odds to the people than the present uncertainty this will/can even help our water flows? Some still may want this to go through quickly believing it will genuinely protect our natural resources; others do not, because like me, they now recognize serious problems and have become concerned there may be more hidden snakes in the boot.

The over simplistic responses by DOE on June 28th to questions on loss of property values only solidified my concerns of inaccurate analysis for our area.

There is a lot of work still to be done before a plan like WRIA 18 should be approved. Doe must re-present to the people an analytically cohesive plan which more accurately addresses the direct effects of WRIA 18 for our area dynamic AND includes a reasonable allotment of time for those in the affected area to review, make comments and vote.

On such a critical issue as this, I am challenging the DOE to respond to the legitimate concerns of the people in order to demonstrate and establish a genuine partnership with our community.

Commenter

Deborah Norman 1, 3, 7, 9, 14, 17

Response

Thank you for your comment. See general responses on Effects on future homebuilders and Mitigation: what's understood. Ecology also has no authority to put the rule to a vote. See response to Comment # 232.

Comment # 368

I have been monitoring the progress and development of the subject proposal for several months with increasing concern of its potential along with many other initiatives to continue the eradication of private property rights and land-use by state and federal natural resource agencies, often driven by the whims of anti-property rights NGO's.

Ecology has taken this issue into "territory" beyond the technical and analytical abilities of most citizens apparently in an attempt to dazzle the public and cloak the real agenda of this water resource use initiative. Mr. Ahlburg's analysis surfaces many questions and flaws in the proposed rule and suggests that the department does not understand or has lost sight of its statutory obligations to the public and regulating limitations, even casting aside internal dissent.

These questions and concerns, along with those from other commentators, need to be addressed. Without the support of the property owners affected, this initiative should cease.

Commenter

Harold Brunstad 1

Response

The proposed rule only charts new territory in that it, like the Walla Walla rule, was drafted in conjunction with a mitigation program designed to make it easier for most new water users to obtain a reliable water supply.

Ecology understands its obligations under the watershed plan adopted by the planning unit and the Clallam County Commission. Ecology understands its responsibility to protect existing water rights and to set instream flows to protect aquatic resources. These are responsibilities Ecology and its predecessor agencies have had for decades, and are not the result of a new agenda.

Comment # 369

The town meeting held on 6/28/12 reflected that the majority of the citizens that will be impacted by these limitations are emphatically against them. Many speakers at this meeting pointed out the legal flaws as well as the lack of logic and the punitive nature of the proposed rules. Similar commentary was presented at the Board of Commissioners meeting on 7/3/12.

Accordingly, I request that you delay the implementation of these rules until such time as you can convince the affected population - as well as our elected representatives - that these rules are logical, lawful, and beneficial by means of a thorough, independently performed economic study.

Commenter

CM Muller 6; Jeremy Fodge 6; Alan Barnard 6; Barbara Bentley 6; Mark & Jackie Bragdon 8; Danni Breen, John L Scott Sequim 6; Ron Carlson 6; Roger Clark 6; Rhonda Curry 6; Pat Davis 6; Jerald R Dow 6; Gene Farr 6; Nancy Louise Froh 6; Daniel E Gase, Coldwell Banker

Uptown Realty 6; Deborah Groesbeck & Bob Conklin 6; Richard & Ruth Hale 6; Donald & Ella Hoffeld 6; Kelly Johnson, Windermere RE Port Angeles 6; Sarah Kincaid 6; Lee Lawrence 6; Colleen & David Lyons 6; Harvey & Margaret Martin 6; Jim Mitchell 6; Mary Mitchell 6; Jim & Bea Muir 6; Terry Neske 6; John & Morgan Nolan 6; Virginia A O'Donnell 6, 8; Julia Opeka 7; Patricia J Orella 6; Maureen Pfaff, Olympic Peninsula Title Company 6; Lynda Rathman 6; Doc Reiss, City of Port Angeles Planning Commission /Windermere Real Estate 6; Ardyth Schaumburg 6; Susan Sparks Smith, Silpada 6; Janet Stevenson 6; Linda L Wishart 6; Richard Wolf 7; M Worman 6; Carol Yearout 6; Maxwell Anderson 6; Nola Judd 4; Ray Gruver 7; Carol Rutledge 1, 7; Carolyn Money 4; Ross Krumpe 21; Neville & Gayle Aitken 6

Response

Thank you for your comment. See response to Comment # 365 and Comment # 620.

Comment # 370

The majority of the local citizens do not support this proposal. It appears that those who stand to profit are driving and supporting the current proposal.

Commenter

Jerald R Sinn 4

Response

See the responses to Comment # 248 and Comment # 365, and the general response to Motivation and authority for adopting the rule.

Comment # 371

Pursuant to the Watershed Planning Act, Ecology must show deference to the will of the people of Clallam County, as expressed in their comments to you, and through their elected Board of Commissioners and Director of Community Development.

Section 90.82.005 states that “The purpose of this chapter is to ... provide local citizens with the maximum possible input concerning their goals and objectives for water resource management and development.”

Section 90.82.010 states that “The local development of these plans serves vital local interests by placing it in the hands of people who have the greatest knowledge of both the resources and the aspirations of those who live and work in the watershed; and who have the greatest stake in the proper, long-term management of the resources.”

Finally, in “Findings -- 2003 1st sp.s. c 4 § 1” in connection with this RCW 90.82.040 the legislature stated that “The legislature declares and reaffirms that a core principle embodied in chapter 90.82 RCW is that state agencies must work cooperatively with local citizens in a process of planning for future uses of water by giving local citizens and the governments closest to them the ability to determine the management of water in the WRIA or WRAs being planned.”

During the June 28 public hearing you heard universal public opposition from almost 300 citizens, the only person in favor of the rule being an employee of a state environmental agency. The Board of County Commissioners is on record as unanimously being opposed to the rule as drafted, as is the City of Sequim, the major town in the area covered by the rule, and the Director of Community Development. A multitude of business and industry organizations from the affected area also are on record opposing the rule as now proposed. Ignoring this opposition and these statutory requirements and legislative intent can only lead to unnecessary litigation and lengthy delays in the implementation of any rule.

Commenter

Pearl Rains Hewett 33; Randy Simmons 23; Kaj Ahlburg 21

Response

RCW 90.82 obligates Ecology to rulemaking where it is required to implement the Watershed Plan approved by the Planning Unit and adopted by the County Commission. An approved watershed plan *shall be* relied on as a primary consideration in determining the public interest:

“After a plan is adopted in accordance with subsection (3) of this section, and if the department participated in the planning process, the plan shall be deemed to satisfy the watershed planning authority of the department with respect to the components included under the provisions of RCW 90.82.070 through 90.82.100 for the watershed or watersheds included in the plan. The department shall use the plan as the framework for making future water resource decisions for the planned watershed or watersheds. ***Additionally, the department shall rely upon the plan as a primary consideration in determining the public interest related to such decisions.***”

Ecology has not ignored and is not ignoring opposition to the rule. It is also not ignoring statutory requirements; however, it is apparent that Ecology’s interpretation of those requirements differs from yours.

RCW 90.82.130(3) provides: “If the watershed plan is approved under subsections (1) and (2) of this section and the plan creates obligations: (a) For agencies of state government, ***the agencies shall adopt by rule the obligations of both state and county governments and rules implementing the state obligations, or, with the consent of the planning unit, may adopt policies, procedures, or agreements related to the obligations or implementation of the obligations in addition to or in lieu of rules. The obligations on state agencies are binding upon adoption of the obligations, and the agencies shall take other actions to fulfill their obligations***

as soon as possible, and should annually review implementation needs with respect to budget and staffing; (b) for counties, the obligations are binding on the counties and the counties shall adopt any necessary implementing ordinances and take other actions to fulfill their obligations as soon as possible, and should annually review implementation needs with respect to budget and staffing; or (c) for an organization voluntarily accepting an obligation, the organization must adopt policies, procedures, agreements, rules, or ordinances to implement the plan, and should annually review implementation needs with respect to budget and staffing.

Comment # 372

Please reconsider and delay the implementation of these rules until such time as you can convince the affected population, logically, that there is a valid reason for implementing them!

Commenter

Terri & Milo Walker 5

Response

Thank you for your comment. The recommendation to adopt instream flows for the Dungeness River has existed in some form since 1994, further delay is not appropriate. Please also see the general response to Motivation and authority for adopting the rule.

Comment # 373

The agency no doubt has estimates of support for its actions. While the Sequim paper quoted a bureaucrat stating that supporters were not expected to show, how will the agency determine if the proposed rule has any local support? What is the agency's means of determining if any support exists?

Commenter

Bruce Larsen 11

Response

Thank you for your comment. The proposed rule implements recommendations from the watershed plan adopted by the local planning unit and county commission. RCW 90.82.130(4) directs Ecology to adopt rules to implement the adopted watershed plan and that "...the department shall rely upon the plan as a primary consideration in determining the public interest related to such decisions." Please also see the general response to Motivation and authority for adopting the rule.

Comment # 374

This rule should not be adopted or put into force. As you are aware from the public meetings, there is overwhelming opposition to the rule as written. If it were indeed a good rule with clear benefits, and with benefits that clearly outweighed the costs, I believe there would be public support.

Commenter

Marnee Foldoe 1

Response

Thank you for your comment.

Comment # 375

The public, as evidenced by numerous letters and emails submitted as well as verbal and written comments provided during the public hearing, does not support it.

Commenter

FaLeana Wech 2

Response

Thank you for your comment.

Public Involvement/Public Notice

Comment # 376

I just want to stay that I believe that this rule should be halted. I believe the people have a reasonable expectation to have been notified in a timely manner -- not within a few months of the rule being proposed, but probably several years notification -- of how that will impact them so that people can make plans. People who bought property years ago, have no knowledge of this and they're wanting to pursue it as they gain knowledge in the last few months. And it's certainly not sufficient time to put things in place for the property they've spent -- many of them -- all of their retirement money to be able to live in this valley. So I believe it needs to be halted.

I think people have a reasonable expectation to have been notified in a timely manner.

Commenter

Kathi Larsen H1, H3

Response

Thank you for your comment. Please see the general comment response on Public outreach.

Comment # 377

Your plan is a failure in that you did not properly communicate to stakeholders of your attempt to usurp water and property rights. A failure in that you have not clearly communicated the plans and strategies you intend for the people to have to perform for mitigation for new water uses.

Commenter

Steve Gale H2, H4

Response

Thank you for your comment. Please see the general comment response on Public outreach.

Comment # 378

A good proportion of the new wells affected by this rule would be drilled in properties owned in absentia; therefore, these owners are faced with increased costs and reduction of property values with no representation in the local government by virtue of their lack of resident voter status.

Commenter

Raul M Perez 3

Response

Thank you for your comment.

Comment # 379

The North Olympic Timber Action Committee has concerns regarding the. Dungeness WRIA18 East Rule because of the impact this rule would have on the citizens and economy of Clallam County.. This is a complex issue! You have published mounds of data but few examples that would inform property owners of the real impacts to their property.

The Department of Ecology needs to do more public outreach to inform the public that will be impacted by the proposed rule. This is too complex an issue to presume that if only a few have commented that the rest are not concerned. The North Olympic Timber Action Committee is asking the Department of Ecology to delay the final rule until there has been more outreach to the affected landowners.

Commenter

Carol Johnson, North Olympic Timber Action Committee 1, 10

Response

Thank you for your comment. Ecology, the Local Leaders Workgroup, and the Watershed Planning Unit have each provided significant opportunities for education and outreach relative to water resources issues in the Dungeness basin. We do not disagree with the potential benefit of additional outreach. We do disagree with the need to do it before the rule is in place. See also the general responses on Public outreach and Effects on future homebuilders.

Comment # 380

The Open House and Public Hearing for the 6/28/12 meeting agenda sheet states the meeting to be about the proposed water resources management rule yet the presentation was not this. Indeed, it was presented as a "done deal" with the meeting set only to comply with having a meeting. Is this a "proposal" which may be modified or not?

Commenter

Florence E Blay 6

Response

Ecology presented the proposed rule at the workshop preceding the hearing. The Administrative Procedures Act, Chapter 34.05 RCW, requires the filing of the proposed rule language, as intended for adoption. Agencies may modify proposed rules in response to the comments received. In January 2012, Ecology presented a preliminary draft rule and requested public input. Ecology then made changes to the preliminary draft rule in response to public comments. Ecology made additional changes before adopting the rule.

Comment # 381

Thank you all for you work on protecting the environment and our way of life. Please add an additional comment period after you have revised the WIRA 18 based on feedback from the community.

Commenter

Scott Gordon 1, 18

Response

Thank you for your comment. Ecology has offered the public more than one opportunity to comment during the rule development and rule adoption process. See also the general response on Public outreach.

Comment # 382

The Lower Elwha Klallam Tribe applauds the tireless efforts of the Department of Ecology in working with members of the public during the instream flow rule making process and developing a plan that is appropriate and site specific to the needs of the Dungeness watershed. Thank you for your time and effort in the culmination of this multi-year local planning effort.

Commenter

Doug Morrill & Matthew Beirne, Lower Elwha Klallam Tribe 3, 5

Response

Thank you for your comment.

Comment # 383

We want to recognize and thank Ecology for its efforts in working to inform the public by holding Q&A panels at two public open houses in January, meeting with numerous stakeholder groups, and distributing the Water Watch newsletter on behalf of the Local Leaders Water Management Work Group earlier this spring.

Commenter

Howard V Doherty Jr, Jim McEntire, & Michael C Chapman, Board of Clallam County Commissioners 1

Response

Thank you for your comment.

Comment # 384

Sunday's July 4, 2012, Peninsula Daily News printed an article stating the Clallam County Comissioners wrote a letter addressing the state Ecology proposed water mangement rule for the Dungeness Valley....stating the letter was "available" at www.clallam.net it was not found by me, after a frustrating search of that site. So far, everything about this "rule" is lacking in disclosure, ie last Thursday community meeting in Sequim was produced with unbelievable poor quality audio/visual aids and badly narrated as to render it useless for the average person attending to gain any knowledge about this rule....but, I suppose the Ecology department got a box checked for making the presentation to the community, no matter the quality or effectiveness. It clearly was not intended to inform. I can't imagine private sector company making a presentation of this quality to "sell" a potential customer.

Commenter

Charles Blood 2

Response

Thank you for the feedback about the quality of the audio/visual aids at the public hearing on June 28. We made a genuine effort to present information understandable to the general public. We also welcome questions through one-on-one conversations, telephone calls, and emails.

Comment # 385

Ecology with their open presentations and meetings is doing a good job up informing/educating the Sequim residents on good water management practices.

During the Sequim meeting/testimony, Ecology was very informative and appeared to be taking notes during the brutal testimony. We all benefited from the exchange. Although it is probably a state mandate, I do appreciate the solicitation of comments. Hopefully, Ecology had not already predetermined that this Water Management Policy will be implement.

Commenter

Warner J Litchfield 1, 19

Response

Thank you for your comment. See response to Comment # 380.

Comment # 386

How many people were anticipated to attend the public hearing in Sequim? The bureaucrats seemed surprised by the attendance – first by having to have a larger facility and second by not being prepared with audio-visual equipment to adequately provide for the size of the facility. Since the equipment was inadequate for viewing from a major part of the room, how can the meeting meet the requirements?

Was there sufficient notice in the change of venue?

What was the count in Sequim? A bureaucrat stated that the number was 100 but a member of the public in later public comments noted a count approaching 300. And how many more cycled through during the meeting because of other prior commitments?

Considering that the property owners are paying property tax and the state does have addresses for the all of the property owners, with merely a notice and hearing are these people receiving due process when their expectation rights are being taken?

Commenter

Bruce Larsen 1, 9

Response

Ecology believes there was sufficient notice of the change in venue for the public hearing. Approximately three hundred people attended the hearing and only two people went to the original location. See also general response on Public outreach.

Comment # 387

During the 1990's I formed a property owners association for individuals who owned river-front property along the Dungeness River. Its stated purposes were to protect their civil rights, property, and the environment from the programs that were being formed and implemented by the Dungeness River Management Team.

The name of that association was the "Dungeness Valley Association." We had slightly over one hundred members. That was a substantial proportion of the total community of river front property owners.

We were offered a seat on the DRMT only if we allowed them to appoint our representative. However, the members of the Dungeness Valley Association voted unanimously not to accept that seat, unless we elected our representative. Thus, they chose to be excluded from the process instead of allowing themselves to be mis-represented.

The suggestion that the various quasi-governmental committees, such as the DRMT, WRIA18, the Local Leaders Group, etc... in any way represent the public or have much public support, is very far from reality.

Commenter

Dr Robert N Crittenden 23

Response

Thank you for your comment. Ecology has heard from many people regarding the rule, both detractors and supporters.

Comment # 388

Ecology's proposed Rule represents the culmination of instream flow protection efforts for the Dungeness Basin that date back nearly 20 years. Our local members have actively participated in many of these efforts, including local watershed planning. Throughout this period, REALTORS® appreciate the time taken by Ecology staff to provide information and answer questions from our members, and to meet with stakeholders in the local area to understand the Proposed Rule and how it will impact landowners and the real estate industry.

Commenter

Faye Nelson, Washington Realtors 1; Heidi Hansen, Sequim Association of Realtors 1

Response

Thank you for your comment

Comment # 389

Besides the extensive and intensive work provided by Ecology staff to provide an understanding of this rule and its intent to manage our watershed's water resources consistent with the prior adopted Plan recommendations, Ecology's assistance in directing public funding for watershed projects is acknowledged and appreciated.

Commenter

Judy M Larson, Protect the Peninsula's Future 1

Response

Thank you for your comment.

Comment # 390

The signators on the Elwha-Dungeness Watershed Plan include the Olympic National Forest. Yet, most of the proposed Rule is about limiting exempt well usage in the Dungeness Valley. How would new wells or new water uses, to the North, impact wilderness lakes, like Gladys Lake or Moose Lake or Moose Lake? I would think that most of their water would come from snow melt and rainfall in the mountains and foothills. Yet, ONF had input. So did the City of Port Angeles, which is not part of the Dungeness Watershed. Fish and fishermen were represented by the Lower Elwha and Jamestown S'Klallam Tribes, and by two sports fishermen. The Environmental Caucus and Protect the Peninsula's Future were there. An interested individual was there. The DRMT and Clallam County were represented. The Department of Ecology was represented. Gary Gleason represented "Education," I'm not sure what the exact group was. The Clallam Conservation District was there, as well as the Dungeness Water Users. Peter (Pete) Schroeder is shown as a "Riverside Property Owner." I like and respect Pete. But, he is an environmentalist, who happens to own some property on the River. The Economic Development Council was represented. So, there would have been some input for business. But, what about the small farmers? Where were they? I don't see them there. The well drillers? The people who represented those with hobby farms, and exempt wells? They weren't on the group. A representative did come from the City of Sequim. But, he was not a powerful player, as the City of Port Angeles was the larger water purveyor. Where was the PUD? They are a major water purveyor in WRIA 18.

Every water group I have been on, has had much influence and "pushing" from agencies. The agencies are always the ones who present the ideas for the "stakeholders" to talk about. They set the table, then try to get the people at the table to all buy in to their agenda. These directed consensus groups are time-consuming, and draining. It is hard to get salient points across when you are facing the disapproval of a group that knows where they are going, ahead of time. That is one of the reasons that people who work, simply aren't willing to invest the time in coming to the table.

Those of us on the Water Working Group, for the WRIA 18 East tried to have some good discussions, and make some good points. And, there was a well driller on that group. But, we didn't get to take any votes. We didn't get to know much about what the Executive Committee was doing. They didn't have any minutes for us, or the public, to read. And, none of us, or the public, was invited to any of Executive committee meetings, until late in the process. I don't

think there were any business people on that committee; and, I don't know how any of them were chosen.

Yet, we hear that the Rule must be promulgated, as the Dungeness Watershed Management Plan laid out all of these things. I still remember, at one of the later meetings, long after the Plan had been adopted, when the specific idea of the "reserves," and how much water would be in them, was floated. No one had any idea that this would be part of the Rule. Maybe some people on the Executive Committee knew. But, those of us on the Water Working Group had not heard of it.

This has now become the Dungeness Water Management Rule. This Rule is not the Elwha-Dungeness Watershed Rule. Don't you think the people who live and work in the Sequim-Dungeness Valley should have more of a say? They now have, in their public testimony, and their written comments.

I support our County Commissioners, the letter from our REALTOR(R) Association, and so many of the excellent letters which have been written from individuals and groups. I sincerely hope that Ecology will listen to all of us.

If there is not community buy-in, then, who is it that you represent?

Thank you very much for listening to us.

Commenter

Marguerite A Glover 33, 34, 35, 37

Response

The rule is implementing recommendations in the Elwha-Dungeness Watershed Management Plan that are specific to East WRIA 18, the Dungeness Watershed. Many groups were invited to and took part in developing the original watershed plan. Since plan approval, Ecology has worked with many in the community to develop this rule. See also general response on Public outreach.

Water Supply Options

Comment # 391

I would encourage you to put dollars into education for water conservation to achieve your goals of inflow rather than mandated solution for buy in my all will be more effective in solving the water problem as you have defined it. Not sure of that either but I an no expert on

this except I look in the river every time I cross the Dungeness and I have never seen fish not being able to go up stream.

Commenter

David Unruh 2

Response

Thank you for your comment. Water conservation has been a significant part of the flow improvement effort in the Dungeness River over the past 15 years.

Comment # 392

If the Dept. of Ecology is concerned about the Dungeness Watershed and conservation of our water resource drives the proposed changes then why haven't conservation actions been applied by educating the community?

Commenter

R Doreen Emerson 5

Response

The importance of water conservation education was a frequent and high priority discussion during watershed planning. Influencing the water use practices of people now living in the Dungeness watershed has already been the subject of one conservation outreach grant, another is planned to begin soon. The objective is to increase awareness of both current and future residents. This second grant will cover classes on sustainable landscaping (which sustains itself without water) information on low- water practices.

We plan to pilot a voluntary performance auditing program for those who own or operate small irrigation systems on their property. Such systems can either fall into disrepair or outlive their usefulness once plants have become well established.

Other elements of this grant include outreach to a number of groups and preparation of written materials for broad distribution, for example by the County, Sequim, Port Angeles, public water system suppliers, and irrigation companies and districts.

Comment # 393

Future water needs can be met by educating the public about water conservation and by providing incentives for low flow plumbing in new homes and remodels.

Commenter

Carol Johnson, North Olympic Timber Action Committee 12

Response

Ecology disagrees. New consumptive uses will further reduce stream flows regardless of how efficient that use is. While conservation programs for existing homes could result in significant savings, there are obstacles to relying on conservation as a way to provide water for future needs. Existing homes rely on water rights that are senior to this rule and state law does not provide a legal mechanism for Ecology to enforce restrictions on established water rights. Voluntary conservation programs do not provide enough assurance to ensure the saved water is available for future new water users. Also, conservation from existing homes would need to be accurately documented, through metering of existing water users, to determine the amount of water available for new users.

Comment # 394

Why hasn't anyone explored the use of household Grey Water Systems? Instead we are encouraged to develop sewer systems verses our water efficient septic systems because septic systems can fail and cause pollution. When a single septic system fails there is minor pollution, but when a public sewer system fails there is major pollution.

Commenter

R Doreen Emerson 6

Response

Grey water systems do not reduce consumptive use. Typically, grey water is redirected from a septic tank drainfield or sewer to landscape irrigation. It offsets a freshwater demand, but does not reduce the impact of a residential water use to aquifers or streams that rely on the aquifer for base low.

Comment # 395

There has got to be a better way to accomplish the preservation of water rights for future property owners and to allow existing property owners to have water to use for normal household and garden functions. Conservation of water has not been addressed in the analysis that your staff has represented in public meetings. When asked about the storage of water and conservation practices, your staff has said that was not an area that was researched in the development of the proposed rule.

Commenter

Diann Dickey, John L Scott 3

Response

Please see the responses to Comment # 392 and Comment # 191.

Comment # 396

What are we to do now? There is no planned water service from the city of Sequim, as far as I know. Our property is outside of their boundaries.

Commenter

Richard Brough 4

Response

If your new domestic water use is subject to the rule, then you would be able to purchase a mitigation certificate from the Dungeness Water Exchange, and receive water through a mitigation project or by relying on the domestic water reserve.

Comment # 397

I have some property I have owned for about thirty five years. It is the site of my future retirement. I have installed a 4 bedroom septic system and well on the site. I understand that because of it's location (above the irrigation) That I may not even be able to purchase water in the future.

Commenter

Allan van der Waal 1, Joanne Beck 1

Response

Water for domestic water needs is explicitly provided by the rule's domestic water reserves. The amount of water reserved is sufficient, even in the most limited areas, to address several years of expected new domestic water development. Once effective mitigation projects are put into place, the effective life of the domestic water reserves will be extended.

Comment # 398

Solve the real long term problem, figure out where we get more water if we truly need it, such as tapping deep aquifer water going directly into the Strait without beneficial use and tail water

percolation into streams. Create more small farms. Preserve our open spaces. Quit subdividing properties for homebuilding. Grow something.

How about irrigation and transfer of water, energize, as suggested by Craig Ritchie? How about desalination? How about aquifer recharge of rivers by runoff for beneficial use? Cloud seeding over the Olympic Mountains, and pump the Elwha River.

Commenter

Jacques M Dulin 14, H8

Response

Thank you for your comment. Most of the water supply alternatives you mention were considered during watershed planning and subsequent meetings of the Local Leaders Water Management Work Group. This rule implements recommendations in the watershed plan. Please also see the response to Comment # 497.

Comment # 399

You need to look at other options for preserving water, and there are many that would be less expensive and less harmful to individuals and the economy of this area

Commenter

Roland Miller, Coldwell Banker Town & Country 6

Response

Ecology, the Dungeness Watershed Planning Unit, the Local Leaders Work Group, and the Washington Water Trust have looked at many options to provide water supply for future uses, and protect existing water resources and existing water rights.

Comment # 400

If indeed there is a need to reduce water usage, then look at limiting water amounts used by the golf courses, large box stores, school districts, state and government offices and the new multi apartment unit complexes. Put meters on all of them and offer incentives for reducing water consumption.

Do not restrict individuals who own their homes, plant gardens and orchards. Our rights as citizens of this country and tax payers of Clallam County are slowly eroded.

Commenter

Karen Huber 4

Response

Please see the general response on Prior appropriation: what's fair?. The rule cannot affect existing water rights. You express a priority based on the use of water; the current law does not support reallocating water from existing municipal, commercial, and domestic uses to make it available for individual homes, gardens, and orchards. Also, "golf courses, large box stores, school districts, state and government offices and the new multi apartment unit complexes" are the current users that already meter their water use or are connected to systems that meter their water use.

Comment # 401

We cannot continue the misguided approaches and policies of seeking water resources from distant watersheds to satisfy the water resource needs of rapidly growing populations. The preferred strategies for sustainable management of water resources must involve water conservation, minimization of exempt wells, and sensible water allocations during periods of low flows that minimize impacts to fisheries resources.

Commenter

Doug Morrill & Matthew Beirne, Lower Elwha Klallam Tribe 2

Response

The proposed rule does, in fact, move to a more sustainable model that relies on transferring existing water rights and projects to manage water for flow restoration, mitigation, and irrigation needs.

Comment # 402

In terms of future costs to ratepayers in public water systems, we understand that water management will be most efficient and associated costs of expanded infrastructure will be minimized if development is planned accordingly.

Commenter

Howard V Doherty Jr, Jim McEntire, & Michael C Chapman, Board of Clallam County Commissioners 13

Response

Thank you for your comment.

Comment # 403

Delay the rule until studies have more fully examined "creative" innovations to actually increase availability of water rather than merely concentrating on restricting usage. Such innovations could be water storage or banking whereby spring surpluses could be captured for use during times of lessened flow. (Maybe a reservoir or,even, a dam...)

Commenter

RA Pilling, Clallam County Republican Party 10, H10

Response

Ecology disagrees with the suggestion to delay rule adoption until a creative solution or storage increases availability of water supply. The rule provides for storage and supports establishing a water bank to meet the needs of new water users. The watershed plan included an assessment of potential storage options. The proposed rule includes a section, WAC 173-518-095, with a framework for evaluation of storage projects. The Legislature has not authorized Ecology to fund construction of a storage project.

Comment # 404

Tourism encourages much needed places for visitors to stay along with places for them to eat. Hotels/motels and restaurants use lots of water.

Plans for Sequim to enlarge by bringing in "big box" stores also uses our water. Not to mention the housing industry that seems to grow daily. Those who live in those homes use water.

In consideration of putting meters on our wells shouldn't the above be restrained instead of going full speed ahead? Most of us are water use conscious and do not need government restrictions.

Commenter

Jorita Jensen 2

Response

Thank you for your comment. The rule would apply a mitigation requirement and a measuring requirements to all new users of surface or groundwater.

Comment # 405

Even city and county governments make us get permits for rain barrel collection and even then we have to use a certain kind that the government specs for us to use rather than doing it the old fashioned way of just collecting the water, then distributing the water to our gardens or livestock. They have made it prohibitive. What is wrong with this practice, discouraging us from alternative way to water and not using ground water? This is not logical.

Commenter

Alaine Reeves 6

Response

Thank you for your comment. Ecology has an interpretive statement on its website that explains under what conditions rainwater catchments is allowed without a water right permit. Local ordinances are typically adopted to ensure public health is protected.

Comment # 406

DOE needs to be repurposed from expropriation and taxation via unnecessary rulemaking, to finding other sources of water, if, as it claims but cannot prove, we are short and must close the Basin, contrary to your authority and State Law. The alleged Basin over-appropriation is merely on paper, and our work on tight-lining has shown that we can conserve without interference from DOE.

Meantime, solve the real long term problem, figure out where we get more water if we truly need it, such as tapping deep aquifer water going directly into the Strait without beneficial use and tail water percolation into streams.

Commenter

Jacques M Dulin 22, 24

Response

The proposed rule provides a water management framework for the future. It provides ways to protect and restore stream flows, provides market-based reallocation mechanisms to provide for future new uses, and it provides a framework for appropriating water from the Dungeness

River for storage when it would not conflict with existing water rights and proposed instream flows. Further, it does not preclude development of water supplies based on sources outside the East WRIA 18 area.

Comment # 407

Much has been written and said about DOE's desire to regulate/manage the people in the valley. You really can't manage the water. If you were serious about managing water, you would simply build a dam/reservoir.

Commenter

Bob Forde 1

Response

Ecology funds and/or operates projects the Legislature authorizes. For example, Ecology owns and operates a dam on Osoyoos Lake because the Legislature determined it was in the best interests of the public to fulfill responsibilities negotiated by the US and Canada through the International Joint Commission. Ecology is also in the process of purchasing Sullivan Lake Dam as part of the Columbia Basin Water Supply Program, RCW 90.90, enacted by the Legislature in 2006. Ecology is serious about managing Washington's water resources.

Comment # 408

Is excess irrigation water currently being pumped back into the aquifer at a beneficial recharge location rather than being discharged back into a river or stream near the mouth? If not, this would be a good project for Ecology to consider funding.

Commenter

Warner J Litchfield 12

Response

Thank you for your comment. Shallow aquifer recharge projects are among the projects or activities the Dungeness Water Exchange has evaluated and plan to implement for its mitigation and flow restoration programs.

Comment # 409

Existing water purveyors: I fail to see the logic in allowing city water purveyors to continue to provide water for new residences while requiring mitigation for new rural homes on septic

systems. If the goal is to keep maximum water in the aquifers, Cities should clean/purify their sewer water and discharge it into beneficial recharge locations. Residential homes on a well already recycle water through the septic system.

I recommend that if additional water is really needed in the Dungeness aquifers, that the City be funded by the state to purify the liquid portion of their sewage and pump it back into the Aquifer at the most beneficial location.

Commenter

Warner J Litchfield 13

Response

Please see the general response regarding Prior appropriation: what's fair?. Additionally, the Legislature encourages Ecology to favor larger water supply systems over smaller systems (see RCW 90.54.020(8)) :

(8) 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.

The city of Sequim plans to use some of the reclaimed water from their sanitary sewer treatment system for shallow aquifer recharge to mitigate for new water use.

Comment # 410

It seems the science on whether restricting future well use will have ANY effect on instream flows is highly questionable, and even if it did, there are many other ways of mitigating this problem than slamming those few of us who have parcels in the affected area that aren't using water yet. How about a tax on ALL water users, PUD included, so we future well-drillers don't have to bear all the weight of this iffy science?

If you want residents to use less water, then you have to make it more expensive for everyone, not just future users, even if it means putting meters on all existing wells.

Commenter

Kathleen Cooper 4, 6, 10

Response

The science of hydrology and hydrogeology is quite settled. There is no scientific uncertainty about the the Second Law of Thermodynamics, also known as the principle of conservation of

mass. What is imprecise is the ability to calculate the specific amounts and locations of the impacts due to pumping specific wells. That ability is primarily a function of the financial resources available to study a hydrologic system, collect data, develop a model, calibrate the model, and then apply the model to assist with decision making. To date, local, state, and federal governments have spent more than \$1 million studying and modeling the surface water and groundwater systems in the Dungeness basin.

Ecology agrees with your comment that if water was more expensive, water users would use less. However, Ecology currently has no authority to set prices on water because the Legislature has not authorized it and Ecology's rules cannot affect existing water rights.

Comment # 411

Foremost among mitigation projects should be a network of diversions, pipelines, and infiltration structures designed to withdraw water from surface streams only when the levels are significantly higher than those needed for maintaining healthy stream flows, and infiltrate that water into the aquifer. This would provide aquifer recharge comparable to that which was formerly provided by the un-lined irrigation ditch network, without threatening the low flows of the streams in the basin.

This alternative would have a fraction of the overhead that the exchange would require, and by spreading a small assessment across the water users in the entire basin, would be more equitable at generating the same level of funding. I believe that if this alternative were offered to the voters of the Dungeness Basin, they would vote to impose this fee upon themselves. The same benefits would be achieved, fairly, and with a smaller cost.

Commenter

Tom Shindler 3

Response

Thank you for your comment. Please see the general response pertaining to Prior appropriation: what's fair?. If the Dungeness Basin voters approve such a plan as you suggest, the rule can accommodate such a solution. The rule does not prescribe or require a mitigation exchange, it allows for it. Any program that functionally accomplishes the water budget neutral requirement in the rule could replace or supplement a mitigation exchange.

Comment # 412

Ecology has been instrumental in having water user stakeholders come together to discuss and solve problems. (Witness DRMT, LLWG, and the incredible improvements to water

management developed by/with the Sequim-Dungeness Water Users Association.) Is there a possibility the Rule could set a “target” and let the locals agree on plans to try strategies, measure success, and reiterate as needed - true adaptive management?

Commenter

Judy M Larson, Protect the Peninsula’s Future 9

Response

Ecology is required to adopt a rule that includes the obligations accepted in the watershed plan. A rule relying only on adaptive management is not feasible.

Piping

Comment # 413

The Clallam Conservation District is obtaining a grant, to help the irrigators pipe even more miles of ditches. With the advent of this Water Rule, there should be parallel pipes--one, a line of perforated pipes, which would allow infiltration/aquifer recharge/stream enhancement, at the times of the year when there is more than enough flow in the River. Otherwise, these piping actions will further impact senior private and public well uses, along with small streams. In addition, small streams have, and will be, impacted greatly. For example, "The total 1997 average seasonal tailwater discharge to Matriotti was measured at 1.16 cfs." (5-23, in the FEIS) There are no tailwaters, with piping of the ditches.

Below is one of the discussions about the impact of the piping on existing water rights, from the FEIS:

“Non-Exempt (Public) Water Supply Wells

“Under the water level declines predicted by the Ecology 2003 model, non-exempt (public) water supply wells will lose a portion of their yield, but will still maintain production capacity yields. While this is different than for exempt wells (a percentage of which will lose their yield entirely, as discussed above), for non-exempt (public) water supply wells whose yields are larger, the implications and impacts of any of the action alternatives are significant. Silberhorn Wellfield production wells were estimated to lose a cumulative production capacity of 62 to 68 gpm. The Loma Vista Wellfield is predicted to experience a total decline in production of 196 to 214 gpm, and the Carlborg Well could experience a 57 to 72 gpm decline in capacity. The cumulative decline in well yield for the Sunland Water District (Domestic Wells #1 and #2) is predicted to be approximately 45 to 55 gpm.

“(Environmental Impacts, 5-55)”

Commenter

Marguerite A Glover 14, 18

Response

Thank you for your comment. You correctly point out that improving irrigation efficiency will tend to reduce water that leaks into the shallow aquifer and tends to maintain flow in the small streams. However, under the state water code, no water user has a right to continuation of surface or sub-surface return flow from less efficient water systems.

Comment # 414

If perforated pipes had been placed alongside the solid pipes when numerous ditch companies/districts enclosed their open ditches, water could have been put back into the aquifers during the high water months thereby preventing the wells in the valley from ever going dry. Why was Ecology in such a rush to pipe the ditches that they didn't do a test with the double pipes in Carlsborg as was considered at one time or just have the ditch companies/districts install the double pipes when they piped the ditches. Now Ecology mentions perforated pipes again. Kind of like shutting the barn door after the horse is gone. Ecology always seems to be in a rush to get things done without considering actual/all possible future consequences and that there might be a better way.

Commenter

Pamela Cameron 10

Response

Thank you for your comment. Please see the response to Comment # 413.

Comment # 415

In the Final Environmental Impact Statement for the Dungeness River Agricultural Water Users Association Comprehensive Water Conservation Plan, November 2003 (the piping project), we are told that some of the Exempt wells would no longer produce a reliable yield. (Environmental Impacts 5-55). This means they would go dry--and, have to be drilled deeper. And, even "Non-Exempt (Public) Water Supply Wells" would experience a loss in yield, due to the piping. In the authors' estimation, this would not severely impact their production, but isn't this an impairment of a senior right, in the name of saving federally threatened or endangered species, in the Dungeness River?

Commenter

Marguerite A Glover 12

Response

Please see the response to Comment # 413, and the general responses pertaining to Federal Reserved Water Rights and Prior appropriation: what's fair?.

Comment # 416

How is the irrigation water in the Dungeness Valley, that is now enclosed in pipes, being allowed to flow back into the Dungeness River to help with instream flows?

For over 100 years the aquifer underlying many residential wells and small streams such as Bell, Cassalery and Matriotti Creeks benefitted from the seepage from the unlined open irrigation ditches meandering through the valley. If the Department of Ecology's theory is that residential wells are using water that would normally eventually seep through the aquifer into a small feeder stream or directly into the Dungeness River, it would hold that the water from the unlined ditches would also end up back in the river. I feel the remaining unlined ditches should remain that way, with further piping terminated.

I assume that during low flow periods the irrigation ditches are closed at the headgates, but during the Winter and Spring, open unlined irrigation ditches would add significantly to the supply of ground water available for the drier months. Perhaps those irrigation ditches in pipes should be re-opened.

Commenter

Russ Mellon 1

Response

Please see the response to Comment # 413. Piping the irrigation ditches has resulted in decreasing the amount of water diverted from the Dungeness River. Substantial restoration of Dungeness River flow has occurred as a result.

Comment # 417

Now with the proposed water rule, you guys are crazy!! All your research on water levels was done before they began piping miles of irrigation ditches in the valley, which were the biggest water wasters. I think the science should be verified by "real" scientists, after new measurements are done.

Commenter

Mike Cameron 2

Response

Thank you for your comment.

Comment # 418

My husband and i have 1 1/4 acre off gupster rd. On gull lane in carlsborg, wa. We bought this as a nest egg a few years ago. One of the redeeming features was a gurgling irrigation ditch that was our own creek with birds and all the wildlife that abounded. This is now piped underground and a huge value/esthetic loss to us as the value has plummeted. Thankyou not very much!!

Commenter

Sandra K & Nick L Larson 1

Response

Thank you for your comment.

Growth

Comment # 419

Since the Dungeness - Elwha Watershed (WRIA 18) Plan was adopted in 2005 we have been working on rules to manage water in the eastern portion of WRIA 18. The Plan calls for instream flows to be established and this is what the proposed rule does. In the 7 years it has taken to get to this point all of us that have been involved have learned quite a bit about the laws that govern water in our state and about the hydrology of the Dungeness watershed.

U.S. Census data shows that the population of Clallam County in 1970 was less than 35,000. Sequim and the surrounding area was predominantly an agricultural community populated by about 2,000 people. Forty years later the 2010 U.S. Census data shows the County has a population of 71,404, over twice the population in 1970, with most of the increase occurring in the eastern portion of the County. This rate of growth is higher than what occurred in the state over the same time frame and much higher than what occurred nationwide. The quantity of water needed for this growth was large.

During this 40 year span the eastern portion of Clallam County has experienced considerable growth and development. And during those same 40 years fish populations in the area have experienced a dramatic downturn. Water quality has degraded, water quantity has decreased, habitat has been significantly altered and numerous species have been listed for protection under the Endangered Species Act. Water management has become a major need.

Commenter

Scott Chitwood, Jamestown S'Klallam Tribe 1

Response

Thank you for your comment. The seven years following adoption of the watershed plan have seen significant new development in east WRIA 18.

Comment # 420

The growth in the Sequim area, is a valid topic for public discussion and decision making. The tool to accomplish these are the argument of ideas, discovery and statements of fact, and elections; not rules drafted and implemented by Ecology officials well removed from electoral checks and balances.

Commenter

Raul M Perez 5

Response

Ecology disagrees. Individuals and agencies from all levels of government have been discovering, discussing, debating, and then planning the use of WRIA 18 water resources for more than 20 years. The Legislature, through RCW 90.82.130(3), requires Ecology to adopt rules implementing the obligations created in the watershed planning process. See also the general responses regarding Motivation and authority for adopting the rule and Public outreach.

Comment # 421

I am a building contractor in the area for the last 17 years. I am originally from California. I also was a contractor down there. I completely understand the urgency to slow the growth down in the area. As you know California had a population explosion that they are still suffering repercussions.

Commenter

Joe McDermott 1

Response

Thank you for your comment.

Comment # 422

Now the problem is too many people – overpopulation which feeds constant pressure from land developers and realtors.

The way to solve this is no more development in the Dungeness water shed. No more growth. End Growth!

Commenter

Edwin R Johnson 2

Response

Thank you for your comment. The rule does not prevent development, but instead allows development while protecting the rights of existing water users and stream flows needed for fish populations and other environmental values.

Current vs. Historical Water Use

Comment # 423

The target flow rates have been set at levels that the Dungeness river historically has never achieved. Over the past 50 years much of the on paper water allocation has been relinquished due to non use. As irrigation has decreased over the years the river has not conversely picked up any significant flow. Experts have calculated that the impact of the exempt wells in the Dungeness water shed account for around .2 to .7 cfs. of flow. Several of the larger water rights that are no longer used were for amounts of 4 cfs. Yet the river flow has not increased proportionately. Therefore it makes no sense that any form of management or manipulation of the water is going to raise the flow of the Dungeness to that which has been proposed as the target rate.

Commenter

Clarence Glover 1

Response

The target flow of 105 cfs was achieved every day during 2010 and 2011 and is exceeded over 90 percent of the time when compared to the long term record.

Streamflow has increased in the lower several miles of the Dungeness River since the 1980s. The long-term gage used by most to describe the streamflows in the Dungeness River is at

river mile 11.8 which is upstream of all of the irrigators' diversions. So even when irrigators diverted 150 cfs or more, these diversions could not be seen in those historic flow records.

However, there are a few years of streamflow data downstream of most or all of the diversions so we know what happened to the river due to diversions. The following paragraph summarizes the flow measurements but what is important to know is that the lower Dungeness River during late summer flowed 210 cfs around 1900, before the large diversions started in 1909, and then dropped to flows as low as 21 cfs in the late 1980s. After diversions were limited, starting in 1994, streamflows increased to around 110 cfs, and further increased to over 210 cfs the last two years.

The average September flow in the lower Dungeness River was **200 to 225 cfs** (RM 0.9) from 1899-1901; flow dropped according to spot measurements of **21 to 26 cfs** (RM 3.3) in September from 1987-1989; the average September flow stayed down at **57 cfs** in 1993 (RM 5.6); diversions were limited to 50 percent of flow starting in 1994; the monthly September average increased to **90 to 125 cfs** (RM 0.9) during 2000 to 2001; and has stayed about the same having averaged **113 cfs** (RM 0.8 Ecology Gage) from 2000 to 2011 with highs of **212 cfs** in 2010 and **222 cfs** in 2011.

Also, please see the general response to Science/fish.

Comment # 424

The Rule in WRIA-17 created reserves for future water use in many sub-basins. The Chimacum sub-basin saw severe restrictions to water and land use for homes and future agricultural.

Now, no new water is allowed for outdoor gardens and growing food in this, our primary farming area. A study conducted by Hydrologic Services (attached) showed that full build-out of the basin would have a consumptive use of only .3 cfs from permit exempt wells – very similar to water demand projections for the Dungeness - and only a small fraction of the water “right” provided to the streams for instream flow.

While both WRIAs are administratively deemed “water-short” and considered critical for fish habitat in terms of water availability, there is much to indicate that actual wet water is available and even plentiful at times. In Chimacum, and in the Dungeness, there is much good news that is not being considered.

A book from the Instream Flow Council (Integrated Approaches to Riverine Resource Stewardship) uses the Dungeness as one of its case studies. It shows 150 cfs used for irrigation in 1979, down to 56 in 2001. With less and less water being used, .3 cfs should be available to the community for future reasonable development without concern.

Commenter

Teren MacLeod, Jefferson County Association of Realtors 1

Response

The 90 percent exceedance flow for Chimacum Creek in August is 3 cfs and an additional 0.3 cfs withdrawal for new diversions would cause a 10 percent loss in streamflow and would likely cause a 10 percent decrease in the long term coho salmon population whose juveniles rear there in the summer. But another 0.3 cfs diversion may cause even a greater loss in the federally listed summer chum population due to a threshold-level effect on the adults that need enough depth to migrate upstream in September to spawn. The summer chum are migrating at existing streamflow levels that are close to preventing upstream migration which could lead to the collapse of the listed population in the creek. Streamflows are so low in Chimacum Creek that when the summer chum migrate upstream thru the riffles and tails of pools their eyes are out of the water. In recent years, streamflows have been measured as low as 1.0 cfs in summer in Chimacum Creek.

Many of the streams in the Dungeness River basin are also water-short with streamflows measured only in the tenths of a cfs in summer.

Comment # 425

And I'd also like to relate to you some experience that we had with 17, with our rule adoption to what is happening here. In WRIA 17, we had more reserves created for future water use in subbasins. The Chimacum subbasin, as you have heard, has had really severe restrictions to water and land use for homes and for agricultural uses.

This is our breadbasket for our community. Now, there is no new water allowed for outdoor gardens, for growing food in this primary farming area.

A study conducted by Hydrological Services presented to the WRIA 17 Planning Unit and funded by Washington Realtors showed that full build out of the Chimacum subbasin would have a consumptive use of only .3 cfs from permit exempt wells. You've heard a lot of numbers. Those are very, very low numbers, very similar to water projections that we are seeing here, and just a small tiny fraction of the water that is being asked to be provided to the streams in the water rights for the streams.

In fact, even in Chimacum, there are over 300 wells that have been built by people who wanted to retire there and have farms. They are now subject to those restrictions and not able to use their water for outside use.

So you'd think we were really in dire straits but, actually, in Chimacum and in the Dungeness here, there is much good news that we don't hear about and it's not being considered. A book from the Instream Flow Council uses the Dungeness as one of its cases studies. It shows 150 cfs used for irrigation in 1979 is down to 54 in 2001. With less and less water being used, wouldn't you'd think that .3 cfs could be available to this community without such great concern?

Commenter

Teren MacLeod, Government Affairs in Jefferson County H1

Response

Thank you for your comment. Comments about instream flow levels and projected growth in WRIA 17 are not relevant to this rule. Please see the response to Comment # 424 and the general response on Small impacts.

Comment # 426

Since Ecology alleges almost every home owner in the valley has already relinquished unused water rights and the Water Users/ditch companies/districts have also relinquished a substantial number of water rights, doesn't that mean that the actual number of allocated water rights that exist are far less than the number of allocated water rights that exist on paper?

Commenter

Pamela Cameron 8

Response

Ecology agrees that actual water rights are often less than the amounts appearing on the water right claims and certificates of water right. Whether that difference is the result of errors on the part of claimants' quantification of their use or if it is due to relinquishment for unexcused non-use is unique to each claim or certificate. Permit-exempt groundwater rights based on regular beneficial use typically have no paper documentation.

Comment # 427

Were the relinquished water rights from old farm property, and others, considered, when drafting the Rule? Was there an inventory or assessment done of these water rights that are no longer in use, and cannot be used, because of the five year relinquishment period?

Commenter

Marguerite A Glover 3

Response

Yes. RCW 90.82.070(1) requires:

- a. An estimate of the surface and ground water present in the management area;
- b. An estimate of the surface and ground water available in the management area, taking into account seasonal and other variations;
- c. An estimate of the water in the management area represented by claims in the water rights claims registry, water use permits, certificated rights, existing minimum instream flow rules, federally reserved rights, and any other rights to water;
- d. An estimate of the surface and ground water actually being used in the management area;
- e. An estimate of the water needed in the future for use in the management area;
- f. An identification of the location of areas where aquifers are known to recharge surface bodies of water and areas known to provide for the recharge of aquifers from the surface; and
- g. An estimate of the surface and ground water available for further appropriation, taking into account the minimum instream flows adopted by rule or to be adopted by rule under this chapter for streams in the management area including the data necessary to evaluate necessary flows for fish.

The assessment is contained in section 2.3 of the Watershed Planning Assessment Report.

Comment # 428

We believe that actual use is based on importance, even if they are not needed -- that is old water rights -- and includes the fact that the bulk of water users are residential only and never use their maximum allotment. I'll give you an example of when I lived in a house in Irondale. I paid a water bill. I never used more than 3,000 gallons a month even though exempt well, as you heard, can use 15 to 20 or unlimited water for stock a day. So we're talking ridiculous numbers here.

But this unused water, they don't know who doesn't use it, but it is taken into their calculations.

In the Dungeness Basin, figures are available to show that overall usage has declined, and you've heard about that before.

Commenter

Dr. Diane Johnson, Chimacum Grange No. 681 H3

Response

Thank you for your comment. Please see the response to Comment # 427.

Comment # 429

Irrigation uses have existed for over 100 years in the Dungeness watershed. In the 1920's state courts adjudicated the water rights of the various irrigators and issued certificates for specific volumes of water that when summed exceeded 500 cubic feet per second; far more than what the Dungeness River actually held for much of the annual cycle. We didn't manage water very well in the 1920's.

In the 1940's the state legislature passed a law that allows property owners to drill a well and use groundwater without acquiring a water right certificate. This law was created as a means of encouraging development in rural areas of the state. Much attention was given to how water could be used (up to 5,000 gallons a day or no limit if watering stock) but little attention was given to what would happen if too much water was used. We didn't manage water very well in the 1940's either. It really wasn't until watershed planning was developed, in the 1980's that we began to consider proper management of the public's water resources in the Dungeness.

Commenter

Scott Chitwood, Jamestown S'Klallam Tribe 3

Response

Thank you for your comment.

Comment # 430

Please consider the facts in the present inflow rule debate, and include in that consideration the work and efforts expended in the huge amounts of water already saved through the intensive water conservation measures taken by the irrigators. Also please consider that as we are able to make more sophisticated studies with better technology, we are learning that we have far more reserves in water than what was thought in the past.

Commenter

Cindy Alia 1

Response

Thank you for your comment. The irrigator's conservation measures, as well as sophisticated ground and surface water studies were taken into account during watershed planning and rule development.

Comment # 431

The first Dungeness River water diverted for agricultural irrigation was the Sequim Prairie ditch of 1896. The 1924 adjudication of Dungeness Water Rights allocated the potential for 581 cubic feet per second of surface water to be withdrawn from the Dungeness River, with a potential to irrigate up to 26,000 acres (information is from the July 2007 Jamestown S'Klallam Tribe Report called "Protecting and Restoring the Waters of the Dungeness." (Note that "The History of the Dungeness Area," by Welden and Virginia Clark, says it was 518 cfs. Bob Caldwell's research said that it was 518.16 cfs.)) Obviously, this was more water than was in the River, and was not sustainable.

In 1998, an MOU between the WA State Department of Ecology and the Dungeness Water Users Association was established. In it, the irrigators agreed to not withdraw more than 50% of the River flow, at any time. They also agreed to maximum acreage and diversion amounts. The legal limit was set at 0.02 cfs draw/acre. This is far less than many water rights certificates have on them. Many of those old water rights have been relinquished, due to non-use.

You probably heard of Woodcock Farms over on Woodcock Road. They had deed of water rights that had a priority date of 1899. Well, the family didn't know that this piece of paper would expire because it doesn't say so on it and so after five years of non-use they lost that water right.

There's plenty of examples like that in this valley. I have another one, somewhere in here, from the area where I happen to live where everybody who built in the area of Miller Tract, we all got to share a water right from Cassalery Creek. Well, most of us didn't do it and we lost that water right, a couple of them still do and I suspect that maybe that's where the Washington Water Trust is going to get some of that water, which would be just fine. I don't have a problem with that.

Currently, the WA State Department of Ecology and the Members of the Dungeness Water Users Association are working on a new Memorandum of Agreement. In 2011, the total acres irrigated in the Sequim-Dungeness Valley was 6,559. In recent history, irrigation withdrawals

have hit up to 93.5 cfs, for some individual ditches. But, the normal withdrawal, per Gary Smith, in the last five years, is 40-50 cfs. At the March 14, 2012 DRMT meeting, Cynthia Nelson (DOE) said that with all the irrigation and conservation improvements, even with evaporation in some parts, peak diversion has only been about 70-75 cfs. This is certainly far less than the "over-appropriation" of 518 cfs! Each year, due to irrigation efficiencies, relinquishment, piping, and less withdrawal from the Dungeness River and other streams, the Dungeness Watershed has seen less usage/consumption of river and stream water.

At the March 14, 2012 DRMT meeting, Bob Caldwell reported that 45.6 cfs was conserved, and put into trust (See page 3 of the approved meeting notes for that date.). 1/3 of this water will be available for the Water Users Association to use or to sell. 2/3 of the conserved water was "given" to instream flow. Why is this water not a credit towards our entire water budget? Why are we setting up a complex and expensive mitigation system, enforcement system, and Water Exchange, when the amount of exempt well buildout for the next twenty years was expected to be a maximum of .3 CFS (from an email written by Tryg Hoff, previous Ecology economist for the Dungeness Rule, on March 01, 2012)? Even if the expected consumption by all new wells in the Valley would be 2 CFS, this number is very insignificant, compared to the 15.2 cfs that was just saved for instream flow, for the Dungeness River.

Looking at the Fourth Final Draft of the new MOA, Ecology acknowledges that the "conserved and saved water as of December 31, 2010 is 45.6 cfs, representing 13,904 annual acre feet (AF)...""...Concurrently with execution of this MOA Ecology will provide the WUA members a written decision acknowledging and documenting the 15.08 cfs and 4598 annual AF in temporary trust for WUA members for future uses as provided in this MOA."..."the WUA members shall execute necessary deeds or water right conveyances to Ecology for the purpose of transferring from temporary trust to permanent (my bolding) trust for instream flow purposes 2/3 of the saved water (30.52 cfs, 9306 AF)."

30.52 cfs for the river. And, we are going to be penalized for "taking" from the River how many cfs? It's negligible, and has already been compensated for, thanks to the hard work of the irrigators. The new MOA will allow the irrigators to take up to 93.5 cfs, as long as that is no more than 50% of the River. They will also be allowed to irrigate up to 7,000 acres (Estimates of historic peak irrigated acreage was from 8,800 to 14,000 acres (Entrix, 2005)). In addition to the 50% agreement, the WUA members (irrigators) will not allow the River to fall below 60 cfs, below the USGS Gage (which is above the irrigation diversions). So, when the River is at 99 cfs, the irrigators will be allowed to take no more than 39 cfs.

In addition to these stipulations, when the WUA members take any water out of their temporary trust, to sell to the Water Exchange, or otherwise use for mitigation for groundwater uses, that same amount of cfs will be added to their actual diversion amounts. Using our previous example, the irrigators could now not take 39 cfs; instead, they would be allowed up to 37 cfs (if the River was at 99 cfs). So, the benefit is mostly going to the River.

Commenter

Marguerite A Glover 19, H1

Response

Please see the general responses on Small impacts and Prior appropriation: what's fair?. Although rural residential water use is only expected to result in a 2-3 cfs impact on streams over the next 20 years, the rule does not apply only to domestic use of water, it applies to all future beneficial uses of surface water and groundwater in the basin.

Comment # 432

I and my family have lived in the Sequim area since the 70's. We have seen a lot of changes. But, we haven't noticed much change in the amount of water in the Dungeness River. It looks the same, each year, as it always has!

I question the need for a water management rule, in the first place. The majority of the water being used, that impacts the river, is from irrigation. We need our farms to be healthy, and continue. But, with the loss of so many large farms, over decades, the irrigators now take far less water from the river.

There have been many water rights that have been relinquished, from the Dungeness River, Matriotti Creek, Sieberts Creek, Casselary Creek, and more. In addition, the Water Users' Association (Irrigators) use far less water than they did in the past. The Dungeness Watershed is not over-allocated (except on paper). There is no reason to close this basin.

This is ludicrous. We are in a watershed where the irrigators now use far less water than they had in the past. A watershed where many stream and river water rights have been relinquished. The remaining minor impacts from the well users, most of whom replenish the aquifer with clean water, from their septic systems, does not warrant all of these new regulations and costs.

Commenter

Dick Sutterlin 1; Marguerite A Glover 10; Sharon H Case 2

Response

Thank you for your comment. Please see the response to Comment # 423 and the general response on Science/fish regarding historical stream flow.

Comment # 433

I visited the very first presentation put on by the Department of Ecology for WRIA 18, and it was dubious from the get-go. I had lived in Sequim for at least 20 years at that point and have crossed the Dungeness River, on average, twice a day. Like any ordinary curious person, I look over the rail to see what's going on.

In over 20 years, despite his many, many people moving here and many, many wells being drilled, there was no apparent change in the river. It fluctuates up and down year after year, never goes dry, never once was there a salmon struggling to get up the river. It couldn't happen because, if there had been, the Sequim Gazette would have been there to take pictures. That would have been big news. It never happened. It won't happen.

I'm not a hydrologist, but I do have a reasonable portion of common sense. Now, a lot of what they told us at that meeting just -- it just made no sense.

In both the recent presentations by the Department of Ecology include the information that, "we never said that there was a shortage of water," which is true. All the propaganda pieces they put out -- go back and read what they said -- they never said that there was a shortage of water; they implied it 15 or 20 different ways, but they've never said it.

Commenter

Tom Williamson H1, H4

Response

Thank you for your comment. Please see the response to Comment # 423 and the general response on Science/fish on historical stream flow.

Comment # 434

Please set forth in detail: (a) the amounts of irrigator water rights (p. 10 of the preliminary CBA mentions 518 cfs in 1924), (b) when they were established, (c) where applicable, the dates on which failure to beneficially use each of those rights led to their automatic extinction, and (d) quantify in cfs rights for how much irrigation water were extinguished on what dates due to lack of beneficial use, and what rights are still in existence (with last known date of beneficial use). It is important to understand that water rights purchased by a water bank from irrigators actually are water rights that have been in recent enough beneficial use to still be valid. It also is important to understand by how much senior withdrawal rights have diminished since 1924 simply through non-use and relinquishment.

Commenter

Pearl Rains Hewett 51; Randy Simmons 41; Kaj Ahlburg 39

Response

Non-use does not result in relinquishment of the rights if it qualifies for one or more exception or sufficient cause under RCW 90.14.140. Ecology agrees that is important that water rights purchased for a water bank are valid rights. Absent a negotiated process to define the limit of the irrigators' rights subsequent to the 1924 adjudication, answering the questions posed is dependent upon a showing that there have been 5 years of more of non-use absent one or more of the 21 sufficient causes or exceptions to relinquishment.

Comment # 435

How does Ecology decide to close a basin that historically shows less water use every year? Why wasn't historic water use presented in the analysis? Why are water available and water used not described?

Commenter

Pearl Rains Hewett 59; Randy Simmons 49; Kaj Ahlburg 47

Response

When considering closure of a basin or stream, Ecology must consider whether water is available to reliably meet the expected needs of prospective water users, to satisfy existing water rights, and to provide base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigation. Please also see the response to Comment #427.

Comment # 436

Do residential users actually use 5000 gal a day? What data supports the daily usages of a residential, commercial and farm irrigation water?

Commenter

Richard & Jill Pinder 13, 14

Response

Some residential users may withdraw as much as 5000 gpd if they are serving a group domestic use.

Data pertaining to residential water use is widely available throughout Washington and the United States and is periodically summarized and published by USEPA and USGS. Land grant universities around the country, including Washington State University, have a long history of researching and publishing data related to crops of commercial interest. WSU has published several studies and developed models Ecology has used over the past 30 years to determine water requirements for various crops and the efficiency of various water delivery systems used to apply irrigation water. The Washington Irrigation Guide, published in 1990 by USDA, NRCS, and WSU Cooperative Extension is a primary source of information used by Ecology to estimate water requirements for irrigated agricultural uses.

Comment # 437

[Ecology's] education process has already significantly reduced the amount of water being used for irrigation purpose, thereby making much more water available for use by private wells.

Per Ecology publication #10-11-018 dtd June 2010, Water diversion for irrigation has been reduced from 100 cfs to 55 or 50 cfs. The reduction in use, at least 45 cfs, equals 162,000 cf per hour. If this water reduction is from an irrigation supply line which runs 24 hours a day, that equates to almost 4 million gallon of water a day that has already been saved in the past few years. This should provide ample water for a minimum of 8000 additional homes, assuming each uses not more than 500 gallons of water a day each with none of it being used to recharge the ground aquifer. Note: Ecology uses 150 gallons for home use per day with a 90% reduction for aquifer recharge through a septic system.

As farm land is sold and turned into residential home sites with septic systems, the use of water should continue to decrease and the available ground water should increase. Keep up the education process and continue learning. Come back in another 10 years and to see if we need to implement a water management program at that time.

Commenter

Warner J Litchfield 2

Response

The water conservation projects in the DWUA were funded by public agencies to achieve flow improvements in the Dungeness River. Also, the DWUA agreed to alter management of its water right in the late 1990s. The DWUA agreement with Ecology to hold the saved water in trust for instream flow purposes in the Dungeness River does not allow Ecology to conscript (without compensation) that water savings for meeting the needs of new water users. The DWUA has indicated it is willing to sell a portion of that water and that is one of the activities

that the Dungeness Water Exchange is pursuing. Please also see the responses to Comment # 393, Comment # 430, and Comment # 431.

Comment # 438

We have a client who has a 1937 water right to draw water from Matriotti Creek. In the last year he finally obtained an approval to move a pump station location 50 feet on Matriotti Creek after waiting over two years. When this approval came back it has come with some new conditions in which the owner had to prove his watering history which he has done. But, it also came back with a reduction in the water right from .8 cubic feet per second (CFS) to .55 CFS. The water right number for this client is CS2-SWC993.

So the question is, has Department of Ecology completed an assessment of all unused or relinquished water rights in the analysis and provided this as a reduction in the Over Appropriation equation that is being sited?

Please respond to my question with a list of all the relinquished historic Water Rights in the Sequim - Dungeness Valley since the formation of the ditch companies and districts created over 100 years ago.

Commenter

Ronald L Gilles 1

Response

Ecology makes a determination of extent and validity when it considers new water right or when it reviews proposed changes to existing water rights. Ecology has not performed an evaluation comparable to what you describe. The watershed planning unit did perform an assessment of surface and ground water rights and it is contained in the Watershed Plan's Phase 2 Assessment Report.

Justification of the Rule

Comment # 439

And for what? For a minimal amount of water to be “saved” for fish? (About 0.77 cfs out of minimum instream flow of 180 cfs). It's what the DOE's recently removed economist calls “2/10 of 1% of the river over a 100 year build out”. This is all over an extremely small and immeasurable amount of water. Further the “studies” – which in fact use modeling rather than empirical science (and modeling can be skewed as we know – garbage in, garbage out), are over 20 years old and haven't been updated. Some of the minimum flows Ecology requires

historically have been met only 10% of the time, and some never. Rather than protecting the water actually in the rivers, the rule attempts to restore the rivers to flow levels never actually achieved.

Commenter

Sue Forde 5

Response

The rule applies to all new uses of surface water and groundwater, not only to prospective domestic or residential water uses. Please see the response to Comment # 431. The rule protects instreams flow from the effects of new water users – it does not operate to restore flows.

Comment # 440

I have been a resident of Sequim my entire life. That would be almost 40 years. In my time here, I have not noticed any difference in the water flows of the Dungeness River. No I have not actually recorded the flows, it is just my observation that they have not changed. This would include a lot of changes in the amount of homes in the area as you can imagine since 1972 when I was born. I will admit that the fish population has declined drastically. That would be due to over fishing by everyone (commercial fisheries, the tribes and yes the sportsman as well). So I am wondering why we need to regulate the wells in the area except for an excuse to trample on the rights of land owners

Commenter

Bill Schroepfer 1

Response

Thank you for your comment. Please see the response to Comment # 423 and the general response on Science/fish on historical stream flow.

Comment # 441

The internal emails in the DOE show a clear disrespect for sound science. In stream flow rules are set higher than the Dungeness River levels have ever been during the dry season. No peer review of your flawed data by outside hydrologists and geologists has ever occurred. No connection between someone flushing their toilet and the river level has been scientifically proven.

Commenter

Dan Shotthafer 1, 3

Response

Thank you for your comment. Please see the response to Comment # 423 on historical stream flow and the general response on Science/fish regarding setting instream flows and peer reviewed studies.

Comment # 442

The science supporting this Rule does not appear to have a very good basis. Kind of reminds me of a collage class I took on “How to Lie With Statistics”.

Commenter

Pamela Cameron 2

Response

Please see the response to Comment # 564, and the general responses regarding Science/fish and the Groundwater model.

Comment # 443

Reference the Clallam County Commission letter of support for “business as usual” on those water resources submitted to DOE.

My comments:

Let me see if I have this right. Dick Pilling = develop every square foot of earth, pave it over and paint trees on the buildings. Pilling supports Commissioner’s letter.

My interpretation of the tenor of the Commissioner’s letter is as follows: "My expert says there is no connection between water in wells and water in the creeks and rivers." It would be nice if Commissioner McEntire identified his expert so that it can be determined if he/she/it is truly an expert or just a figment of Commissioner McEntire's imagination. This unidentified expert argument is continually repeated by those who ignore facts. Use of this tactic should not be allowed sway of the issue.

The Commissioner’s letter continues, "But, just in case someone vocally disagrees (like in court action) there may be a connection of well water to creek/river water, so if there is a

connection you (DOE) have to prove it before I will agree to limit use of water from the creeks"

In the meantime I (McEntire, Pilling, developers lobby) will grunt and snort in our efforts to exploit the environment to the fullest, just like we have done in the past with development and its impact on the Salmon. After all we are doing just fine without all those damned fish.

Wetlands are another good example of current policy. Locally, we have successfully ignored the law and have fully developed some of the swampiest, worthless wetlands and filled them in with pit run to create very livable homes, albeit a bit damp in the rainy season.

Furthermore, the massive dumping of garbage and toxics into the streams and the Strait shows not visible effects to my use of those resources, afterall the water is still blue and my yacht moves through it, same as in the good old days before those environmentalist nuts started all of that ballyhoo.

Burning all that leftover "wood junk" in the forests after tree harvest will not impact future tree growth, besides my expert assures me that trees are not plants and do not need replenishment of soil nutrients. We deserve electricity for our computer games. After we get that unregulated utility electric plant up and running, we figure it is Grandfathered and no court will reverse our actions.

The Commissioner's letter concludes: However, if all of that subterfuge won't work for my interests, then let's conduct a baseless economic study with phony assumptions and string it out for years and years, until no one cares about this issue anymore, while we make "best and most profitable development use" of the land. We were here first and we have the right to exploit our land any way we want to.

Summary of Commissioner's letter: The future be damned. You betcha! We won't be here that long anyway!!

Commenter

Harley M Oien 3

Response

Thank you for your comment.

Comment # 444

We attended the open house and public hearing on June 28, 2012. Please accept this email as our objection to the proposed "rule" for the following reasons. In 2004 we purchased 8.12 acres off of Happy Valley Road in Sequim (County) with the intention of one day building our

retirement home. Each successive year, we improved this acreage and completed a short plat. As part of the requirements of the County, we had to prove that there was water available. Each year after the purchase we made improvements, installed two wells, two pumps, provided road access improvements, underground electrical, telephone and lines for Highland Irrigation water and finally the septic system. You can appreciate that none of this is an inexpensive venture. Now, when we are at the threshold of finally building our home, we are facing an unknown financial impact that very possibly will prohibit the use of our property unless we pay a ransom in the form of mitigation (fees), face a loss not only of improvement costs but serious devaluation of our property.

Included in our Policy of Title Insurance are rights to water that have passed from one heir to the next and to ALL assigns thereafter. Having had no formal notification ever over the years, we continued with the development of the short plat, following all the rules - obtaining required permits, etc. With no inkling or fear concerning water, we proceeded.

After the open house and public hearing, we came away with certainty that this plan has not been realistically proven to be necessary. It has been proven that there is ample water in this area and that private water well usage has diminished consistently. In these economic times, it is virtually unbelievable that the Washington DOE will precipitate the loss of income to Clallam County (due to devaluation of property), to the individual property owners for the loss of use of their property and inhibit economic growth to peripheral businesses involved with property development.

Frankly, we don't understand why the DOE would further the downfall of the economy by imposing this unproven rule (theory).

Commenter

Jim & Geri Thomas 1, 2

Response

Please see the general response pertaining to Prior appropriation: what's fair? and the response to Comment # 564.

Comment # 445

I just want to say: We don't want it, it's not needed, and God has provided all these years -- many, many years -- ever since anybody's been living here, even including the Indians. It's just more control. And we see it coming down in every way, every shape, and every form, and more costs.

Our economy is slow, as we all know, in the last few years. There's much less building, much less new homes, and much less need for extra water., if there's no problem, then why create a problem when there's no problem. When you're out in the desert -- and I have never in my 20 years of living here, driven by and seen a dead crop from lack of water or lack of the ability to water and irrigate.

So I didn't quite see -- and I know there was a question earlier of who's against it and who's for it -- but I'd like to see the raised hands of the few that are up here now as to who is against this, please.

Thank you very much. I hope the Department of Ecology sees this and knows that's it's not a problem, and we don't want it.

I took a survey earlier of who was opposed to this rule, and I looked around and I saw every hand raised. Now, it's hard to tell for sure, and I don't know if our two distinguished people from the Department of Ecology were sitting in the audience at that time or that one guy from the Forestry Department, but what I saw was every hand raised. So all I want to do is put for the record that we here in this room are against this thing. And I would say 99-plus percent were against it. And that's for the record.

Commenter

Melvina Worman H1, H3, H4; 7, 9

Response

Thank you for your comment. Please see the general responses pertaining to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, Federal Reserved Water Rights, Science/fish, and the Groundwater model.

Comment # 446

Our area is sparsely populated – if flow levels are affected then why aren't densely populated areas showing this problem?

Commenter

CM Muller 2

Response

Thank you for your comment. Other areas of the state are suffering from reduced flows, including densely populated areas.

Comment # 447

The world is 2/3 water and the Department of Ecology is trying to charge us for it. Looks like overkill to me.

This is over reach, pure and simple.

Commenter

Richard French 6, Al King 1

Response

Thank you for your comment.

Comment # 448

Additionally, with the dramatic reduction in withdrawals from the Dungeness and its tributaries over the last several years, we believe the new instream flow rule is overly restrictive and would unnecessarily impact the lives of citizens in light of the dramatic increases in the efficient use of water in the basin.

Commenter

Washington REALTORS®, Washington Farm Bureau, Building Industry Association of WA, WA Cattlemen's Association, Washington State Grange, Association of Washington Business, North Peninsula Builders Association, Sequim Association of REALTORS®, Jefferson County Assoc. of REALTORS® 3; Helen Watkins H3

Response

Thank you for your comment. Please see the response to Comment # 437.

Comment # 449

With all the work in water conservation in the basin over the past several decades and the downward trajectory of water use this rule would seem unnecessary.

Did DOE ever say how many salmon we're saving?

The impact these wells have on the river is conjecture based on models, not empirical science. Were DOE's computer models crafted with the same lack of scruples demonstrated by their Economic Impact Statement? Are flow thresholds that are rarely if ever met appropriate in the real world?

Department of Ecology (DOE) contends that the river is over allocated and they throw around big numbers. They then turn around and tell us the water rights which have not been used for five years, a significant portion of their bandied about big number, are gone. Which is it DOE? You can't have it both ways! You have to subtract out the rights extinguished through non-use to arrive at the real allocation number.

Commenter

Steve Marble 4, 7, 8, H4, H7, H8

Response

Please see the response to Comment # 438 and the general response to Science/fish.

Comment # 450

We are in a very wet climate. We do not need or want this "rule" in our area!

To save some fish, our real estate values are allowed to collapse. All this in a climate that gets more rain than Noah did at the time of the great flood?

These areas receive an annual rainfall of many many feet. Water usage in these areas have never been proven to be taking or unbalancing anything from these lush rainforest climate ecosystems. Rural communities here have existed for over a century and they certainly have not grown. There is an over abundance of water on the Olympic Peninsula.

Washington is the "Evergreen State." It is evergreen due to the abundance of rain. I have doubts about the necessity of restricting water usage. Although I have concerns about population growth (in California, I saw that it can destroy an area), I do not think this rule is appropriate.

Commenter

Richard Brough 2; Joshua Worman 1; Marnee Foldoe 3; Brooke Dorhofer 2

Response

Thank you for your comment. Most of the Dungeness basin lays in the rainshadow of the Olympic Mountains. Average annual rainfall in Sequim is 16 inches. It is the driest area in Western Washington. See also Comment # 419 related to the population growth in the basin.

Comment # 451

There is no reason for this government intervention.

Please listen to the local people, and do not force this upon our community. It is unnecessary.

Commenter

dhupfer 1; Sharon H Case 7

Response

Thank you for your comment.

Comment # 452

In the 1940's, there were 949 farms with milk cows, in the Sequim-Dungeness Valley. The irrigation was flood irrigation, with high withdrawals off the Dungeness River. Yet, there were plenty of fish. Even with the increase in population, the amount of water pulled from the Dungeness River now is FAR less than what was used in previous times.

Commenter

Magan Waldron 1; Richard French 1; Sharon H Case 1

Response

Thank you for your comment. Please see the response to Comment # 70 and the general response on Small impacts.

Comment # 453

After the open house and public hearing, we came away with certainty that this plan has not been realistically proven to be necessary. It has been proven that there is ample water in this area and that private water well usage has diminished consistently. Frankly, we don't understand why the DOE would further the downfall of the economy by imposing this unproven rule (theory).

Commenter

Jim & Geri Thomas 2

Response

Thank you for your comment. Rather than “ample water,” the watershed plan determined that water supply is limited in the basin, which is the driest area of Western Washington. Similarly, Ecology disagrees with the assumption that total private well usage has decreased. Also, we are not aware of local data that suggests per capita or per household data pertaining to well usage for self-supplied systems has decreased. Please see Comment # 419 related to population growth in the basin.

Comment # 454

I'm am writing to let you know that I oppose the new water rules you are going to put into effect. My research shows that your assumptions are flawed and you will do doing nothing to save any salmon. All you will do is set up a draconian water exchange program that will harm the taxpayers of this area and create a hugh, costly government oversight organization

I simply ask that you cease and desist until you can prove the cause and effect and evaluate the economic consequences of your proposed water program

Commenter

Dan Hendrickson 1, 2

Response

Thank you for your comment. Please see the general response on Science/fish. The economic consequences of the rule are presented in the Cost Benefit Analysis for this rule.

Comment # 455

Exempt Well Withdrawals Are Not Causing Significant Impact on Streamflows.

Like in other instream flow rules recently adopted by Ecology, an underlying assumption is that impacts to streamflows have been directly caused by increased reliance on exempt groundwater wells that capture groundwater that otherwise would provide instream flow. While wells of a certain depth and location will capture groundwater that provide baseflow, the presumption that all wells must be regulated to protect surface water flows is not supported by the specific hydrogeology in WRIA 18.

While certain documents relating to the ISF Rule assume that the reliance on exempt wells over the past 30 years has caused instream flow impacts, actual flow data does not support this presumption. Specifically, see flow data again for September 1 for the period of record from 1937 to 1948:

Year	USGS Flows for Dungeness River
1948	162 cfs
1947	146 cfs
1946	237 cfs
1945	143 cfs
1944	97 cfs
1943	174 cfs
1942	140 cfs
1941	212 cfs
1940	162 cfs
1939	156 cfs
1938	160 cfs
1937	174 cfs

The flow levels on September 1 for this historical period of record are similar to actual flows on September 1 from the past decade – in spite of the increasing reliance on exempt groundwater withdrawals that appears to be a cause of Ecology’s concern for streamflows. While a short answer may be that changes in irrigation practices toward more efficient irrigation diversion and delivery methods has resulted in streamflow improvements that more than offset any groundwater withdrawal impacts, the reality is that far more will be done to protect streamflows by focusing efforts on continuing to improve the efficiency of all surface and groundwater diversions.

Commenter

Dennis Schultz, Olympic Stewardship Foundation 12; Bill Clarke, Washington Realtors/Sequim Realtors 4 ; Bill Riley, Washington Realtors 2

Response

The USGS gauge is upstream of the irrigator’s diversion and most groundwater withdrawals. Changes in water use by the DWUA and virtually all groundwater users are therefore not reflected in USGS gauge data.

Comment # 456

I have reviewed the “scientific” studies that Ecology is basing its findings for the proposed in Dungeness Water Management Rule (I have also reviewed this proposed rule) and fail to find adequate, peer reviewed studies that suggest Ecology has adequate information on the characteristics of the ground water aquifers in the Dungeness portion of the Elwha-Dungeness Water Resource Inventory (WRIA) 18 to make decisions and determinations on the ground water availability in this area. There have been no geophysical studies conducted, including

electromagnetic inductance, seismic reflection and refraction, or microgravity studies to identify potential sources of ground water, structural controls, and the recharge areas for the aquifers in this area. In fact, none of the studies I have reviewed were actually conducted to identify potential sources of ground water (to identify ground water availability for the entire Dungeness portion of WRIA 18), with most studies simply verifying what is already known, that perennial and seasonal streams are interconnected with ground water and that ground water does typically provide stream or river baseflow when there is no headwater source to maintain the surface water flow.

Considering Ecology is making finite determinations on a resource it knows very little about and the impacts of these determinations on the citizens of this portion of WRIA 18 can be profound and costly, it is unclear why Ecology did not conduct the detailed, comprehensive studies necessary to fully identify all potential ground water resources in this area and conduct the detailed stream and river studies (by licensed specialty geologists) necessary to establish the instream flow rule base lines for the rivers and streams in this portion of WRIA 18. The studies Ecology currently has are inadequate to make any definitive interpretations of the hydrogeology in this area or to determine how ground water withdrawals affect any surface water feature in this area (streams, rivers, ponds, lakes, etc.).

Additionally, I did not observe any hydrogeologic, hydrologic, geomorphologic, fluvial geomorphologic, and other geologic studies that would have had to be conducted on every stream and river to determine what aquifer(s) is providing the base flow for all reaches of these “streams” and rivers and how these aquifers are connected to domestic and agricultural use of the aquifers in this area of WRIA 18. Additionally, what peer reviewed scientific studies were conducted to determine what the minimum instream flows are for each of these streams and rivers? These studies would need to be signed and stamped by the specialty geologist who conducted or oversaw these studies and there would need to be clear evidence that independent peer review had been conducted (truly independent, using USGS or GSA peer review standards).

It is unclear where Ecology derived the flow rates presented Tables II A and B and how these correlate to ground water withdrawals in this portion of WRIA 18 considering virtually nothing is known about the subsurface hydrology in this area and no concerted effort has been made to learn anything about the ground water aquifers in this area or how they actually interact with surface water features. It is clear that Ecology has deviated from its mission in the 1960 when the water supply bulletins were being prepared and studies were being conducted to learn more about the available water supplies (ground water supplies) to a mission of completely inadequate studies to allow Ecology to apply the precautionary principal when establishing restrictions on ground water (and surface water) rights.

It is clear that Ecology has chosen to rely on the precautionary principal in lieu of conducting sound, comprehensive scientific studies to identify all potential sources of ground water in this

area of WRIA 18 and that the agency chooses to remain ignorant of the actual conditions in this area as a convenience to impose these restrictions, rather than funding the studies that are necessary to fully understand the availability of ground water in this area and how this ground water interacts with all surface water features. It is unclear why Ecology believes it has conducted adequate scientific studies, but it is clear that the level of study and the types of study are inadequate to make the determinations the Agency proposes in this Rule.

Ecology should not proceed until it has conducted due diligence to the maximum extent possible with comprehensive scientific studies that include a full array of geophysical studies.

Commenter

Steven Neugebauer 1, 3

Response

Ecology disagrees with your suggestion that due diligence requires a full array of geophysical studies. Typically, geologists do not conduct instream flow studies because they lack the training, knowledge, and experience needed to create hydraulic models of streams and correctly interpret the effect on salmon and steelhead populations resulting from habitat impacts due to changes in streamflow. Fish biologists and hydrologists have the necessary expertise. Please see the general responses to Science/fish and the Groundwater model.

Comment # 457

DOE could not make any guarantees this new water rule, once implemented, would enhance, protect, improve or add an ounce of water to our existing water situation. It appears that this rule, which is designed to serve the environment and the people, may not have been thoroughly researched, accurately prepared or ethically processed.

Commenter

Deborah Norman 2

Response

The rule is not designed to enhance or restore flows in the Dungeness River or the small streams. The rule protects those streams, and existing rights to those rivers and streams, from the adverse impacts of new consumptive water uses. The rule is the result of a long and detailed planning process at the direction of local governments in the area, including the County, with the participation of state agencies and tribes. Ecology disagrees with your postulation that the research for the plan and rule was not thorough, accurate, or that it is the result of unethical behavior.

Comment # 458

I quote from one email; " Is there a need for mitigation in this basin? No one has evaluated this except activists that say yes, you must mitigate everywhere. All the time! For every reason! This is nonsense, and overstepping our regulatory trust to make good judgement calls. The Dungeness basin is NOT a closed basin. ----You should only pull out the regulatory stick if you can prove that regulation is necessary to stop a runaway train. The fact is that there is plenty of legal water available in the basin."

Commenter

George Chandler 3

Response

Ecology disagrees.

Comment # 459

We believe that actual usage rates are important, even if they are not metered, and that includes the fact that the bulk of water users are residential only and NEVER use their maximum allotment--but that is the factor used by DOE in determining the "shortage" of water. If one looks at historic usage rates, even with projected future increases, the picture is one of abundance!

In the Dungeness Basin, figures are available to show that overall usage has declined dramatically over the last 20 years or so--irrigation needs and practices have changed, the type of crop has changed, and residential needs are significantly lower than those of large herds of cattle and hayfields. Conservation efforts have been extensive and effective. More is being done with less, and there is more water in the river now than ever.

Commenter

Dr Diane Johnson, Chimacum Grange #681 3

Response

Thank you for your comment. Please see the response to Comment # 437.

Comment # 460

Why the DOE would subject the citizens of the Dungeness Valley to pay \$42 million in mitigation costs for no proven benefit, whether to fish or habitat, much less benefit to the people, is beyond belief.

Commenter

Jacques M Dulin 8

Response

Please see the responses to Comment # 261 and Comment # 406.

Comment # 461

I understand the need for and believe in sensible water management. The current system is working well and does not need change.

Commenter

Andy Sallee 3

Response

The current system does not work so well for those with interests in protecting or restoring streamflows, or those who require a permit to use ground or surface water.

Comment # 462

Sounds like another way to create more government jobs and expense accounts for the cost of state employees using SUV's to drive around and spy on local citizens.

Commenter

Karen Huber 3

Response

Thank you for your comment. Ecology will not profit from the implementation of the rule or the operation of the Exchange.

Comment # 463

Is this indeed a solution looking for a problem by an out-of-control agency? If not, when might we expect to see some technical proof of that?

In the opinion of many, however, DOE has proposed a solution in desperate search of a problem... that there is no problem and, moreover, if there was, DOE's proposal would have little impact upon it.

Your Dungeness Water Rule Seems to be a very radical solution desperately in search of a problem. You need to state the problem before the solutions - not after. It would appear you are trying to solve a water shortage problem - but we have none. We sit at the base of a mountain range that gathers water and dumps it on us thru both rivers and aquifers, with salt water to the North of us. We are blessed with a plethora of water.. And any water we don't use is turned into salt and evaporated and returned to the mountains.

Please state the problem you are going to solve before stating the solution.

If your claim is a shortage of water, then provide some real scientific basis for it.

Commenter

John Mackay 2, 4; RA Pilling, Clallam County Republican Party 4, H4; J Marvin Chastain 1

Response

Thank you for your comment. The water resource management problems in the Dungeness watershed are described in the 2005 Watershed Plan and the Phase 2 assessment report preceding it. Please also see the general response to Science/fish.

Comment # 464

I am strongly opposed to the upcoming unnecessary well restriction. Besides being unnecessary it is unfair. Please reconsider, there is no real reason for this extreme measure. What is the real agenda?

Commenter

Ed Sumpter 1, 4

Response

Ecology disagrees. Please see the general responses pertaining to Motivation and authority for adopting the rule and Prior appropriation: what's fair?. The purpose of the rule is to protect existing water rights, ensure adequate instream flows for aquatic resources, and to provide reliable water for future domestic uses.

Comment # 465

The standards to be applied to determine volumes, pricing, wildlife mitigation, etc. rely on data that is not available or at best incomplete. Therefore, it appears that the proposal is a set of assumptions developed to support a predetermined conclusion.

A believable case has not been made to support a need for this proposal's conclusions. There is no factual evidence that we are going to have a serious shortage of water. Many of the local citizens do not believe any real assessment of other alternatives, e.g. water from other areas, were considered.

Commenter

Jerald R Sinn 3, 5

Response

Thank you for your comment. It is unclear what you are referring to with regard to assumptions. Not only will the Dungeness basin have serious shortages of water in the future, it had serious shortages in 2001 and 2005. Perhaps you were not affected, but others were.

Comment # 466

I would like to protest both the form & function of DOE's proposed WRIA 18 E rule. Upon review of the pending realities associated with this proposed rule, an analysis of objections & overwhelming public sentiment, it is clear that DOE has little substantive science to support this rule.

Commenter

W David Sharman 1

Response

Ecology disagrees. Please see the general responses pertaining to Science/fish and Groundwater model.

Comment # 467

The facts that came out at the meeting indicated that extremely shoddy work was done by your agency and give one the impression that perhaps some laws are being broken by Ecology employees in the furtherance of this agenda and also the No Net Loss program being shepherded through the process by the well compensated ESA Adolphson group.

Commenter

Robert C McGonigel 2

Response

Thank you for your comment. The mitigation requirement in the proposed rule and the Dungeness Water Exchange's mitigation program, which is designed to make compliance with the proposed rule simpler for most new water users, has nothing to do with ESA Adolphson.

Comment # 468

The Department has not made their case. That is, they have not presented a comprehensive report that tells exactly how the various reports and studies support their proposed rule. They leave the public to guess what their reasoning might be. The Department really needs to make their case.

Commenter

Dr Robert N Crittenden 27

Response

We disagree. Ecology is required to adopt a rule implementing the obligations contained in the 2005 watershed plan. The Planning Unit process and the adoption process by the Clallam County Commission form the basis for the instream flow recommendations in the proposed rule. Additionally, Ecology spent several years working with the Dungeness River Executive Committee and the Local Leaders Work Group to improve understanding of and commitment to the recommendations in the plan. Please see the general response pertaining to Motivation and authority for adopting the rule.

Comment # 469

My Husband and I attended the WRIA 18 open house last night and I want to state in simple terms that all the intellectual data, charts etc. did not impress us. We can see that this whole ploy about the fish is a cover up for the control of the water and to be able to meter wells in the future. The state as we all know is in dire need of revenue and they are looking for all ways to derive income from the tax payers. It is the spending of money in our state that has caused this dilemma and has giving the Dept of Ecology the task to create a reason for well metering so as to extort more needed income. The state has calculated the lost revenue earned from private wells in the state of Wa.

This is all smoke and mirrors to detract from the real issues. And last night was just a dog and pony show because in the scheme of things to come the Dept of Ecology has been given rights to do what ever it wants to do no matter how many of us object with great facts.

Commenter

Nelson & Carol Topper 1, 3

Response

Thank you for your comment. This rule is not about control, it is about a putting a more sustainable water management program in place. See the response to Comment # 261 and the general response to Motivation and authority for adopting the rule.

Comment # 470

I am not one to write letters to public officials, having been a congressional staffer to a Congressman for 7 years, but I find I must now. I have watched this process over the past several years and am increasingly skeptical of the process itself, the science, the population growth projections, etc. And the revelation of e-mails from a high-ranking official are especially unsettling. PLEASE carefully consider the statement from the Clallam County Commissioners, those closest to the residents impacted. Ecology should serve people too!!

Commenter

Jane Manzer 1, 2, 3

Response

Thank you for your comment. Please see the response to Comment #261 and the general response to Motivation and authority for adopting the rule.

Comment # 471

Who made the determination that a need for this rule was necessary and was it backed by concurring scientific analyses that would withstand "outside of Ecology "critical review ?

A)Who made the determination that the "remedy" fit the problem as a solution? With what scientific analyses? Was it computer based analysis?

B) What if any "pro/con" analysis was made about the proposed remedy, in view of the negative aspects on livability here in the Dungeness Valley this rule dictates. Are those data available for public review ?

Commenter

Charles Blood 3

Response

Please see the response to Comment # 564 and the general responses regarding Motivation and authority for adopting the rule, Science/fish and the Groundwater model.

Comment # 472

This action will put a very high cost on development with no evidence of a return. You do not even know if we have a problem. As the land use changes to less agriculture (a sign of land use that is changing) thus water use is changing. The water needs are changing. We do not need a fix for a problem that doesn't exist.

Commenter

Bill Hermann 3

Response

Please see the response to Comment # 406. Ecology agrees that surface water and groundwater uses have been changing and they will continue to change to reflect a growing population.

Comment # 473

Please go back to refining the scientific data used to develop this rule and give a fair and objective assessment of whether it is necessary to restrict water use in the Dungeness River Valley. Is there really a problem with instream water flow? Has the water flow actually diminished over the recorded history?

Commenter

Diann Dickey, John L Scott 4

Response

Ecology recognizes the Dungeness River flow has been reduced seasonally by DWUA diversions for more than 100 years. Restoring Dungeness River flow in recent years has led to infrastructure and management changes within the DWUA service areas that have led to

reducing flow in the small streams and water levels in some portions of the shallow aquifer. Please see the response to Comment #423 and the general response to Science/fish.

Comment # 474

We are pretty much at the end of the water chain in our location. So, how does my location affect water usage as much; it goes right back into the ground and right out to the straights eventually.....?

Commenter

Alaine Reeves 4

Response

Thank you for your comment. Ecology acknowledges that well use in some areas, such as the shallow aquifer near marine waters, will have little impact on surface water levels in the basin. The rule allows for this in WAC 173-518-070, where future users that can demonstrate the potential use will not impact closed surface waters will not need to mitigate. Please also see the response to Comment #497.

Comment # 475

Stop this rule until an independent study has been completed to support DOE theory.

A thorough unbiased investigatioin as to the scientific merit of your arguments should be initiated, undertaken, and published.

Commenter

Melissa Soares 1 ; Andrew Watkins 2

Response

Thank you for your comment. Please see the general responses regarding Science/fish and the Groundwater model.

Comment # 476

Is there a problem in the water shed or is DOE looking for control of the water usage and rights of the Clallam County citizens and businesses?

If there is a water right law in effect for the state of Washington, Why does the DOE feel the need to create a rule for water management in Clallam County Dungeness water shed?

What are the currant facts and data to back up the WRIA 18 rule proposal?

Where is the evidence of water usage at various times of the year that would impact ground water, stream and rivers?

Is average rain fall and snow pack a consideration when analyzing the water usage of a certain area whether it is Clallam, Jefferson or any other county in the state?

If WRIA 18 water usage is being measured by the Agricultural Water Users Association and the City of Sequim why do we need more regulation by the DOE?

Commenter

Richard & Jill Pinder 1, 3, 4, 5, 6, 10

Response

Thank you for your comment. Please see the general response to Motivation and authority for adopting the rule, Science/fish, the Groundwater model, and the response to Comment # 248. The commenter is encouraged to review the 2005 Watershed Plan and the Phase 2 Assessment Report preceding it.

Comment # 477

The Dungeness Basin has been using less and less water and has invested a great deal of money to restore habitat and water to the Dungeness River. Why would Ecology implement such draconian measures in an area that is using less and less water? Per your own department studies, we would use a very small amount of water if the area covered by WRIA 18 was developed under current zoning and if it was all developed using exempt wells. The USGS flow chart for the Dungeness River shows that there has not been a significant change in the flows to this river. The flows from the years 1937 to 1948 are not significantly different than what they have been for the last 10 years. The exempt wells are not, have not, and will not have a significant impact on Streamflows. There is no need for this rule.

Commenter

Helen L Watkins 6

Response

Thank you for your comment. Please see the responses to Comments #430, # 432, and #455, and the general responses to Science/fish on historical stream flow, and Small impacts.

Comment # 478

Mitigation - water for money: If as implied, there is water available to sell, then water must currently be available. So, there is no water shortage -- rights!. Why is this rule being considered?

Commenter

Warner J Litchfield 14

Response

Thank you for your comment. Water that could be purchased to put into the Water Exchange is currently held in senior water rights. There is no new water available except from November 16 to July 14 on the Dungeness mainstem, subject to interruption when instream flows are not met, and also subject to the maximum allocations in WAC 173-518-090. Please also see the general response regarding Motivation and authority for adopting the rule.

Comment # 479

If your rule is based on facts not theory it would have more respect and leverage.

Commenter

Sandra K & Nick L Larson 4

Response

Thank you for your comment.

Comment # 480

In the Dungeness Basin, Past Public Investments in Streamflow Restoration Make the Proposed Rule Unnecessary – And Show Why a Capital Approach, Not a Regulatory Approach, Is Best Suited for Instream Flow Protections.

Ecology's recent success in using public funds to restore streamflows in the Dungeness Basin is well-documented. Washington State University and the University of Washington

completed a study in 2004 on Ecology's water acquisition program that detailed the extent of efforts in the Dungeness Basin. The report states as follows:

In the Dungeness Area, agricultural water users have been relatively receptive to the Water Acquisition Program. In 2001, thirteen one-year split-season leases (August 1 to September 15) totaling 417 acre-feet per year were completed. The combination of water right leases and irrigation system improvements in 2001 resulted in an estimated 8.5 cfs of additional water in the Dungeness River. In 2003, twenty-five similar split season leases were concluded, each for a three- year period, totaling 10.17 cfs.

Of Water and Trust: A Review of the Washington Water Acquisition Program; Prepared By Nicholas P. Lovrich (Principal Investigator), Washington State University and Dan Siemann, University of Washington (secondary authors omitted), March 2004, page 9, Exhibit B.

These instream flow improvements were the result of significant state and federal funding. As described by Ecology:

State, federal, and local partners have invested 26 million dollars in salmon habitat recovery projects in the last approximately 15 years in the Dungeness of which 10.5 million was for water conservation, irrigation efficiency, and acquisition projects to improve flow in the Dungeness. Diversions were reduced by about 10 cfs during that period. That's about \$1 million per cfs of flow improvement.

January 23, 2012 email from Tom Loranger [Exhibit C]

Finally, these recent improvements in Dungeness Basin streamflows should be viewed in the context of streamflow improvements achieved over the past few decades. A review of Dungeness River water use efficiency programs concluded that diversions from Dungeness River have been reduced from the pre-1979 average of 150 cfs, to 109 cfs before 1990, and down to 56 cfs in 2001.

In recent years, increasing efficiency has created a significant reduction in agricultural diversions. Diversions have dropped from a seasonal average of 150 cfs (4.3 cms) during flood irrigation (before 1979) to 109 cfs (3.1 cms) (before 1990) to 56 cfs (1.6 cms) in 2001.

Integrated Approaches to Riverine Resource Stewardship: Case Studies, Science, Law, People, and Policy, Allan Locke, Hal Beecher (and other co-authors), Instream Flow Council.

The substantive improvements in streamflows must be compared to the relative impact of future exempt withdrawals as calculated by Ecology. Ecology has calculated the likely consumptive impact of exempt wells in the Dungeness Basin, including all regulated tributary sub-basins, as part of the Proposed Rule. In this analysis, Ecology projects for the next 20 years the same rural development growth rate as occurred in the watershed from 1990 – 2010, which

Ecology acknowledged was “a flawed assumption as the current well construction [sic] is about half of the rate observed between 1990 and 2010.” February 2, 2012 email from Dave Nazy [Exhibit D]. Ecology then calculated average annual consumption of 100 gallons per day, and maximum daily consumptive use in July of 320 gallons per day, accounting for higher indoor and outdoor water use during the peak water use months of summer. Based on this, Ecology calculated the impacts from new exempt wells as follows:

Average Instantaneous Consumptive Use in WRIA 18 Over 20 years .5487 cfs
Maximum Instantaneous Consumptive Use in WRIA 18 Over 20 years 1.75 cfs
February 2, 2012 email from Dave Nazy (Exhibit D)

Thus, assuming a rural development growth rate equal to the housing boom period that Ecology acknowledges as “a flawed assumption,” the consumptive impact of all new exempt wells of 1.75 cfs is only 17.5% of the streamflow diversion reductions already achieved by Ecology. Further, while the streamflow improvements occurred with surface water rights having direct and immediate impacts on the Dungeness River and tributaries, these exempt well “impacts” are occurring through wells that will varying distances from surface waters, thus having indirect and often immeasurable impacts.

A different Ecology analysis concluded that the Proposed Rule would prevent impacts of about .77 cfs across the entire basin over the next 20 years. March 7, 2012 email from Tryg Hoff, Exhibit E. A third Ecology analysis, based on Office of Financial Management information was summarized as follows: “OFM estimates of new residences in the unincorporated areas of the Dungeness in the next 20 years: 2000 to 3500, @ 350 gallons per day consumptive use per exempt well, this would be 1.1 to 1.9 cfs of consumptive use. January 23, 2012 email from Tom Loranger, Exhibit C.

Altogether, these impact estimates compared to past Ecology investments in Dungeness Basin streamflow restoration show why the Proposed Rule should not be adopted. After investing \$10 million in public funds to obtain a 10 cfs improvement, plus an additional \$16 million in related habitat restoration work, Ecology is now poised to adopt a rule for which the agency’s own numbers show a cost impact of between \$7.7 million and \$23 million – all to prevent somewhere between .77 cfs and 1.9 cfs of impact on streamflows. And this level of impact is based on assumed growth rates equal to the housing boom of 1990 – 2010, assuming that groundwater withdrawals have identical impacts on streamflows as surface water diversions, and assuming 350 gallons per day of consumptive use for each new exempt well, none of which are logical assumptions.

Commenter

Bill Clarke, Washington Realtors/Sequim Realtors 3

Response

Ecology calculated the potential consumptive use impact from rural residential water use when we prepared the Cost Benefit Analysis (CBA). One item on the benefit side of the ledger is the estimated number of fish “saved” as a result of managing future new uses of water. The consumptive use impact was part of the calculation to estimate the benefits to fish. Please see the CBA for a description of the analysis.

Ecology was deliberately conservative when we did this calculation to avoid inflating the estimated benefits of the rule. Only the impact of rural residential (permit-exempt) water use was calculated, consequently, the conclusion that all new uses over the next 20 years will result in small or de minimis impact to surface water absent a rule is not well founded. Also, new uses will affect several small streams, and not only the Dungeness River.

Comparison of the future impacts of only one category of future use (rural residential) to the river flow improvement derived from publicly funded Dungeness basin irrigation improvement projects over the past 15 years doesn’t offer a sound basis to conclude whether a rule should be adopted that addresses all future surface water and ground water uses and establishes instream flows to protect aquatic resources. Even if we were to limit our consideration to the de minimus impact of rural residential water use, Ecology could not ignore that impact. Please see the general response on Small impacts.

Comment # 481

All streams flow into the sea, yet the sea is never full. To the place the streams come from, there they return again.

As the water cycles, I buy property and use the water that cycles through my property. Use your water on your property and keep the thieves away from my water!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!

Commenter

Daniel 1

Response

All water in Washington is owned by the public, and regulated through water rights that are based on beneficial use. Please see the general response pertaining to Prior appropriation: what’s fair?.

Fish

Comment # 482

The rule places the interest of fish, salmon, as the best and highest use of the Dungeness basin's water. Even if this were a view held by the preponderance of the residents, salmon numbers are also subject to ocean predation and commercial fishing losses; therefore, restrictions on private well use may in the end accomplish little to increase population. We can all agree that the salmon require some stream flow for reproduction. However, in my reading about the issue, Dungeness flows are currently higher than in the 1950s when agriculture was more widespread in the valley --yet fish numbers are lower now.

Commenter

Raul M Perez 1

Response

There is no evidence that there were more fish salmon and steelhead in the Dungeness River in the 1950s. WDFW's database has no counts for Dungeness River summer steelhead, fall and summer chum, and Coho salmon during the 1950s. WDFW only began counting Chinook and pink salmon and steelhead in the mid-1980s. The population counts for pink and Chinook salmon show their numbers have increased since WDFW started counting in 1985 and 1986, respectively.

In 1975, the Department of Fisheries, in their Catalog of Washington Streams and Salmon Utilization, said the Dungeness State Salmon Hatchery at river mile 10.5 was built in 1902 and was successful until 1909 when extensive irrigation projects were developed along the river. Severe depletions in the spawning stocks were noted thereafter. The report noted (in 1975) that although the Dungeness River hatchery had been artificially propagating spring Chinook for over three decades, the runs had not increased appreciably.

Comment # 483

I am also concerned that there has been no outside study of the plan to check the "science" (remember historically the river has never flowed at the rate the rule is mandating) even though historically there have been salmon runs with much larger yields than currently seen. This suggests that outside forces are responsible for the depleted salmon numbers. Commercial fishing in the ocean, the practice of netting near the mouth of the river during the fall run (I have personally observed a trawler dragging a net in Dungeness Bay during last year's fall run) and possibly environmental issues in the strait may be the cause of depleting numbers rather than the flow rate.

Commenter

Doug Hale, Coldwell Banker Town & Country 4

Response

Thank you for your comment. Please see the response to Comment # 482.

Comment # 484

The Rule, at best would protect .29 - .77 cfs, a trivial amount of water from the watershed, even assuming, arguendo, that DOE is justified in relying on the flawed baseline measurements of historic stream flow and toe width values. There is no proof that the Rule will save any fish, much less large quantities of fish. It also begs the question of for whom fish are being saved and for what purpose? For gil netting, or for looking at and saying “how wonderful”?

Commenter

Jacques M Dulin 2

Response

Setting an instream flow rule to provide water supply while preserving fish habitat is done for the citizens of the state of Washington. The Water Resources Act of 1971 (RCW 90.54) lists the fundamental purposes for setting instream flows. Please also see the general response on Small impacts.

Comment # 485

[Salmon] Harvest opportunity has been reduced in many cases and eliminated in others. Hatchery operations, often the only type of production that offers Tribes harvestable salmon, have been reduced. All in the name of salmon populations and their recovery plans. Yet the rate of habitat decline marches on. There is no change in how we treat our habitat as we continue to alter our shorelines, uplands, riparian zones, floodplains, and channel migration zones. These habitats continue to degrade. Docks continue to be built, rip-rap is as popular as ever, stream bank armoring projects big and small are permitted, and encroachment on valuable fish and wildlife habitat remains common.

Habitat management measures are not keeping pace with harvest and hatchery management measures. We are losing our habitat faster than we can restore it. Salmon are not recovering. Treaty Rights are not protected. Water resource management is needed in WRIA 18.

In the Dungeness watershed, water = habitat = fish. This is a linear relationship, a well proven one. The proposed rule seeks to establish instream flows for fish. People have rights to the

water. These rights are in place and have been in place for almost 100 years. People cannot live without water and the rule insures that people will always have rights to water. It is now time for the state to assign rights to water for other resources that cannot live without it, our fish and wildlife.

If we do not manage our water we take away from our habitat which results in loss of fish. The proposed rule will only begin the process of managing the public's water. We need to first stop treating our water resource as if there is no limit to the supply. Then we then need to begin the long and costly job of restoring instream flows which the Dungeness Water Exchange has the potential to facilitate. Restoration of flows is a critical aspect of the rule as we must provide for the needs of fish and wildlife species listed for protection under the Endangered Species Act. Once recovered, local fish populations need to become more productive in order to provide increased harvest opportunity, including that reserved by the Tribes by treaty.

Commenter

Scott Chitwood, Jamestown S'Klallam Tribe 8, 9

Response

Thank you for your comment. Ecology agrees that it is important and timely to manage water supply and work on flow restoration.

Comment # 486

The first assumption is that low river flows are the cause of endangered salmon populations. Never mind that salmon population crashes have been reported as far back as the nineteenth century in local papers and prior to that in Native legend. Never mind that most oceanographers attribute large fluctuations in salmon populations to oceanic conditions. Never mind that large population swings can be a natural phenomenon augmented by bad management decisions.

Commenter

Steve Marble 2, H2

Response

Here are the ESA-listed salmon and steelhead populations in the Dungeness River.

1. Hood Canal Summer-run Chum Salmon were listed as threatened by NOAA in March, 1999.
2. Puget Sound Chinook Salmon were listed as threatened by NOAA in the Federal Register in March, 1999.
3. Puget Sound Steelhead were listed as threatened by NOAA in June, 2007.

4. Coastal-Puget Sound Bull Trout were listed as threatened by USFWS in November, 1999.

In the 1999 Federal Register listing for Hood Canal Summer-run Chum Salmon NOAA said a multitude of factors had contributed to the decline of chum salmon. They noted that destruction of freshwater habitat was not only an important factor threatening steelhead but also applied to the decline of chum salmon. They specifically mentioned that habitat alterations such as water withdrawal were resulting in insufficient flows. They identified detrimental effects on chum salmon.

Comment # 487

A few people are saying these new regulations are going to help salmon by keeping the river from drying up. Some of the river flow has likely increased due to the closure of numerous irrigation ditches over the last 30 years. The river is not going to dry up. This is simply ridiculous!

The salmon issue is complex and not going to be solved by pushing more water down the river. The Salmon problem is a result of poor decisions by various state and federal agencies over many years. Getting the Sport Fisherman, Commercial Fisherman, Tribes, Canadians, State Fisheries and other government agencies on the same page is the only real solution that is going to truly help save the salmon.

Commenter

Andy Sallee 4

Response

Thank you for your comment. Please see the response to Comment # 486.

Comment # 488

If the reduction of salmon returns in the Dungeness River is the result of new wells in the valley, how do you explain the similar reduction in salmon returns in the Hoh River?

Commenter

Tom Williamson 6

Response

Ecology has not studied the Hoh River. The degraded salmon runs in 1999 in the Dungeness River were found by NOAA to be due to several long-standing human-induced factors (e.g.

habitat degradation, water diversions, salmon harvest, and artificial hatchery propagation) that serve to exacerbate the adverse effects of natural factors (e.g. competition and predation) or environmental variability from such factors as drought and poor ocean conditions. Please see the response to Comment # 486.

Comment # 489

If you are serious about saving the fish in the Dungeness River - do what they used to do when we had lots of fish - dredge the river. This would not only get rid of the silt build up by the dike but would create a deeper channel (with pools, of course) so the river would flow better. Plus, it could supply a lot of sand/gravel to the county and other government agencies for roads/trails/etc.

Commenter

Pamela Cameron 3

Response

This comment highlights a common misunderstanding about the proposed rule. The rule is not intended to assure improved stream flows or to increase salmon runs. The proposed rule is designed to prevent new water withdrawals from causing further degradation to stream flows and fish habitat, and to protect the rights of senior water users. Setting instream flows is one water management tool to protect streams from getting worse.

Dredging the River would not prevent new water withdrawals from causing further degradation. Ecology does not have authority to dredge rivers, and has not investigated whether dredging the river could improve habitat.

Comment # 490

Now, they aren't talking about these instream flows as far as the river can't hold silt. I want to touch on one house in particular down in Brady on the Satsop. I've been all over in western Washington. I know the road gets flooded. And I've gone up and sat in this woman's house. I walked inside and her waterline's four feet up.

Well, what's unusual about this house is, it's on a full basement. And I said, why would you build a house on a full basement in a floodplain? She said, it never flooded for 40 years. We stopped using the basement in the '70s, that's when we first had trouble. And I said, what's changed? And she said, well, we're all farmers down here. We're not allowed in the rivers anymore, and we're not going to maintain them. They're full.

So here we go. And this is everywhere I go, from the Chehalis all the way up and down. Every river is that way. We're not maintaining the rivers. They're full of silt. The instream flows are off. The channels are too full. There's no water for the fish. That's my opinion.

Commenter

Jeff Monroe H3

Response

Thank you for your comment. Please see the response to Comment # 489.

Comment # 491

I have lived in the Dungeness area since 1977 and as an ardent fisherman, have had a keen interest in health of the fish stock in the various area rivers and small streams. Until the Bolt Decision, there were tremendous runs of Chinook, Coho, Chum and Pink Salmon in the Dungeness River through about 1987. The tribal fishermen heavily netted the river for several seasons significantly reducing the number of native species returning to spawn. Certainly the non-tribal sportsman have had an impact as well, but netting the mouth of the river and Dungeness Bay was not a select fishing method, with the very species we are trying to protect, being prey to the nets. Fishing in Dungeness Bay and in most of Area 6 (east of Port Angeles to almost Port Townsend) is not open for Chinook fishing in the Summer and Fall for non-tribal and only clipped fin (non-native) Coho may be retained. Tribal fisherman can and do net inside Dungeness Bay in the Fall and retain and sell 14 to 20 pound native Coho salmon. If these are truly protected fish, the tribes should not be allowed to fish with nets which intercept, catch and retain protected stocks. Tribal fisherman should have to troll for salmon using barbless hooks and release native stock just as the non-tribals; or use fish wiers or other methods of catching and sorting fish without killing the native stocks. This State and DOE needs to work closely with the Tribes and discountinue all gill netting in all State waters if we are really serious about saving the native stocks.

It should be noted that we had near record returns last Fall of Pink salmon in the Dungeness River. These are native fish which demonstrates the water quality and conditions have been sufficient for survival. The main reason the Pink runs have been so strong is that they were and are not targeted by the tribal fishers and netted to any significant extent. Again, you cannot protect native fish if nets are going to be allowed. So it does not matter how much water is in the river. If the DOE really wants to fight for the protection of native fish stocks, please work with all the stakeholders, and put an end to all gill net fishing in State waters.

Commenter

Russ Mellon 2, 3

Response

This comment highlights a common misunderstanding about the proposed rule. The rule is not intended to assure improved stream flows or to increase salmon runs. The proposed rule is designed to prevent new water withdrawals from causing further degradation to stream flows and fish habitat, and to protect the rights of senior water users. Setting instream flows is one water management tool to protect streams from getting worse. Regulating fish harvest practices will not prevent new water withdrawals from causing further degradation, nor does Ecology have authority to regulate fish harvest practices.

Please see the response to Comment # 486 for the reasons for the reductions of salmon populations in the Dungeness River. Regarding the large pink salmon return to the Dungeness River in 2011, there were a couple of factors that changed. Worldwide on both sides of the Pacific Ocean pink salmon returns were at record levels. This could only happen worldwide in many countries simultaneously because ocean productivity was at a peak in its cycle. And summer streamflows were naturally at very high levels throughout the Olympia Peninsula due to unusually high amounts of precipitation.

Note historically that the lower Dungeness River during late summer flowed 210 cfs around 1900 before the large diversions started in 1909 and then dropped to flows as low as 21 cfs in the late 1980s but after diversions were limited, starting in 1994, streamflows increased to around 110 cfs and increased to over 210 cfs in 2010 and 2011.

Comment # 492

Now the wild fish in the Dungeness River are few, caused not by lack of spawning water, but by nylon pollution. i.e. gill nets stretched across the river by commercial and tribal fisherman. Getting the wild fish back in the river, which was once a goal of fisherman and ecologists, is now a never ending occupation which we all pour money into, trying a different method every few years without success. Get rid of the nylon pollution and the fish will come back.

Commenter

Richard French 2

Response

Thank you for your comment. Please see the responses to Comment # 486 and Comment #490.

Comment # 493

How does increasing the river flow cause more salmon to spawn when the tribe are allowed to take half of the salmon, but there is no accountability as to how much they take or how many fish are available?

Commenter

Jorita Jensen 1

Response

Thank you for your comment. Please see the response to Comment # 492.

Comment # 494

In wading through in your Dungeness rule documents I've found no mention of the negative effects salmon, per se, have relative to pollution. Specifically, salmon spawn, die, decay, and thereby contaminate our streams and waterways. I'm far from being an expert, but I've read that salmon pollution, in itself, can be one of the most toxic contaminates of our waters, to include streams, rivers, and the Strait.

Commenter

Dr Gerald J Stiles 1, 3

Response

The rivers and streams of the Olympic Peninsula have been found to be very low in nutrients. This lack of nutrients is preventing full restoration of salmon and steelhead populations. Presently there are extensive programs throughout western Washington by tribal and state agencies to collect salmon carcasses from hatcheries, and distribute them throughout the river and stream basins to try and restore the salmon populations by raising the level of nutrients in the streams and rivers.

Comment # 495

The impact of the reserves and the maximum depletion amounts on the waters and the fish of the Dungeness river basin will be significant. The basin is home to four species of salmonids listed under the Endangered Species Act (ESA) and the precipitous decline of flows in the basin is the fundamental cause for the listing. In 1899-1901, the average September, flow in the lower Dungeness River was 200 to 225 cubic feet per second (cfs) at river mile 0.9. Caldwell and Beecher, Instream Flows of the Dungeness River (WDFW and Department of Ecology).

Since then, irrigation and development have done significant damage to flows. In 2000-2011, average monthly flow in September averaged only 113 cfs at river mile 0.8 (with that average increased due to high flows of 212 cfs in 2010 and 222 cfs in 2011, two very wet summers). In short, current average September flow in the Dungeness falls far below the minimum flow level set in the proposed rule. Plainly, the water resources of the Dungeness are imperiled. Yet, in the name of political compromise and consensus, the proposed rule allows further consumptive use from this water-short basin.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 6

Response

Minimum instream flow levels are not meant to always be achieved, but protect beneficial flow levels when available. The reserves are designed to have a very small impact on the listed populations. They are designed to be a 1 percent impact once every 10 years in a low flow year and much less impact in average flow years.

Please see our response to Comment # 486 regarding the reasons for the ESA listings in the Dungeness River. There were several factors listed for their decline but diversions were one of the factors.

Comment # 496

Many species of which are on the endangered species list reside within the waters of the Dugeness River. The state must under "The Endanger Species Act" maintain these minimum flows to meet the acts minimum standards under Federal law.

Commenter

Don Schluter, Salmon and Steelhead Conservation Society 3

Response

Thank you for your comment.

Groundwater Model

Comment # 497

It is peculiar that, when you use Ecology's mitigation calculator, to find your well's impact on the River and streams, you find a higher impact in the deeper aquifer, with coastal wells. Why

is that? When you are on Jamestown Road, or Marine Drive in Sequim, how are you affecting the River much at all. Do the artesian wells take water from the River and the streams? Or, was that water that would have gone to the Strait? What are the margins of error for the mitigation calculator? And, how was it proofed?

Commenter

Marguerite A Glover 23

Response

Ecology is aware that there are a few small areas close to marine water where the mitigation calculator has a slightly higher impact to streams from withdrawals from deeper aquifers compared to shallower withdrawals.

Wells in the shallow aquifer near marine water are capturing water that is mostly down-gradient of the majority of stream length and is close to the marine groundwater discharge area. Withdrawals from the shallow aquifer in this area are mostly reducing discharge to marine water rather than impacting exchange of water with streams.

Withdrawals from deeper confined aquifers can impact larger areas, resulting in vertical leakage over a wider area and an increased number of impacted stream reaches. The deeper aquifers are also hydraulically up-gradient of shallow aquifers near marine areas. These conditions result in a few small areas where modeled impacts are slightly higher for deeper withdrawals compared to shallower withdrawals.

It should be noted that for most areas, modeled impacts to streams decrease with distance and depth. Withdrawals from deeper aquifers and areas close to marine waters have less modeled impact to streams than withdrawals close to streams and in the southern portion of the model domain.

Artesian wells are wells that tap into a confined aquifer. Confined aquifers are aquifers where the pressure head in the aquifer is at a higher elevation than the top of the aquifer, which is typically overlain by a lower permeable layer. Wells tapping confined aquifers would have a water level elevation higher than the screened or open portion of the well as well as the top of the aquifer unit. Flowing artesian wells occur when the pressure head is higher than the land surface and/or top of well. Water withdrawn from confined aquifers can and does impact the exchange of groundwater between aquifers and streams. This is known to occur in the Sequim area as described below.

Available evidence strongly suggests that all of the known aquifers in the Dungeness River Basin are part of one hydrologic system, as described in USGS SIR 99-4048. This system consists of a series of glacial deposits underlain by relative low-permeable bedrock. The bedrock, which is also used as an aquifer, occurs at the surface in the foothills and mountains

and dips to the north beneath the glacial deposits. The more recent glacial deposits have been subdivided into three aquifers, which are each separated by lower-permeable units.

Groundwater recharge to area aquifers occurs primarily at the surface with some groundwater inflow assumed to occur from the south. Sources of recharge include precipitation, leakage from the Dungeness River, leakage from irrigation ditches, septic discharge, and irrigation return flows. Groundwater elevations in all of the aquifers slope to the north toward marine water. There is a downward vertical hydraulic gradient through the glacial units near the foothills and an upward gradient near marine waters. Groundwater discharge locations include marine water, streams, springs, wetlands, irrigation ditches, and wells.

Any water withdrawn by a well has to come from somewhere and all groundwater withdrawals result in impacts to the hydrologic system in which they occur. In most cases, the hydrologic impacts from increased pumping manifest themselves as reductions in storage (declining water levels in the aquifer over time), reduced discharge (decrease in the amount of water flowing out of the aquifer), and increased recharge (increase in the amount of water flowing into the aquifer). Pumping from deeper aquifers near Sequim can cause an increase in water flow to the deep aquifer from a shallower unit and/or less water flowing out of the aquifer into either shallower units and/or marine water.

Because the volume of water removed by a well has to come from somewhere, the effects of taking that water propagate through the hydrologic system until the new “stress” on the system can be accounted for and the system adjusts to the change. The end result is ultimately a change at the top of the saturated zone where any change affects the amount of groundwater flowing into or out of a hydraulically connected streambed. In the Dungeness River Basin, groundwater withdrawals also reduce the amount of groundwater discharge to marine waters. In many areas in the shallow aquifer and most of the deeper aquifers, more than half of the modeled impacts are a reduction in discharge to marine water rather than impacts to local streams. Impacts to marine waters do not require mitigation under the proposed rule.

The mitigation calculator uses output from the groundwater model to determine impacts to each stream from any location in the proposed rule area. The model output was verified through the model development and calibration process. Model calibration is the process of comparing model output to observations (actual measurements) and then adjusting model inputs until model output reasonably matches observations. This includes collection and input of site-specific data into the model, and comparison of model output to actual measurements and observations.

Sources of data used for model input include geologic maps, well logs, land use data, water rights, water use data, precipitation records, stream flow measurements, groundwater level measurements, aquifer test data, topographic maps, bathymetry data, and population estimates. These physical measurements of the study area are used to construct the model. For example,

well logs are used to define where aquifers are present and how thick they should be represented in the model.

One of the key calibration parameters is matching model-predicted groundwater levels to measured groundwater levels in wells. For the Dungeness model, groundwater levels were measured monthly in over 60 area wells by USGS and other project partners between December 1995 and September 1997. Thus, the model inputs represent conditions during this period. The water level measurements collected during this 2-year period were compared to model output (predicted water levels in the aquifers at the measured well locations). This data was used to calibrate the model so that it reasonably predicts actual conditions.

Although there are an endless number of parameter combinations that could be used to develop a model that reasonably matches measured data, Ecology is confident that the mitigation calculator is based on is a reasonable approximation of actual site conditions.

Comment # 498

The Dungeness-Quilcene Watershed, we learned there were two aquifers in the Dungeness area -- one was contiguous to the river, the other one was not connected to the river -- and I've heard nothing about the difference in the aquifers here tonight.

Commenter

Roger Short H3

Response

Thank you for your comment. Please see the response to Comment # 497.

Comment # 499

In WRIA 17 a study performed, I believe, by the USGS showed that a very significant amount of water travels directly from the mountains underground through deep confined aquifers to the sea. If this were the case in the Dungeness basin, the focus should shift to attempting to bring some of this water up to the surface to allow it to replenish stream flows when they are low. A similar study should be performed for WRIA 18 East before implementing any rules.

Commenter

Pearl Rains Hewett 26; Randy Simmons 16; Kaj Ahlburg 14

Response

Thank you for your comment. It is also likely that a significant amount of groundwater is discharging directly to marine water from all of the primary aquifers in the Dungeness Basin. Although using groundwater from deep confining units will reduce the amount of groundwater discharging to marine water, it will also impact streams within the proposed rule area. Please see response to Comment # 497 and the general response related to the Groundwater model for more information.

Comment # 500

During the question and answer session before the formal public hearing on this proposed rule, in Sequim, on June 28, 2012, I asked about the two parts of the 2008 groundwater flow model and whether they were proprietary or in the public domain. The answer I received from a representative of the Department of Ecology, if, I properly understood it, was that those two parts are a finite difference model that was written by the USGS and an interface that allows one to run the finite difference model. He said that the finite difference model is in the public domain but the interface is proprietary.

Apparently, the 2008 groundwater flow model requires the use of both of those components. That model is important, because it provided some of the studies upon which the proposed rule is based and it will, also, be used in its implementation. It is specifically referred to in the proposed rule at 173-518-070 3ai, 173-518-080 5c, 173-518-085 4d, and perhaps elsewhere.

As a proprietary program, it would appear that members of the general public don't have the right to obtain it. By that I mean, obtain the compiled program, its source code and its documentation, and have the right to thoroughly examine it and run it. These things are necessary for them to obtain an understanding of what precisely it does and how it functions. For that reason, it probably has never been examined by any member of the general public.

In particular, when I asked the Department of Ecology for the groundwater model, on two occasions, I was told, both times, that it was proprietary and I couldn't have it. I thought that those Department of Ecology employees had told me a direct lie, and I complained about that in item #3 of my June 22 formal comments on this rule. However, it now appears that they told me the truth, that part of that model is proprietary and, therefore, unobtainable.

If all the components of the 2008 groundwater flow model that are needed to actually run it, aren't available to the public, then, the proposed rule is a secret rule to the extent that it rests upon those proprietary components or they are necessary for its implementation. In that case the public will be governed by a secret rule.

I recommend that an alternative in the public domain to those proprietary components be provided and that, if, the rule is implemented, it use those alternatives, instead of the proprietary components. Furthermore, there will be a need to allow time for an open public review of those components, once they become available. That is particularly important, here, as the present situation bears the appearance of, having been an attempt to avoid review.

Allow me to apologize for accusing the Departmental employees of telling a direct lie. It, now, appears that Clallam County's hydrologist, Ann Soule, was the individual who provided me with false information. She did that, first, when she responded to my testimony to the County Commissioners, in which I said that the groundwater model was proprietary and not available. She said that the groundwater model was not proprietary but was available. However, it appears, now, that part of it was available but another part of it was proprietary. Later, during the afternoon information session before the public hearing in Sequim, on June 28th, she told me that the interface was available but the USGS model wasn't. However, when I asked the Department's staff, during the question and answer session just before the formal hearing, to verify whether what she had told me was correct or not. They told me that I had it exactly backwards: The interface was proprietary but the USGS model is in the public domain.

I still haven't verified what the true situation may be. Nevertheless, whatever it may be, there should not be any part of that model including its interface, that is proprietary. It must all be in the public domain, so that it can be thoroughly examined and run by any member of the public. Otherwise, we would be governed by a secret rule.

Commenter

Dr Robert N Crittenden 18

Response

The groundwater model uses a program called MODFLOW. MODFLOW was developed by USGS and is in the public domain. The 2008 Dungeness Groundwater Model was built in Groundwater Vistas. Groundwater Vistas is a Windows graphical user interface for 3-D groundwater flow & transport modeling. Groundwater Vistas is a model-independent graphical design system for MODFLOW MODPATH (both steady-state and transient versions), MT3DMS, MODFLOWT, MODFLOW-SURFACT, MODFLOW2000, GFLOW, RT3D, PATH3D, SEAWAT and PEST, the model-independent calibration software. Groundwater Vistas is not in the public domain but is available for purchase from a number of vendors. Ecology has purchased the program and used it to run the Dungeness Groundwater Model. USGS also uses the software. Although Ecology cannot provide a copy of Groundwater Vistas, the groundwater model files are available to anyone who wishes to obtain them and use the program.

Comment # 501

The reason that I didn't directly examine the model's code and its documentation, was that on two occasions, when I requested copies of them, I was told that they were proprietary and I could not have copies.

I was only told that it was not proprietary at the Clallam County Board of Commissioners' hearing on the proposed rule. By then, it was too late for me to obtain and study it. --- I strongly object to the Department's employees telling me a direct lie in order, apparently, to prevent my examining the model.

Incidentally, I did a groundwater model as part of my master's thesis, and several others later on. So, I have little doubt that I could understand it and run it, provided that its code was written transparently and it was properly documented.

Commenter

Dr Robert N Crittenden 3

Response

Thank you for your comment. See the response to Comment # 500.

Comment # 502

A Quote From DOE concerning CB:

"Employing the latest computer modeling tools, the report incorporates factors such as climate change, population growth and regional and global economic conditions into forecast calculations. It also leverages and further builds on modeling tools and datasets developed by the University of Washington Climate Impacts Group. "It will take innovative water solutions to meet existing and future water demands in the basin."

"developed by"? Nowhere did it say anything was scientifically studied or found by? or provided by persons of expertise in these geographical areas of study.

Where are the facts to back those statements up? where is the evidence of this modeled projected prediction?

Is DOE basing their findings on modeled what if's? done by foreseeing psychics?

These same methods and claims apply to the Dungeness Water area. Were there tests done by geologists? or hydrogeologists? Can a meteorologists make a proven factual statement about just what the climate will be doing in the future, without factual evidence of how all these other future projections would play true? No I don't believe so.

Commenter

Brooke Dorhofer 4

Response

Groundwater modeling was done by hydrogeologists and is proposed to be used to determine impacts and mitigation requirements. This model was developed using a variety of published data sources.

We agree that no one can make proven factual statements about climate in the future.

Comment # 503

The steady-state calibration runs in the 2008 Dungeness Groundwater Flow model have more parameters than data and, therefore, have zero degrees of freedom.

In this comment, I go through the 2008 report showing, where the data and parameters are found and demonstrating that there are more parameters than data. Then, I compute the model's degrees of freedom.

The 2008 Dungeness Groundwater Flow Model, Design, Construction, Calibration, and Results by Clallam County and Pacific Groundwater Group is available on Clallam County's website at clallam.net/environment/assets/applets/PGG_2008_Dungeness_Model_Final_Report.pdf

That is a pdf file. I will refer to the page numbers of the original report as, for example, "Section 5.5.3 on page 35." However, not all the pages of that report were numbered. In particular, the tables and figures at the end of it don't have page numbers. Therefore, for those pages, I will refer to their location by the page number of the pdf file, for example, "Table 4.2 on pdf page 61."

They presented the data set that they used in the steady-state calibration runs in their Table 5-3 on pdf page 64 of their report. There are 69 observations. That is,

$n=69$

where n is the sample size

They presented the estimated values for the hydraulic conductivity parameters in Table 4-2 on pdf page 61. There are 68 of those parameters.

In particular, that includes 27 vertical conductivities, 27 horizontal conductivities, and twelve vertical conductivities for the streambeds, plus two additional values for the streambeds of Siebert and McDonald Creeks. Thus, $27+27+12+2=68$.

However, those were not all the estimated parameters. Other parameters that they estimated are discussed in Section 5.2 beginning on page 27 of their report. There they list most of the parameters that they estimated or adjusted. In particular:

- Aquifer horizontal conductivity --- These were included in the 68 parameters discussed above.
- Aquitard vertical conductivity --- This is at least one additional parameter.
- Streambed vertical conductivity --- These were included in the 68 parameters discussed above.
- Dungeness River Elevation --- As discussed in their text, they treated the Dungeness River as if it were elevated above grade by this fixed amount, in order to better fit the movement of water into and out of its streambed. This is one of the more obvious unrealistic aspects of this model. It adds at least one additional parameter.
- Drain Cell Distributions --- This may have be the locations of the "drain cells", where groundwater finally moves from the ground into saltwater or possibly, alternatively, into a stream. There seem to have been several of these drain cells. They contribute at least one more parameter but probably several.
- Constant head cell vertical conductivity --- There seems to have been at least one of these. That contributes at least one more parameter but possibly more.

These parameters contribute at least four additional parameters but probably more. Taking these additional parameters into account, there were at least $68+4 = 72$ estimated parameters. That is more parameters than data.

That is what I wish to show, because, the model's "degrees of freedom", df , is equal to the number of data minus the number of estimated parameters. However, zero is the smallest possible value for the degrees of freedom. So, if there are more parameters than data, the degrees of freedom is set to zero. As that is the case here, the model has zero degrees of freedom:

$$df=0$$

where df is the degrees of freedom

Nevertheless, their model had even more fitted parameters than were included in Table 4-2 or in their explicit list in section 5.2. They are discussed elsewhere in the text. In particular, in the text on page 27 of their report, they discuss varying the horizontal conductivity of the lower aquifer and, also, of one or more additional deep layers. That adds at least two more parameters, bringing the total to at least $68+4+2=74$.

Furthermore, by far the largest group of additional parameters that they adjusted to improve the fit of the model were structural parameters, rather than the more usual numerical parameters. Specifically, these were the locations of the boundaries between the various zones in layer 1. They provide a map of those zones in figure 4-10 on pdf page 84. In particular, on page 23 of their report they say, "the boundaries of the various sub-regions were sometimes shifted within layer 1 during calibration." As these changes in the locations of the boundaries could be represented as numerical parameters, they, have to be included as estimated parameters. Potentially, there are several hundred such parameters but they seem to have only adjusted a few of them.

In particular, on page 28 of their report they mention changing the boundaries of Grey's Marsh. There are also several differences in the zone boundaries between realization Dung-7e and Dung-7g. These can be seen by using a light table and overlaying the maps in Figures 4-10 and 4-11 on pdf pages 84 and 85. However, these differences don't reveal what all the changes may have been from the zones, that were originally defined by Dr. Thomas et al. in their 1999 report (Hydrogeological assessment of the Sequim-Dungeness Area. Clallam County, Washington. USGS Water Resources Investigation Report 99-4048.)

Commenter

Dr Robert N Crittenden 1;

Response

Thank you for your comment. The groundwater model has a lot more data built into it than 69 observations. There were 69 wells that were used as calibration targets but they are not the only data used in the model. Most of these wells were measured monthly over an 18-month period.

See the general response to Groundwater model.

Comment # 504

The 2008 model doesn't provide unique solutions.

Because their model has more parameters than data, it will not provide unique estimates. The authors recognized that non-uniqueness and repeatedly mentioned it. For example (on page 47) they said:

"The ability to create more than one model realization capable of meeting calibration criteria (referred to as non-uniqueness) is quite common, and accounts for some of the uncertainty inherent in predicting impacts from hydrologic stresses. This inherent uncertainty can not be

avoided in any model or predictive approach, largely because subsurface conditions are inherently variable and data are typically insufficient to characterize such variability. While model predictions can still be performed to obtain estimates of impact at a commonly accepted degree of accuracy, uncertainty associated with non-uniqueness cannot be avoided and prevents prediction of "exact" values of hydrologic impact. In some cases, modelers will use stochastic analysis of multiple (ie. many) realizations to characterize the range of uncertainty in model predictions."

That shows that they recognized the cause of the non-uniqueness but it also reveals their naivety of statistical methods and scientific modeling practices.

If they would reduce the number of parameters in their model and/or get more data, they would obtain unique estimates. Nevertheless, those would still be estimates with random error, rather than exact values.

Commenter

Dr Robert N Crittenden 9

Response

Thank you for your comment. Ecology respectfully disagrees with your comment that the model should produce a unique solution. No regional groundwater model is capable of producing a unique solution. A discussion of this is provided below, excerpted from [L.F. Konikow & J.D. Bredehoeft, 1992](#). More details are available in numerous technical papers.

To determine uniquely the parameter distribution for the Dungeness Basin would require so much expensive field testing that it is not feasible either economically or technically. Therefore, the model was built, in effect, to solve a large set of simultaneous equations having more unknowns than equations. It is inherently impossible to obtain a unique solution to such a problem but that is the nature of groundwater modeling. The modeler attempted to select a set of parameter estimates that yielded the best solution through model calibration. This was done by comparing observations of groundwater elevations to corresponding values calculated by the model. The calibration procedure involved varying parameter values within reasonable ranges until the differences between observed and computed values were minimized. Parameters were adjusted using professional judgment and site-specific information.

The model is considered calibrated when it reproduces historical data within some subjectively acceptable level. There are no specific rules that define how good it good enough; it is a judgment made by the modeler or modeling team, and is typically reflective of the available funding for the project. This process does not obtain a unique set of parameters. A poor match suggests (1) an error in the conceptual model, (2) an error in the numerical solution, or (3) a poor set of parameter values.

Ecology is confident that the 2008 groundwater model was built using a large amount of relevant data, standard methods and calibration techniques. Development of the 2008 Model was a collaborative effort between consultants, Clallam County, and other project partners. Jim Rumbaugh of Environmental Simulations Inc., the developer of Groundwater Vistas, provided input during model design and calibration tasks.

The groundwater model is best suited to regional scale simulations due to its coarse grid resolution. Predictive simulations within the shallow aquifer have more certainty than simulations in the middle and deep aquifers.

As with all models, predictive results should be interpreted as approximate, because models are inherently non-unique and include some degree of uncertainty. Uncertainty was discussed in the 2009 Groundwater Model Report. Given the inherent uncertainties built into the model, Ecology is confident the model provides a reasonable approximation of the hydrologic system and provides the best tool currently available to estimate hydrologic impacts within the local groundwater flow system

Comment # 505

The 2008 model contains no statistical tests. Conclusions were reached based on "judgment," instead. That is not a scientifically valid method.

The accepted scientific practice is to conduct statistical tests and to draw reasonable conclusions based upon their results. However, no tests were conducted. The conclusions that were reached appear to have been based on the user's judgment. That would, of course, be expected to include the user's biases and preconceptions. That is contrary to the purpose of science, as science seeks to avoid precisely those types of influences. This shows that the 2008 model is not scientific. The same also applies to the secondary studies that were based upon it.

Commenter

Dr Robert N Crittenden 8

Response

Please see the response to Comment # 504.

Comment # 506

I'd also like to ask that we have science that is clearly replicable.

Commenter

Teren MacLeod, Government Affairs in Jefferson County H5

Response

Thank you for your comment. Studies specific to one watershed should not necessarily result in findings that are “replicable” in a different watershed. As for the scientific methods for developing instream flow levels, Ecology, Washington Dept of Fish and Wildlife, and the USGS and consultants developing groundwater models, all employ standard methods and methodologies. Some of the “science” is predictive, and replication of a result would not be desirable.

Comment # 507

The fitting procedure used in the above models wasn't impartial

They computed two realizations of the parameter values, to provide some impression of how non-uniqueness affected the dispersion in their estimates. However, the values of those two realizations largely reflect choices they made, for they manually searched for optima, and decided where to stop, presumably, when the response surface got relatively flat, instead of using an automated or standardized search procedure.

I must admit that the more widely available automated search procedures don't work very well. They tend to be slow and all too often miss optima or won't converge. Although, more reliable procedures can be written, the usual ones often need manual oversight. However, in doing that, care needs to be taken that the outcome of a search is not the user's choice, as occurred for the two realizations of the groundwater model.

Incidentally, notice that those two realizations have different RSS values. So, clearly they are not two instances of non-unique solutions. They appear to have been selected, instead, from the total range of possible realizations.

They also manually adjusted parameter values in certain cells with large residuals such as dry or flooded cells. However, they seem to have referred back to other reports to correct defects in the model structure for those cells. So, what they did probably was not so serious a flaw in methodology that we would have to conclude that any cell's parameters would have been individually readjusted if they didn't like the way the model fitted it.

Their comments on page A5 of their report, regarding those types of corrections reveal that they did not even consistently hand-adjust the hydraulic conductivities to improve the fit of the model.

Overall, their fitting methodology seems to have been ad-hoc and subject to their personal biases.

Commenter

Dr Robert N Crittenden 10

Response

Thank you for your comment. Please see response to Comment # 504.

Comment # 508

I've examined the three principle studies that this rule is based on, and I've found that each of them has very significant flaws. These are the groundwater models, that's the 2008 model by the Pacific Groundwater Group. It has zero degrees of freedom and, therefore, has infinite variances. It tells you exactly nothing.

The second study is the IFI Study. Now if you read the review of IFI that was written by Mr. Beauvais, he says the fact that that qualitative element in that study that has a huge effect on its output. The fact that there's a qualitative element tells me that the output is not scientifically based; it is political.

And the third study that is surface collated method. It was developed by using regression, but they failed to discount the alpha value. That's a technical issue, but it means that the model that they're using is not valid.

Because the scientific basis of this rule is fundamentally and deeply flawed, I recommend that the department not adopt it.

Commenter

Robert Crittenden H1

Response

Thank you for your comment. Please see the responses to Comment # 500, Comment # 503, Comment # 504, and Comment # 532; and the general responses on Science/fish and the Groundwater model.

Comment # 509

The adoption of any new model or upgrades to an existing model should be done by an elected body through an open public process, instead of being under the department's authority.

Section WAC 173-518-070 3ai of the proposed rule says, regarding the 2008 model,

"If ecology determines a better method is available in the future, then ecology will apply the new method."

The concern that is expressed above in criticism #12, is that the non-uniqueness of the 2008 model provides the ability to arbitrary adjust its outcomes and this sentence in the proposed rule, authorizes the department to do precisely that.

It should be replaced by requiring that any change be adopted through an open public process conducted by an elected authority, such as the Clallam County Board of Commissioners. To leave it under the department's authority would allow and authorize the implementation of arbitrary governance.

Commenter

Dr Robert N Crittenden 13

Response

Thank you for your comment. Ecology has been authorized by the Legislature (an elected body) to regulate water rights.

Comment # 510

The 2008 groundwater model might be used for the limited legitimate uses of an empirical model

From a completely different perspective, the 2008 groundwater model could be regarded as an empirical model. In that case, many of the above criticisms are no longer applicable. The legitimate uses of an empirical model are to interpolate short distances within the range of observed data, provided that the underlying processes are known to be consistently applicable throughout that region, but their most appropriate use is to provide an algorithm for the regeneration of data. However, it is being used, as if it were a realistic or theoretical model. In particular, it is being used to make estimates and predictions and to extrapolate beyond the range of the observations or far from them. Those are not valid applications of an empirical model. Nevertheless, there is no reason why it should not be used for any of the limited purposes for which it is appropriate. However, that doesn't include most of the types of uses that are involved in supporting the instream flow rule or its implementation.

Nor is there a basis for hope that a continued use of empirical models will lead to an improved understanding.

Commenter

Dr Robert N Crittenden 16

Response

Thank you for your comment.

Comment # 511

The groundwater model developed to predict stream flow impacts from new groundwater withdrawals is an excellent and contemporary peer-reviewed tool, and will be valuable in applying the water availability, impairment, and public-welfare prongs of the RCW 90.03.290 "four-part-test".

Commenter

Shirley Nixon 4

Response

Thank you for your comment.

Climate/Hydrological Continuity

Comment # 512

How are surface waters (streams and lakes) connected to underground aquifers, and thus connected by this rule? Geologically speaking, I understand that surface water percolates into the ground to recharge aquifers, but I do not understand how surface water closure should effect how many wells are allowed to be connected to an underground aquifer. Increased withdrawal from an aquifer does not change the amount or rate of water percolating into the aquifer from surface water sources. Yet the two seem to be related via the management rule. If they are not related should that not be clearly stated by the rule? Is this rule attempting to address two separate water issues with one water exchange? Realistically it seems that there should be a more prescriptive definition of how aquifer water will be "banked," "exchanged" and "mitigated." Why all the focus on stream flow alone?

Commenter

Junko Harbord 1

Response

Please see the general response to Small impacts.

Available evidence strongly suggests that all of the known aquifers in the Dungeness River Basin are part of one hydrologic system, as described in USGS SIR 99-4048. This system consists of a series of glacial deposits underlain by relative low-permeable bedrock. The bedrock, which is also used as an aquifer, occurs at the surface in the foothills and mountains and dips to the north beneath the glacial deposits. The more recent glacial deposits have been subdivided into three aquifers, which are separated by lower-permeable units.

Groundwater recharge to area aquifers occurs primarily at the surface with some groundwater inflow assumed to occur from the south. Sources of recharge include precipitation, leakage from the Dungeness River, leakage from irrigation ditches, septic discharge, and irrigation return flows. Groundwater elevations in all of the aquifers slope to the north toward marine water. There is a downward vertical hydraulic gradient through the glacial units near the foothills and an upward gradient near marine waters. Groundwater discharge locations include marine water, streams, springs, wetlands, irrigation ditches, and wells.

It is known that the Dungeness River and other local streams are hydraulically connected to shallow groundwater. This was described and quantified in [USGS SIR 02-4161](#). Groundwater flows into or out of the streambeds depending on the relative hydraulic gradient between the two and the Dungeness River is a major source of groundwater recharge. Available data also strongly suggests hydraulic connection between the various aquifers. This is evident when pumping from one aquifer causes water levels to respond in another. Groundwater level monitoring by the City of Sequim (see [2001 Hydrologic Monitoring Report](#)) illustrates the hydraulic connection between local aquifers.

Any water withdrawn by a well has to come from somewhere and all groundwater withdrawals result in impacts to the hydrologic system in which they occur. In most cases, the hydrologic impacts from increased pumping manifest themselves as reductions in storage (declining water levels in the aquifer over time), reduced discharge (decrease in the amount of water flowing out of the aquifer), and increased recharge (increase in the amount of water flowing into the aquifer). Pumping from deeper aquifers near Sequim can cause an increase in water flow to the deep aquifer from a shallower unit and/or less water flowing out of the aquifer into either shallower units and/or marine water.

Because the volume of water removed by a well has to come from somewhere, the effects of taking that water propagate through the hydrologic system until the new “stress” on the system can be accounted for and the system adjusts to the change. The end result is ultimately a change at the top of the saturated zone where any change affects the amount of groundwater flowing into or out of a hydraulically connected streambed.

In the Dungeness River Basin groundwater withdrawals also reduce the amount of groundwater discharge to marine waters. In many areas in the shallow aquifer and most of the deeper aquifers, more than half of the modeled impacts are a reduction in discharge to marine water rather than impacts to local streams. Impacts to the marine waters do not require mitigation under the proposed rule.

Comment # 513

My well is west of the river 6 miles and is one half a mile from the shoreline. How could my well water possibly affect the river from my location? I'm not a hydrologist, but I'm not a fool either! I would like answers to my questions, answered thoroughly. I'm not pointing fingers at anyone but something is not adding up here.

Commenter

Joe McDermott 3

Response

Thank you for your comment. Please see the response to Comment # 512.

Comment # 514

I also want to go on record to say that I have a real concern -- this was brought up in WRIA 17 in its proposed rule making -- stream connectivity groundwater withdrawal. I have a real problem with this because it was huge then, and I don't see where the model that's being used in the Dungeness is anywhere close to answering that same question that was done during WRIA 17. Groundwater withdrawal and it's connectivity to the stream, who identifies that and where's the science to that really well-documented?

Commenter

Ed Bowen H3

Response

Thank you for your comment. Please see the response to Comment # 512 and the general response on the Groundwater model.

Comment # 515

Your determination of hydraulic continuity, is not true.

Commenter

Dan & Lois Perry 3; Ross Krumpke 9

Response

Ecology respectfully disagrees with your statement. Please see the response to Comment # 512.

Comment # 516

D.O.E. keeps telling us that well water is taking from the river. I have lived here for forty years and the river looks now at all times of the year just like it did when i came here and as you very well know many wells have been drilled in those forty years. Please explain how you can justify D.O.E.s position.

Commenter

Dick Sutterlin 3

Response

Thank your for your comment. Please see the response to Comment # 512.

Comment # 517

What of the fact that the glaciers that feed our streams, rivers and lakes are slowly dissapating? The rule does not acknowlodge this, nor does it have a "mitigation" plan for the lower stream levels due to disappearance of glaciers in the mountains. Should this exchange in fact have a water right uptake rule? Where it has a set goal to take back over appropriated water, due to the shrinkage of "water storage" at the peaks of our mountains? If this reality lies in our future, then this rule should address the possiblity and have an action plan for it.

Commenter

Junko Harbord 3

Response

The rule cannot affect exsiting water rights. The water restoration effort that is outside the scope of the rule will consequently focus on purchasing existing water rights from willing sellers. The acquired water rights would then be dedicated to instream flow purposes. Also, the river restoration effort has and will continue to fund improved water efficiency to reduce the overall demand for water by the largest out-of-stream water use, agricultural irrigation. The

predicted effects of climate changes on this watershed are an additional reason to put a sustainable water management framework in place.

Comment # 518

Precipitation within the Dungeness watershed is considerably less than average for a western Washington watershed. In many respects the Dungeness has a hydrologic cycle that matches watersheds on the eastern side of our state. That is, water flow patterns are driven by runoff in the fall/winter and snow melt in the spring/summer. Loss of our glaciers and permanent snow fields is a well know factor affecting our hydrologic cycle. With the well-advertised climate changes coming the streams and rivers draining the Olympic Mountains are projected to have less water flowing in them during the spring and summer. This will, in turn, have a bearing on future groundwater supplies. The time to set up our water management structure is now.

One critical factor learned while developing the rule was the connectivity that exists between our surface water and groundwater in east WRIA 18. Many thousands of years of erosion and alluvial deposits linked to the last retreat of the Cordilleran Ice Sheet, glacial outwash since that time with rivers and streams draining the runoff and melting snow from the Olympic Mountains have shaped our watersheds and created the layered aquifers. It was enlightening to learn of the connectivity between groundwater and surface water supplies in east WRIA 18.

Commenter

Scott Chitwood, Jamestown S’Klallam Tribe 2

Response

Ecology agrees. A flexible water management program with an effective mitigation process that can be adapted to changing conditions is critical to long-term durability. The intent of using a migration calculator that incorporates the results of the groundwater model is to make the mitigation program effective across all streams in the area.

Comment # 519

Finally, given that we know that climate change will significantly reduce recharge from snow melt. Ecology should apply the precautionary principle and assess any new proposed use against the likelihood of reduced recharge over the next few decades.

Commenter

Suzanne Skinner & Keith Masill, Center for Environmental Law and Policy 19

Response

Thank you for your comment.

Comment # 520

DOE's scientists assert that there is a hydrological connectivity between aquifers and the waters flowing in streams and rivers and, furthermore, that an increase in the number of wells drawing from these aquifers will cause a corresponding decrease in the flow levels in the rivers. To remedy this perceived problem, DOE contends that it must implement and enforce a complex and expensive system of water banking and mitigation.

However, many other equally knowledgeable scientists contend that this supposed hydrological connectivity has not been proven and is merely a hypothesis. Moreover, if such a connectivity does exist, the effects of the wells on the flow levels is minimal and, therefore, the hardships inflicted on the general populace will far outweigh any potential benefits.

Commenter

CM Muller 1; Jeremy Fodge 4; Alan Barnard 4; Barbara Bentley 4; Mark & Jackie Bragdon 6; Danni Breen, John L Scott Sequim 4; Ron Carlson 4; Roger Clark 4; Rhonda Curry 4; Pat Davis 4; Jerald R Dow 4; Gene Farr 4; Nancy Louise Froh 4; Daniel E Gase, Coldwell Banker Uptown Realty 4; Deborah Groesbeck & Bob Conklin 4; Richard & Ruth Hale 4; Donald & Ella Hoffeld 4; Kelly Johnson, Windermere RE Port Angeles 4; Sarah Kincaid 4; Lee Lawrence 4; Colleen & David Lyons 4; Harvey & Margaret Martin 4; Jim Mitchell 4; Mary Mitchell 4; Jim & Bea Muir 4; Terry Neske 4; John & Morgan Nolan 4; Virginia A O'Donnell 4; Julia Opeka 4; Patricia J Orella 4; Maureen Pfaff, Olympic Peninsula Title Company 4; Lynda Rathman 4; Doc Reiss, City of Port Angeles Planning Commission /Windermere Real Estate 4; Ardyth Schaumburg 4; Susan Sparks Smith, Silpada 4; Janet Stevenson 4; Linda L Wishart 4; Richard Wolf 5; M Worman 4; Carol Yearout 4; Maxwell Anderson 4; Nola Judd 2; Ray Gruver 5; Carol Rutledge 5; Ross Krump 19; Neville & Gayle Aitken 4; RA Pilling, Clallam County Republican Party 5, H5

Response

That is correct; Ecology, hydrogeologists and scientists at USGS, and consultants who have subsequently continued developing the groundwater model have accepted or demonstrated the relationship between groundwater and surface water. Ecology is unaware of any licensed hydrogeologist or professional engineer or scientist familiar with hydrology or hydrogeology that submitted a study, information, or data contradicting the conceptual model used in developing the groundwater model. Please also see the responses to Comment # 502, Comment # 503, Comment # 504, and Comment # 512, and the general response on Small impacts. Ecology encourages commenters to review the WRIA 18 Watershed Plan, Section 2.1.5.

Comment # 521

There is a lack of reviewed scientific data to support the assertion that there is hydrologic continuity between all private exempt wells and the streams in the areas designated under WRIA 18. Ecology's contention that all of the 3 aquifers and the rivers/streams within WRIA 18 are connected has not had a peer reviewed scientific study. Such a study needs to be done prior to the implementation of this rule as Ecology has no statutory authority to regulate any wells that cannot be proven to be hydraulically connected.

Commenter

Helen L Watkins 2

Response

Please see the response to Comment # 520.

Comment # 522

I've been to all the meetings that DOE has hosted here in Sequim as well as a plethora of local meetings where this rule has been discussed and I am not convinced that there is a hydrological connectivity between aquifers and the waters flowing in streams. The science from DOE and from independent scientists is not 100% conclusive so I ask that we stop the clock from ticking in adopting the rule until we know for certain which of these scientific studies is correct.

Commenter

Nell Clausen, Estes Builders 1

Response

It is unclear what you mean by 100 percent conclusive. It is certain that connection between surface water and groundwater occurs in the Dungeness. Quantification of the impacts of pumping on nearby streams, and prediction of changes in groundwater levels resulting from fluvial recharge and changes in river stage is not necessarily accurate or precise. A lack of accuracy, or a lack of precision, in a predictive model simply does not equate to a conclusion that communication between surface water and groundwater does not occur. Please also see the general response to Small impacts.

Comment # 523

There is insufficient peer reviewed scientific data on the hydrologic continuity between all private exempt wells and the streams in the Dungeness basin, particularly wells that draw water

from the second or third aquifer down. Ecology claims that the confining beds separating these lower confined aquifers from the uppermost aquifer and the river beds are, in fact, permeable, but there is no peer reviewed scientific study supporting that assertion.

Section 90.54.030 (3) requires Ecology to “Develop such additional data and studies pertaining to water and related resources as are necessary to accomplish the objectives of this chapter”. Ecology should commission such a study, and incorporate its results into the rules before proposing any final version of the rules.

Ecology should produce peer reviewed scientific studies that show which wells in which specific areas, and drilled at what depths into which aquifers, have hydrologic continuity with streams in the Dungeness basin. Only those wells for which hydrologic continuity with rivers in the Dungeness Basin has been proven to have a material and adverse effect on stream flows, reducing them below required minimum instream flows, should the proposed rules subject to the restrictions you want to impose on all wells (metering, reduction in allowed daily withdrawals below 5,000 gpd, restrictions on outdoor watering, mitigation payments, etc.). Ecology has no statutory authority to regulate wells that can not be proven to be hydraulically connected and such an approach would violate the least burdensome alternative requirement.

Commenter

Pearl Rains Hewett 25, 27; Randy Simmons 15, 17; Kaj Ahlburg 13, 15

Response

Thank you for your comment. Ecology respectfully disagrees that there is not sufficient data, investigations, and evidence that can be used to understand the hydrologic system of the Dungeness River Basin. Please see the general response regarding the Groundwater model. Please also see the responses to Comment # 28, Comment # 497, and Comment # 520 for more information.

Comment # 524

If all the rivers are hydraulically connected, how can you close some year round and not others?

Commenter

Pearl Rains Hewett 55; Randy Simmons 45; Kaj Ahlburg 43

Response

The Dungeness mainstem is a snowmelt dominated stream; its spring and early summer flows are therefore much more reliable than the smaller streams that do not have extensive snowpack in their headwaters.

Comment # 525

How recent and accurate are the studies done on the Dungeness Water Shed? Has a study been done in the last five years?

Commenter

Richard & Jill Pinder 8, 9

Response

Thank you for your comment. Ecology is confident that the studies that form the basis for the rule are scientifically sound and accurate, please see the general responses regarding Science/fish and the Groundwater model. Studies are regularly performed in the Dungeness Watershed, for example, Pacific Groundwater Group produced a March 31, 2009 report entitled: "Aquifer Recharge Feasibility Study for the Dungeness Peninsula" There may be others.

Comment # 526

My wife and I would both like to voice our VERY strong opposition to your proposed restrictions on water wells here in the Sequim area.

Your ideas make absolutely no sense at all and smacks of nothing but wacked out enviro extremism. Unless you can repeal the law of gravity there is no way my well or any other well in the future that is drawing water some 75-100 feet below the bottom of the Dungeness River bed can have ANY impact on the water flow levels of the river. Please don't insult my intelligence with your nonsense.

Commenter

Greg & Joanna Carroll 1

Response

Please see the responses to Comment # 520 and Comment # 523.

Comment # 527

DOE's scientists seem to assert that there is a hydrological connectivity between aquifers and the waters flowing in streams and rivers and that an increase in the number of wells drawing from these aquifers will cause a corresponding decrease in the flow levels in the rivers. To

remedy this perceived problem, DOE contends that it must implement and enforce a complex and expensive system of water banking and mitigation. All this when the Dungeness Valley has been decreasing water usage for the past several years.

Commenter

Richard & Martha French 4

Response

Please see the responses to Comment # 80 and Comment # 520.

Comment # 528

DOE's scientists assertion that there is a hydrological connectivity between aquifers and the waters flowing in streams and rivers and, furthermore, that an increase in the number of wells drawing from these aquifers will cause a corresponding decrease in the flow levels in the rivers is sound, and basic logic. DOE is right in it's position that, if development is to continue, there must be in place a water banking and mitigation plan. Minimizing impact and withdrawal should be the first step of this planning.

Commenter

Anne Shaffer, Coastal Watershed Institute 4

Response

Thank you for you comment. Ecology agrees.

Comment # 529

There is connections between ground water and rivers. When working for the Fisheries Dept. Back in 1989 on the Clearwater River, we learned some hard lessons there, that when the river rose and fell, a pond adjacent to the river rose and fell correspondingly. We had a smolt trap on a creek then drained the pond.

So I would imagine that a reduction in ground water from too many people living on the Dungeness watershed could cause problems for salmon migration in August, September, and October. That problem did occur before they changed the irrigation intake. I saw that with pink salmon.

Commenter

Edwin R Johnson 1

Response

Thank you for your comment. Ecology agrees.

Studies

Comment # 530

The Instream Flow Incremental Methodology (IFIM) study that was done on the Dungeness River is one of the main pieces of research that provides the basis for the Dungeness Water Management Rule. Including a couple of flaws in how the sampling was done.

1. The observations of the river's configuration weren't random samples. They, therefore, can't be used to compute unbiased estimates of the river as a whole.

According to Dr. Hal Beecher's public presentation in Port Angeles, they didn't sample cross-sections of the Dungeness River at random but selected ones that they thought were representative. That is contrary to the principles of scientific sampling and leads to a potential bias.

The general principle involved is, that samples that were drawn at random from a population of possible samples, can be used to estimate the average characteristics of that population. In this case, as they didn't draw their samples at random from the overall river, they can't be used to provide unbiased estimates for the overall river, only for those sections of it that they considered "representative."

If one were to contrast their estimates against estimates based on samples drawn at random from the overall river, you could estimate the bias in their perception of what was "representative." However, that was not done and the configuration of the bed of the Dungeness River has gone through substantial changes since those original samples were taken, so, it is no longer possible to estimate the bias.

2. The configuration of the Dungeness River has changed considerably since those samples were taken. Consequently, they are no longer applicable even if they were when they were taken.

Those changes in the riverbed were primarily caused by a pulse of bed material that moved down the river. It destabilized the river's channel and in many locations, caused it to change its course. That pulse originated in a large mass failure in the Upper Dungeness Valley, during 1980. It is known locally as the "Gold Creek Slide." Only, in the last few years, has the resulting pulse of bed material reached the river-mouth. However, now that it has done so, the riverbed may have once again achieved a relatively stable configuration. It would now be

appropriate to remeasure its cross-sections, this time, at random locations along the river. That would provide estimates that might remain reasonably accurate for a period of years. In contrast, the previous measurements probably no longer reflect current conditions in the river.

3. The optimum instream flows need to be recalculated based on new measurements, before the rule is adopted, as it has been a long time since the river's configuration was measured and there have been substantial changes during the intervening period.

Commenter

Dr Robert N Crittenden 19

Response

This question directly questions Dr. Hal Beecher's presentation regarding the selection of transects used in the PHABSIM hydraulic model. Dr. Hal Beecher, WDFW's instream flow expert who has worked extensively on the Dungeness instream flows since the 1970s, made the following comments that we agree with regarding Robert Crittenden's comments:

"In his comments on the Dungeness IFIM study, he (Dr. Crittenden) raises the concern that the study transects were not randomly sampled, nor were they validated. Here Dr. Crittenden confounds a management-focused study from a strictly scientific research study. For a scientific research study, random sampling is very important when seeking new insights and hypothesis testing. In contrast, the Dungeness PHABSIM study aimed to determine how flow influences habitat, all else being equal, and then to apply that relationship to management for habitat protection. It uses scientifically determined relationships to do develop management recommendations (when is it imprudent to issue additional water rights because of probable impact to fish and their habitat). In this way it is analogous to most medical procedures where the patients are not viewed as subjects of a scientific study with random sampling, but instead are treated, for the specific purpose of maintaining or restoring the patient's health, with treatments developed through scientific study.

"The biologists who selected the sites perceived that they reasonably represented the habitat types present in the river, perhaps more representative of the more flow-sensitive conditions in the reaches. Subsequent assessment suggests that they were indeed reasonably representative. I used satellite photos on MapQuest or Google maps and measured channel width and number of channels every 200 m from Woodcock Rd to Hwy 101. The satellite photos appear to have been taken during summer low flow. Mean wetted width was 19.7 m (sum of channels) \pm 8.6 (standard deviation). First two transects, in the study site, were 20 and 22 m."

"In his second point about the changing nature of the Dungeness River channel, Dr. Crittenden's comments again have merit. It becomes a question of how much

measurement is needed to develop instream flows that will achieve habitat protection. Having watched the Dungeness River over a number of years and comparing it to many other rivers, the changes in it do not appear so extreme that redoing the studies is a priority. (Dr. Crittenden's discussion of the incremental nature of IFIM does not reflect the actual method and suggest that he is overstating his familiarity with IFIM. He claims to have used IFIM during the 1970s, but it only came into use in the late 1970s; he did not use it in Washington.)

“His third point combines the first two and have been addressed.”

Comment # 531

The Instream Flow Incremental Methodology (IFIM) study that was done on the Dungeness River is one of the main pieces of research that provides the basis for the Dungeness Water Management Rule. However, that methodology has several serious weaknesses related to the IFIM. The less serious of the two weaknesses is that it doesn't model the movement of the bed-load. That is something that can only be done to a very limited degree. The approach that IFIM takes, instead, is to only predict the effects of small incremental changes that would not be expected to result in large changes in the river's configuration. However, the methodology also expects the user to observe how the configuration of the river-bed changed in response to whatever was done. The instream flow needs are, then, reassessed using the new set of cross-sections that were measured after the change was made. --- IFIM is a process of making many small changes and re-assessing after each of them. That is why it is called "incremental."

The Water Management Rule may be expected to result in relatively small changes in the discharge of the river. That meets the assumption of there being only small changes. Nevertheless, the cross-sections need to be remeasured and the instream flow needs reassessed, now, as more than twenty years have elapsed since the last cross-sections were sampled, the river's configuration has changed dramatically during those years, there has been significant water conservation during that period, as well as there having been sampling problems in the original study.

The proposed rule has a trigger-level for the re-measurement of the cross-sections, if there is a large change in the river's discharge. That is as it should be, although, one might debate what that trigger-level should be. However, in addition, there should, also, be periodic resampled, because, although, we expect that the planned changes in the river's discharge will only cause relatively small and gradual changes in the river's configuration, other factors that are not accounted for, such as large woody debris or the breaching of bank protection or dikes, can lead to abrupt unexpected changes in the river's configuration.

Commenter

Dr Robert N Crittenden 20

Response

Thank you for your comment. Please see the response to Comment # 530.

Ecology disagrees with your characterization of the IFIM method. The IFIM does not require remeasuring and reassessing cross-sections and observing bed change after measuring cross-sections. That is not why the method is called “incremental.” The incremental in the name refers to the fact that the method can accurately predict how a small incremental change in flow will change the quantity of fish habitat for a given fish species and lifestage.

Modeling bed load movement is not required to determine how a change in flow will change the quantity of fish habitat. As you mentioned, it is extremely difficult to predict how bedload will move and change over time down a river. And even if you could predict the shape and quantity of bedload movement you would first need to predict accurately all the floods that would occur in the future along with the exact quantity of rain that will occur on every day. This is not possible.

As answered in our response to Comment # 530, there was no sampling problem in the original study and Dr. Beecher did not find a change in the wetted width of the transects measured in the original IFIM study when compared to recent satellite photos. We find no evidence of dramatic change in bedload and wetted width since the study was done and no reason to remeasure the transects.

Comment # 532

The Instream Flow Incremental Methodology (IFIM) study that was done on the Dungeness River is one of the main pieces of research that provides the basis for the Dungeness Water Management Rule. However, that methodology has several serious weaknesses related to the IFIM study, the more serious being that IFIM isn't a scientific method, because, it contains a qualitative element which allows its outcomes to be politically determined. Furthermore, that appears to have happened in this case.

That qualitative element is the selection of the objectives of the study and the species and age compositions of the aquatic organisms for which the flow rates are optimized.

The potential of that qualitative element to have a strong influence over the outcome of an IFIM study are well recognized. For example, Dr. Ken Bovee said in the preface to his 1986 paper (Bovee, Ken D 1986. Development and evaluation of habitat suitability criteria for use in

the instream flow incremental methodology. Instream flow information paper no. 21. Washington DC, National Ecology Center, Division of Wildlife and Contaminant Research, Fish and Wildlife Service, US Dept of the Interior.):

"... Experienced users realize that the important decisions relating to biological data are made outside the mechanical operation of the models, and that the outcome of the analysis hinges on assumptions and decisions made long before the models are run."

In the body of the text of that paper, he went on to discuss the importance of properly establishing the study's purpose and objectives, including avoiding any hidden objectives or agendas; and the importance of the selection of the target species and the criteria for their selection.

He also discussed those issues in his 1982 paper (Bovee, Ken D 1982. A guide to stream habitat analysis using the Instream Flow Incremental Methodology. Instream flow information paper no. 12. Washington DC, National Ecology Center, Division of Wildlife and Contaminant Research, Fish and Wildlife Service, US Dept of the Interior.)

Those papers, show that he was concerned about the possible use of IFIM to advance hidden agendas or objectives. He undoubtedly was well aware of the existence of intentions that might not be made public in a particular application of that methodology, because, several of them were explicitly stated in the first paper of that series (Lamb, Berton L. and Debra A. Sweetman, (eds.) 1979. Guidelines for preparing expert testimony in water management decisions relating to instream flow issues. Instream flow information paper no. 1. Washington DC, National Ecology Center, Division of Wildlife and Contaminant Research, Fish and Wildlife Service, US Dept of the Interior.) They included, among others, the use of the strict control of land-use, as a means for controlling water use; and the control of water rights, as a means from controlling land-use.

I have encountered a fairly widespread belief, among the residents of the Dungeness Valley, that the stated purposes and objectives of the Dungeness Water Management Rule aren't its real purposes and objectives. Many of them believe that it is intended to control land-use, development, and possibly many other aspects of human life. I, too, have reason to believe that it serves objectives other than those that are stated in the proposed rule.

I will, now, address how the IFIM study was conducted, as that sheds some light on what its real objectives may be.

At one WRIA18 meeting, I asked Mr. Brad Caldwell, who had been involved in the IFIM study, why they had focused on providing habitat primarily for Chinook Salmon. His response was that, the Washington State Department of Ecology had instructed them to maximize the instream flow requirements.

Chinook Salmon require higher flow levels than most, if not all other, salmonid species, because, they are adapted to spawning and spending much of their freshwater live in main channels. I should, also, add that, over the last few decades there has only been a very small population of Chinook in the Dungeness River System.

At some point in time, there was also another decision that was made, that was that they should maximize salmonid habitat. Common alternatives would include but are not limited to maximizing habitat for different species of fish, or for a broad range of aquatic species; achieving a balance between fish production and other beneficial uses for the water, such as irrigation for agricultural production; or maximizing other beneficial uses of the water, while still maintaining the minimum flow needed to provide necessary fish habitat.

I should add that most fisheries biologists, today, believe that freshwater habitat isn't the limiting factor in the life-cycle of most salmonid stocks. I will say more about that, later on in this comment.

The above critical decisions (that they should maximize salmonid habitat, instream flow, and focus on Chinook Salmon) don't appear to have been made within the open public process. --- That is precisely the type of issue that Dr. Bovee was concerned about, decisions based on hidden objectives or agendas that effectively determine the outcome of IFIM.

I was present at the WRIA18 meeting when the sub-committee was formed to select the species and age compositions for the IFIM study. Although, I am a PhD fisheries biometrician, have published on salmonid life histories, and had used IFIM, during the 1970s, the members of WRIA18 strongly dissuaded me from attending those sub-committee meetings. The result was that those meetings consisted primarily, if not entirely, of government employees. What I recall is that they represented the Tribe, Department of Fish and Wildlife, and possibly one or more other agencies. As a result, their deliberations and the objectives or agendas they were serving remain unknown to the public, except to the extent that they can be deduced from their actions.

The above qualitative decisions on the objectives and target species, effectively determined the outcome of the IFIM process. The other issues, such as the defects in the sampling methods, are probably of little consequence, in comparison. Nevertheless, redoing the IFIM study remains important, because, those qualitative decisions can be reconsidered, at that time. They need to be reconsidered, so that any hidden objectives and agendas that are not legitimate government objectives can be brought to light and avoided.

Commenter

Dr Robert N Crittenden 21

Response

Ecology disagrees with Dr. Crittenden's characterization of the IFIM study and determination of instream flows as a process with a hidden agenda whose only objective was to control human life. The process was very open and very well documented as described in our general response to Science/fish.

We disagree with the statement that the method was not scientific but political, with a hidden agenda because the multi-agency technical committee that oversaw the USFWS study selected an objective for the study (to determine how fish habitat changes with flow) and a purpose for the study (to provide information to help resolve water conflicts between irrigators' diversion and water needed instream for salmon survival). We would question why anyone would think a scientific study would be better if it was done with no purpose nor objective.

Dr. Beecher's response: "Dr. Crittenden's point seems to be that there are hidden agendas in the IFIM study. The agencies with fish responsibility were focused on determining suitable instream flows for the Dungeness River. He questions the focus on Chinook salmon, but these were one of the first stocks listed under the Endangered Species Act and therefore warranting attention. Steelhead rearing habitat was also given heavy weighting in the study for summer instream flows, and steelhead rearing also benefits from flows that are relatively high. Steelhead are the most flow-dependent species because of prolonged rearing (two years in freshwater) and their relative prevalence (based on personal observation through snorkeling significant parts of the lower Dungeness). Both species are ESA-listed and were both given major consideration in the development of instream flow recommendations based on the IFIM/PHABSIM study."

Your statement regarding Brad Caldwell is in error. Ecology never told the committee to maximize the instream flow requirements and maximize the habitat for spawning Chinook salmon. Please read the documents and about the process listed in general response Science/fish.

The process of determining how to use the fish habitat relationships in the IFIM report is documented in the following report: **Recommended Instream Flows for the Lower Dungeness River** by Hiss, USFWS, May 1993. <http://www.fws.gov/wafwo/fisheries/Publications/FP070.pdf>. You will see in the report that spawning Chinook salmon habitat maximizes at 575 cfs for the river yet the committee chose 180 cfs as the recommended instream flow to Ecology. Clearly the committee did not maximize spawning Chinook habitat nor was it their only species and lifestage of concern. Our objective was to determine a flow that would protect and preserve the habitat for the several priority fish species and lifestages month by month.

Regarding your involvement or not with the original committee, Dr. Beecher's response: "Dr. Crittenden was never excluded from any consideration of instream flows and study evaluation, to my knowledge."

Ecology disagrees with your comment that fisheries biologists believe freshwater isn't the limiting factor for salmonids but do agree with the response by Dr. Hal Beecher: "Dr. Crittenden's point is that freshwater conditions are over-stated, and this seems to be based on some generalizations from his sockeye salmon research (a species that is absent from the Dungeness); for a number of reasons his argument "does not hold water." Fish, including salmon, steelhead, other trout, charr, need water. We have examples in Washington of what happens when streams are dewatered: in the 1940s, salmon were extirpated from the Walla Walla River because of lack of instream flow (dry and nearly dry channel); my colleagues (Paul LaRiviere and Jonathan Kohr) have documented dead steelhead juveniles when Manastash Creek (Yakima River basin) was dewatered. So it becomes a threshold and response question to determine how much flow is needed. Different species have different flow sensitivities."

Flow sensitivity of fish is influenced by when (season, life history stage) fish use freshwater in relation to how much water is present, where they use freshwater (lake, big river, small stream, wetland), and for how long. Dr. Crittenden's remarks are probably very relevant to Fraser River sockeye salmon, which rear in lakes where flow is not a big issue and migration is the main time of exposure to flowing water; sockeye migrating in and out of smaller streams might be expected to be more sensitive to flow than those in the mighty Fraser.

In contrast, a number of studies (Beecher et al. 2010; Mathews and Olson 1980; McKernan et al. 1950; Neave 1949; Scarnecchia 1981; Smoker 1953, 1955; Zillges 1977) have shown a strong relationship between coho salmon production and freshwater flow. Coho salmon rear for a full year in streams. The consistent 3-year life history of coho salmon renders such trends more detectable than for most other salmonids. (Chinook salmon, in contrast, return as 2-through 5-year old spawners, so the number of Chinook entering a fishery or returning to spawn in a given year cannot be related directly to the number of smolts produced in a single year. Smolts are young salmon entering saltwater.)

Freshwater habitat is not the only limiting factor for salmon and oceanographic conditions are known to be a substantial influence on anadromous salmonids. More importantly, salmon need a secure freshwater habitat in which to recover from other stresses, such as oceanographic variation. Salmon and steelhead need favorable conditions in all their environments in order to be productive at a rate that can fulfill human needs and wants while remaining sustainable. Dr. Crittenden is certainly correct that, to quote Brad Caldwell, "there are a thousand ways to kill salmon, low flows are just one way," but instream flow protection is intended to avoid the type of action (Department of Ecology issuing too many water rights and drying the river and killing fish) that Dr. Crittenden warns about.

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Comment # 533

A key assumption in this application of IFIM, is that salmon are limited by freshwater habitat. However, that assumption is doubtful in general and fails to reflect the conditions in the Dungeness River system, in particular. The result is that the predicted optimum flows, from IFIM, are probably grossly out of proportion to what is necessary or needed.

Regarding the factors limiting salmon abundance, Bob Lohn, the Director of NOAA for the Northwest Region during the mid-1990s, aptly summarized the situation, when he stated that, "Most credible scientists, today, believe that the salmon crisis was caused by ocean conditions, not freshwater habitat."

During the early 1990s, I modeled a sockeye salmon stock in British Columbia (Crittenden R.N. 1994. "A model for the processes regulating recruitment in a sockeye salmon stock." *Ecological Modelling*,71: 69-84). I found that their smolt migration was the bottleneck in their

life-cycle. The smolts experienced intense predation by birds and fish but larger smolts could swim faster and were better at avoiding those predators. At that time, the only other study of the full life-cycle of a salmonid stock which achieved statistical significance was the work done by William Ricker on an Oregon Coastal stock, during the 1950s. He also found that the bottleneck occurred during their smolt migration. However, he concluded that the limiting factor was the availability of hiding places, from predators, whereas, I found that their size was the limiting factor.

Other authors have postulated various other possible limiting factors. For example, some think that it may be the availability of near-shore habitat, such as eelgrass beds. However, one has to model the full life-cycle, with statistical significance, in order to demonstrate where the bottleneck occurs but very few studies have done that.

Furthermore, each salmonid stock is adapted to its specific habitat and the various stocks and species show remarkable variation in their life-cycles. Consequently, the fact that, twenty years ago, there were only two stocks for which the limiting factor had been identified and for both of them that occurred during their smolt migration; certainly doesn't demonstrate that that is when the limiting factor occurs for all salmonid stocks.

Nevertheless, Bob Lohn's remark about its, not being freshwater habitat, remains accurate, for he made that statement, during the salmon crisis of the 1990s and the low salmon abundance during that period clearly wasn't due to limitation of that factor. That should have been evident to many people. The reason is, that the salmon abundance was reduced in both rivers that had degraded habitat and pristine rivers. --- So, obviously their decline wasn't caused by habitat loss.

In most cases, the management policies of government agencies were what was actually limiting their abundance. I wrote three books on that issue and related topics. (Crittenden, R.N. 1992. *Salmon at Risk*, first edn. Hargrave Publishing, Carlsborg WA. Over the years that followed, that book gradually grew, as I learned more. It went through eight editions. It is now out-of-print. I also wrote two other books on closely related topics. They are *Elite Planners* which does an analysis of the interlocking directorates of the groups and corporations behind the policies that were discussed in *Salmon at Risk*; and in the year 2000, I published, *Politics of Change*, which is a history of Western thought, which traces the roots of those agendas back to their origins.) As a result of having written and published around a thousand pages on this topic and related issues, I know many examples and illustrations of how the low salmon abundance was and still is the result of deliberate government policies. I will try to pick a few that tell the story as briefly as possible.

Ocean harvest was one of the main parts of the policies that caused the salmon crisis. As the agencies regulate that harvest, Mr. Lohn's statement remains literally correct, although, it is somewhat deceptive.

In particular, a NOAA study had definitively demonstrated that the West Vancouver Island fishery was the main factor that had depressed the Chinook salmon stocks of Western Washington, before the Canadian American Salmon Interception Treaty of the late 1980s and early 1990s. For that reason, the terms of that treaty specifically included closing that fishery. The effect was that the Chinook stocks in Western Washington recovered, exactly as might be expected.

Freidenburg (M.E. Fraidenburg 1989. The new politics of natural resources: Negotiating a shift towards privatization of natural resource policy making in Washington State. *The Northwest Environmental Journal*. 5:211-240.) recorded how the State Agencies and an environmental group took advantage of that knowledge to influence the beliefs and behavior of the public. Specifically, the environmental group, Long-Live-the-Kings, formed groups of local volunteers and got them to do habitat restoration projects on the rivers of the Olympic Peninsula. The members of those groups didn't know about the interception treaty, they thought that their habitat restoration projects had caused the subsequent increase in salmon abundance. --- That established a pattern that the government agencies would use again-and-again over the years that followed. That approach towards tricking the public by manipulating a part of the salmon life-cycle that the public doesn't see, was even used to influence the instream flow negotiations for the Dungeness River and to mold public opinion about those negotiations and the resulting proposed Water Management Rule.

The Canadian-American Salmon Interception Treaty came to an end, due to the refusal of the State of Alaska to stop the fishermen of the southern panhandle from intercepting the Fraser River Sockeye. Then, Canada re-opened the West Vancouver Island fishery. That had its expected effect, and contributed substantially to depressing the salmon stocks from Washington State. I knew Norma Jean Sands, who was the manager of that South-Alaskan fishery, as I had attended graduate school with her. So, when I met her at an American Fisheries Society meeting, I asked her why she let them catch the Canadian fish. She told me that Senator Stevens, the US Senator from Alaska, had told her to. That was why she did it. Later Senator Stevens would be one of the individuals who testified at the hearing that led to the creation of the "salmon czar." That position eventually took form as the head of the Salmon Recovery Funding Board. That individual eventually controlled much of the funding for the Watershed Councils and WRIAs. --- These events are all interconnected and it is a complicated story.

Later, at the end of the decade of the 1990s and the opening years of the next decade, Canada unilaterally closed the West Vancouver Island fishery. As might be expected, there were good runs of salmon in Washington State. They were record runs. However it is impossible to prove that there was a causal relationship between the fisheries and those large runs, because, there were also changes in ocean condition, those years.

More recently, I attended the impact hearing on the Washington State Hatchery Management Plan at the Jefferson County Library. Only two members of the public attended, myself and another fellow. He asked his questions first and then left. Then, I asked my questions. I explained that I had written a paper in fitting the Ricker Curve to Salmon spawner-recruit data (Crittenden, R.N. 1994. Optimum Escapement Computed using the Ricker Spawner Recruit Curve. Fisheries Research. 20: 215-227). That is a statistical procedure that is necessary, if one intends to do conventional scientific management of salmon. Unfortunately, with the amount and quality of data that were available at that time, the fit of that curve was rarely significant. However, with only a few more years of data, particularly from low abundance years, significance could be achieved. Then, I asked whether they were or planned to depress the salmon abundance to obtain those data. They said, Yes, they were doing that. So, I asked what rivers they were doing it on. They said that there were too many for them to remember. Finally, I asked about two specific rivers, the Samish and the Dungeness. They said, yes, they were doing that on both of them.

The principle ways they depress the salmon stocks is to allow too high a harvest, so that not enough adults return to spawn, or simply by not putting enough eggs into the spawning trays. They also do various things that reduce natural spawning. One example, is placing rootballs from large forest trees and other large woody debris in the Dungeness River, alledgedly to provide habitat. However, during large storm events they are carried downstream and as they go they plow up the riverbed. They destroy any salmon redd they go through. The residents along the river have complained about this, many times. Nevertheless, it probably makes little difference, for there are many ways by which the agencies can depress the salmon stocks.

Regarding the upper part of the Dungeness Watershed, above the hatchery, the reason that there is little spawning there, even though that part of the river is pristine and has a great deal of habitat, is that a number of years ago they raked the river at the hatchery. Their intention was to make the upper river a Coho-only river for sport fishing. When I came to Clallam County in the mid-1990s, that rack was still in the woods behind the hatchery. However, when I looked for it again, more recently, it was no longer there.

The reason that few fish still ever go above the hatchery, even though they no longer rack the river is two-fold. First their abundance is low enough that they find abundant habitat in the lower river and don't need to go any further; and Second, the fish that are raised in the hatchery are imprinted on Canyon Creek water and return to that water source. Canyon Creek is blocked off from salmon except that it provides the water supply for the hatchery. The Department has an acclamation pond in the upper river basin but they don't raise the fish in it long enough for them to imprint on that water, instead.

Nevertheless, not even a month ago, two members of a sport fishing group came by my home and told me that the employees at the hatchery had complained to them that the Tribe was instituting a program to raise salmon from the egg stage in the upper basin. They and the

WDFW employees they had talked with wanted that program stopped. --- In fact, that program is something that I have been advocating for several years. I am glad that someone is finally doing it. However, they are not likely to succeed as well as they ought to, unless WDFW allows them to. There are just too many opportunities for the department or their cooperating sport fishermen to eliminate those fish.

The point that I wish to make, is that the salmon stocks in the Dungeness River System are limited by government policies, not by freshwater habitat, and even under natural conditions freshwater habitat is probably not the limiting factor in their life-cycle. In light of these considerations, the estimates from IFIM of the optimum instream flows are probably grossly out of proportion to what is necessary or needed.

Commenter

Dr Robert N Crittenden 22

Response

By Dr. Hal Beecher: “Although Bob Lohn had a political appointment to an important salmon management administrative position, he is not a biologist. His conclusion also has merit, though, as freshwater habitat is not the only limiting factor for salmon and oceanographic conditions are known to be a substantial influence on anadromous salmonids. More importantly, salmon need a secure freshwater habitat in which to recover from other stresses, such as oceanographic variation. Salmon and steelhead need favorable conditions in all their environments in order to be productive at a rate that can fulfill human needs and wants while remaining sustainable.

“Dr. Crittenden is certainly correct that, to quote Brad Caldwell, “there are a thousand ways to kill salmon, low flows are just one way,” but instream flow protection is intended to avoid the type of action (Department of Ecology issuing too many water rights and drying the river and killing fish) that Dr. Crittenden warns about.

“Dr. Crittenden’s remarks are probably very relevant to Fraser River sockeye salmon, which rear in lakes where flow is not a big issue and migration is the main time of exposure to flowing water; sockeye migrating in and out of smaller streams might be expected to be more sensitive to flow than those in the mighty Fraser.

“In contrast, a number of studies (Beecher et al. 2010; Mathews and Olson 1980; McKernan et al. 1950; Neave 1949; Scarnecchia 1981; Smoker 1953, 1955; Zillges 1977) have shown a strong relationship between coho salmon production and freshwater flow. Coho salmon rear for a full year in streams. The consistent 3-year life history of coho salmon renders such trends more detectable than for most other salmonids. (Chinook salmon, in contrast, return as 2-through 5-year old spawners, so the number of Chinook entering a fishery or returning to

spawn in a given year cannot be related directly to the number of smolts produced in a single year. Smolts are young salmon entering saltwater.)

“I disagree with Dr. Crittenden’s statement that few salmon spawn above the hatchery. The number of pink salmon in the Grey Wolf River, well upstream of the hatchery, can be impressive in odd-numbered years, as I have seen when fishing up there.”

Ecology notes that the quote by Bob Lohn of NOAA was a general statement you allege he made about all the rivers in the Northwest in the mid-1990s. But NOAA later made a specific determination about the limiting factors for the Dungeness River. In the 1999 Federal Register listing for Hood Canal Summer-run Chum Salmon, NOAA said a multitude of factors had contributed to the decline of chum salmon. **They noted that destruction of freshwater habitat was not only an important factor threatening steelhead but also applied to the decline of chum salmon. They specifically mentioned that habitat alterations such as water withdrawal were resulting in insufficient flows.** They identified detrimental effects on chum salmon due to gravel aggradation from logging practices resulting in channel shifting and diking.

In summary, NOAA found the present (1999) depressed salmon population was the result of several long-standing human-induced factors (e.g. habitat degradation, water diversions, salmon harvest, and artificial hatchery propagation) that serve to exacerbate the adverse effects of natural factors (e.g. competition and predation) or environmental variability from such factors as drought and poor ocean conditions.

The factors listed above would also detrimentally affect the listed Chinook salmon, Steelhead, and Bull trout. They would all suffer negative population effects from the same natural and human-induced factors listed.

Comment # 534

Reliable science underlies the rule’s prescribed instream flow levels. The Dungeness is one of most scientifically studied fish-critical basins in Washington State.

Although some of the studies relied-upon are a decade or more old, there is no credible evidence that instream values or aquifer levels have improved since the studies were conducted. If these studies were repeated today they would likely show that more protective flow levels are needed than set forth in the proposed rule, due to factors such as burgeoning regional development, changed land use patterns, and the effects of climate change.

Commenter

Shirley Nixon 3

Response

Doing instream flow studies does not cause instream values or aquifer levels to improve. Instream values and aquifer levels may increase due to an increase in streamflow.

An IFIM/PHABSIM study measures the widths, depths, velocities, and substates in the river channel and does not measure regional development or land use or climate change. Those variables would have to change a lot to change the channel shape. The channel shape is shaped by the frequency and size of the flood flows and diking. We are not aware of any historic changes in flood flows at this time.

Comment # 535

Swift's Toewidth Method was used to estimate the flow in the small streams in the Eastern WRIA18, for which there were no stream gage data. However, there were several flaws in how that method was developed and applied, which render it scientifically invalid. There have been more recent studies of the flow in those streams, which may or may not replace the results from Swift's toewidth method. Nevertheless, to the extent that the proposed rule still rests upon the results of that method, that work needs to be replaced with something that is scientifically valid.

Swift's toewidth method and its application contain the following flaws:

1. It was originally developed using stepwise linear regression but there is not indication in their report that they discounted the alpha-levels for multiple comparisons. Although, that is a technical issue, it is a serious mistake. The result is that the model they developed has no scientific support.
2. They selected the rivers and streams they studied instead of randomly sampling them. Consequently, if their method was valid, it would only apply to those particular streams and rivers, rather than to streams and rivers in general.
3. Likewise, they selected the sites on those streams and rivers where they took measurements rather than randomly sampling. Consequently, if their method was valid, it would only apply to those particular sites on those particular streams and rivers, not to those rivers and streams in general.
4. The streams in WRIA18 to which it is being applied have smaller discharges than the rivers and streams for which the method was developed, or are near the limit of that range. The problem is that Swift's toewidth method is an empirical model and, as such, it is appropriate for interpolation within the range of the data from which it was developed. It is not appropriate to

use it for extrapolation beyond that range. For this reason, the use of Swift's toewidth method on the small streams in eastern WRIA18 is a misapplication of that method.

5. There is, also, reasonable doubt as to whether the toewidth's that were measured on the small streams in Eastern WRIA18 were meaningful. --- Those streams were altered from their presettlement conditions, with the advent of irrigated agriculture and the draining of wetlands, during the early twentieth century. Later, at the time the measurements were taken for the application of Swift's method, although, agriculture was declining, there was still quite a lot of it, and many of the farmers were still using the older methods of irrigation. Flood irrigation, leakage from the irrigation ditches, and tail-water provided a lot of water for those streams. However, since that time, many of the irrigation ditches have been piped and the older irrigation methods have been replaced by more efficient methods. Furthermore, much of the irrigated agricultural has been replaced by homes. And homes use much less water per acre. The result of these changes is that the measurements that were taken reflect neither pre-settlement conditions nor current conditions.

I am inclined to think that the legal mandate is to maintain the instream conditions that exist at the time that the rule is adopted. In that case, new measurements need to be taken, if, the more recent studies don't serve this purpose.

Commenter

Dr Robert N Crittenden 24

Response

Ecology agrees with Dr. Beecher's response: "Dr. Crittenden suggests the toe-width method is invalid because Swift might not have included the alpha-level computation correctly for multiple regression. I think it is much more likely that, knowing how to do multiple regression in the days before statistical software packages were widely available (there were some for mainframes), the person (Swift) doing the multiple regression would also know that alpha-levels (probabilities of an observation being random, commonly referred to as significance levels) are affected by numbers of variables and sample sizes.

"Dr. Crittenden states that the study streams and sites on those streams for Swift's study were selected, but it is not clear from Swift's paper that this is true. However, Swift does not indicate random sampling, so Dr. Crittenden is probably correct. It is most likely that Swift's streams were selected based on stratified sampling, given the need to look at areas where fish actually spawn in good numbers. The work being undertaken under Jim Pacheco's lead largely answers Dr. Crittenden's concern: Jim and coworkers are applying the Swift approach to a large sample of sites and cross-checking its results with those of PHABSIM.

“Dr. Crittenden’s comment about the small size of streams in eastern WRIA 18 is interesting. WDFW staff recognized that the trend of Swift’s equations and the depths and velocities associated with flows based on Swift’s equations in small streams result in flows that seldom occur in dry months. Based on these observations of flows and habitat conditions in very small streams, WDFW recommended that all very small streams be closed to further appropriation. It is interesting that under his comment on Swift’s method he states “it is appropriate for interpolation within the range of the data from which it was developed,” acknowledging its validity in streams of the size of Swift’s original study streams.

“Dr. Crittenden expressed concern that toe-width measurements in eastern WRIA 18 no longer reflect the condition of those streams. Although the changes that he mentions have occurred in those watersheds, the rate of change is small and conclusions are unlikely to have changed much.”

Ecology notes that Swift’s Toe-width method was created using streams with toe-widths as small 11 feet. Dr. Crittenden feels that interpolation within the sizes of stream used in the original study would be appropriate for use with the Toe-width equations. So all the toe-widths used in the rule for the small streams except Cassalery are appropriate according to Dr. Crittenden since only Cassalery’s toe-width is less than 11 feet.

Swift in his original Toe-width method development picked sites based on them being known sites of salmon spawning because he wanted to know what widths corresponded to what depths and velocities needed for salmon spawning. Salmon pick sites based on very specific criteria. He only used reaches that were known spawning sites so that all substate was set at a value of 1 to simplify his calculations and because he wanted to know what depths and velocities were needed by spawning salmon – not random measurements of reaches where no salmon spawn. Salmon do not spawn randomly nor pick spawning sites at random. Measuring random reaches of river where no salmon spawn would not have provided him with any information on the depths and velocities and widths needed by spawning salmon.

Comment # 536

That insidious plan [to recharge the aquifer with treated wastewater] is based on the aquifer recharge study. That was done conditional upon the parameters that were estimated using the static recharge study of the 2008 groundwater flow model. As I have stated in a previous comment, the static calibration study has zero degrees of freedom and infinite variances and, consequently, the aquifer recharge study, which was done conditional upon it, inherits those infinite variances. Thus, neither of them are scientifically valid, they are both arbitrary and to me, they are invidious.

Thus, they violate my civil rights.

Commenter

Dr Robert N Crittenden 26

Response

The City of Sequim or the PUD are potential generators of reclaimed water and they may use that reclaimed water for aquifer recharge in accordance with the state's water quality standards and the Reclaimed Water Guidelines. The process for obtaining permission to do it includes environmental review and issuance of a Reclaimed Water Permit under RCW 90.46. The approval processes have both notice and appeal provisions intended to protect the right to due process.

Comment # 537

Based on background information (such as provided in the series of Dungeness Water Watch publications), the proposed rule appears to be properly founded on use of BAS and IFIM.

Please postpone the making of an additional law here in Clallam county until an independent study has been done.

I have been listening to the data presented and I dont think thos rule is a good fit for our County.

We propose that you delay the implementation of the Instream Flow Rules until impartial studies have:

- Presented sound, peer reviewed evidence that said hydrological connectivity exists
- Confirmed that limiting water usage by well-users will have more than a passing affect on in stream flow levels
- Established that the In stream Flow levels mandated by DOE are actually achievable and are not impossible goals that have only rarely been achieved in past decades.

Furthermore, new standards and requirements often are implemented without current, valid, peer-reviewed science. I believe this to be the case with the Water Rule.

You tie everything in your rules to stream flow which is strictly surface runoff whereas well water comes from the aquifer; therefore we also think you should have an independent peer review of the science purported to be the basis of these rules before proceeding.

Ecology's science is flawed – assumptions have been reached are nothing but teory and opinion.

I would like to register my formal complaint against the wira 18 rule as it stands today. I do not believe the studies used are accurate and the whole rule should be reviewed in its entirety or revoked.

Commenter

Elaine & George Chandler 7; Arthur Buhner 1; RA Pilling, Clallam County Republican Party 7, H7; Jo Anne Estes 2; Linda J Ulin 1 ; Judy M Larson, Protect the Peninsula's Future 2; Gary Terrell 2

Response

Thank you for your comment. Ecology feels confident in the science and existing studies, which have undergone peer review, that support elements of the rule. Please see the general responses to Science/fish and the Groundwater model.

Tribal Issues

Comment # 538

During the past year the Treaty Tribes of western Washington have been trying to capture the attention of the federal government with regard to salmon recovery. In the 1850's the Tribes signed treaties that gave the United States title to millions of acres of land in exchange for continued and protected rights, forever reserved, to fishing, hunting and gathering opportunities, among others. These rights have become severely constrained and they are at risk of disappearing. Harvest opportunity has been reduced in many cases and eliminated in others. Hatchery operations, often the only type of production that offers Tribes harvestable salmon, have been reduced. All in the name of salmon populations and their recovery plans.

Commenter

Scott Chitwood, Jamestown S'Klallam Tribe 7, 8

Response

Thank you for your comment.

Comment # 539

According to spokesperson for DOE "the tribes have some undefined claims" of water rights. How can you determine if the watershed is over allocated if ALL claims are not clearly and specifically defined?

Commenter

Tom Williamson 3

Response

The Dungeness basin and the small streams were concluded to be fully or over appropriated based on uses recognized under state law, without considering tribal reserved rights. Given the existing uses of surface and groundwater, plus the water that is needed to protect existing aquatic habitat, there isn't water available to meet prospective out-of-stream needs (such as domestic, municipal, or irrigation uses) with reliability appropriate to the purpose.

Comment # 540

How come the tribal rights are not being adjudicated before implementing WRIA 18? Are you going to magically come up with more water rights when they are given 50% thru the Boldt decision later. I think wria 18 is going to cause more lawsuits than it solves particularly when the tribal rights are determined after the fact. Determine the tribal rights before you implement wria18. What is the reason its not being done now? Get it all up front and in the public eye and not behind closed doors.

Commenter

David Kruth 1, 2

Response

The United States cannot be sued in Washington's Superior Courts to adjudicate its rights to water in the Dungeness Basin without Ecology commencing a general adjudication of all water rights in the basin. If all rights are adjudicated, Congress has given consent under the McCarren amendment to have the rights of the United States adjudicated in state courts. Also see the general response regarding Federal Reserved Water Rights.

Comment # 541

Why does the proposed rule and analysis involve your agreement with the Jamestown S'Klallam Tribe and the proposal to restore stream flows? What legal authority does Ecology have to restore stream flow, rather than just requiring instream flows equal to the stream flow derived from groundwater inflow or discharge?

Commenter

Pearl Rains Hewett 53; Randy Simmons 43; Kaj Ahlburg 41

Response

Washington State has many complex relationships and obligations to the United States, and to the sovereign tribes within Washington. The Centennial Accord, signed in 1989, describes the framework for the State's approach to working with the federally recognized native American tribes in Washington.

Ecology's authority to *restore* instream flow is based upon the Legislature's decision to allow Ecology to hold water rights in the Trust Water right Program (see RCW 90.42 and RCW 90.38) and to fund conservation projects and water acquisition transactions that reallocate water from willing sellers to instream flow purposes. Water rights are a form of property right; therefore, Ecology negotiates leases and purchases that serve to restore streamflows.

Ecology's authority and obligation to set instream flows to protect aquatic resources derives from RCW 90.22.010 and RCW 90.54.020(3)(a) and not from our agreements with the United States or the tribes.

Comment # 542

What I don't understand is why, as down there the county or state can place a building moratorium releasing measured amount of permits in order to organize the water situation. All, this creating water rights seems like the long way around the issue or something sneaky is going on. I would like to know more about how the water rights are formed? Who already owns some of them? How they can be acquired? How is the Jamestown tribe involved and how many shares do they own? I know the tribe somehow say they own the fish, now do they own the water in the river also? If so, Is this how all of the studies indicate that the entire basin that the tribe once occupied is now directly relating the river water to our well water?

Commenter

Joe McDermott 2

Response

Please see the general responses pertaining to Prior appropriation: what's fair? and Federal Reserved Water Rights.

Comment # 543

As one of the three S'Klallam Tribes with Treaty affirmed Usual and Accustomed hunting, fishing and gathering rights in this area, we have been working collaboratively with our colleagues to protect and recover resources, especially salmon, that we have depended on for millennia. Securing water flows has been and remains a critical need.

Commenter

Paul McCollum & Dave Fuller, Port Gamble S'Klallam Tribe 3

Response

Thank you for your comment.

Comment # 544

Finally, you have not candidly addressed the 800# gorilla in the room. What role does the Tribes' assertion that treaty fishing rights are at risk play in DOE's drive to provide streams in WRIA 18 with a senior right to water? And how important has that role been in sacrificing the needs of non-tribal citizens of the Dungeness Valley to fish?

Commenter

Jacques M Dulin 20

Response

Ecology is required by RCW 90.82 to adopt a rule to implement the recommendation of the adopted watershed plan. Ecology is proposing the rule to implement state law enacted by the Washington Legislature. It is aware of the potential risks relative to federal reserved rights, but those risks have not been Ecology's primary reason for participating in Pilot Planning, Watershed Planning, and, finally, to advance the rule proposal to implement the recommendations in the watershed plan. Please also see the general response pertaining to Federal Reserved Water Rights.

Water Law

Comment # 545

If there is no current or foreseeable shortage of water in our aquifers, as stated by DOE spokesperson, how can any senior water right be impinged?

Commenter

Tom Williamson 5

Response

Impairment, detriment, and injury are terms that describe an encroachment upon a water right prohibited by the water code. Detriment or injury to existing groundwater rights can occur in

local areas within an aquifer or groundwater body. Injury to a surface water right from pumping groundwater aquifers can occur where there is hydraulic continuity between the river and the groundwater aquifers. Please refer to Hubbard v Department of Ecology, Division III Court of Appeals (1997) on Ecology's website for a specific description of how groundwater pumping can impair a senior surface water right.

Comment # 546

We disagree with DOE rewriting the State Water laws - see the attached copy of the State Attorney Generals Opinion (2009_AOG Permit Exempt Opinion) with regard to DOE restricting the use of the legal 'Permit Exempt Well' water allowances.

[Summary of findings below. Body in Appendix XX.]

Water-Water Rights-Wells-Interlocal Cooperation Act-Interpretation of statutes exempting certain withdrawals of groundwater from permitting requirements, and authorizing the Department of Ecology to withdraw waters from appropriation

1. The statutory exemption from the permitting requirement for use in watering lawns and noncommercial gardens is not included within the exemption for domestic use.
2. The Department of Ecology lacks the authority to impose lower or different limits on exempt withdrawals of groundwater than are provided in statute by "partially withdrawing" the waters from additional appropriation.
3. The authority of the Department of Ecology to withdraw waters from new appropriations applies to both permitted and permit-exempt uses of groundwater.
4. The Interlocal Cooperation Act is not an independent source of agency authority.

September 21,2009

Cite As: AGO 2009 No. 6

Commenter

Ross Krumpe 5; Dennis Schultz, Olympic Stewardship Foundation 4

Response

Ecology's rule does not rewrite existing water laws. When issuing AGO 2009 No. 6, the Attorney General reviewed the Upper Kittitas Groundwater Withdrawal Rule Ecology adopted and determined it to be lawful.

Please note point No. 3 above in your comment (an excerpt from the AGO). Ecology has authority to close or withdraw from appropriation any remaining unappropriated groundwater.

This rule does not establish a restriction on the amount of water use under the groundwater permit exemption. The rule does require that all new groundwater withdrawals be mitigated.

Comment # 547

What does the Attorney General's office have to do with the DOE except issue a formal opinion based on water exemption what data does the Attorney General's office base this formal opinion on?

Commenter

Richard & Jill Pinder 15

Response

The Attorney General provides legal advice to state agencies, the Legislature, and political subdivisions of the state when advice is requested. Formal opinions of the Attorney General are not law, however, the advice is binding on the agencies. The formal opinions are generally given substantial weight by the Washington Court system.

Comment # 548

I was present at the Sequim Community Church meeting last night. First, I want to thank you for a very good summarization of the rule as it currently stands (and will likely be adopted). I thought Ecology staff did a fine job of both speaking and listening.

The reason I am sending this, however, is that I saw a basic disconnect with many in the audience regarding the concept of the "impact" of the rule and am afraid that something obvious to those who work with water law regularly (including those of us in the private sector) is being missed by many in the regulated community.

Many of the assertions of "impact to property values" or believing there is a "constitutional taking" issue or that "you rethink your economic impact assessment" seem to believe that the status quo (the situation as it now exists without the rule) is that they would have unfettered access to water on their property. They are unaware that the findings of the Watershed Plan is that there is no water to allocate and that the appropriate response to applications lacking a mitigation plan under the non-rule condition would be denial of the application. It seemed equally unknown that a request for a moratorium on the groundwater exemption by any of several affected parties would likely need to be taken serious by Ecology. Even if Ecology were to resist the moratorium, armed with the findings of the watershed plan a court would likely impose it.

Commenter

F Michael Krautkramer, Robinson Noble Inc 1

Response

Thank you for your comment. Ecology will continue to work with individuals and local groups to improve understanding of the instream flow program and water right law generally.

Comment # 549

At least two local government entities and many individuals have raised serious questions relative to conflicts with existing RCWs. They recommend that the law needs to be change before any decision is made to implement the proposed rule.

Commenter

Jerald R Sinn 2

Response

Individuals and local government entities do not alone decide what the law should be or is. We have elected a Legislature that determines what the law should be, with an executive branch to carry out the Legislature's directions, and the Court's job to interpret and, where necessary, resolve disputes over its interpretation.

Comment # 550

The State of Washington water resource planning directions came initially from 90.54 RCW known as the Water Resource Act of 1971. Included in this act were fundamentals of allocation of water within the state and provisions for setting forth "Base Flows" in all perennial steams of the state. Separately, in 1969, the water code provided, under 90.22 RCW, that "Minimum Flows" may be adopted for protection of specific values related to stream flow. The language associated with the 90.54.020(3)(a) RCW included within a "Declaration of Fundamentals" that "Perennial Rivers and Streams ... shall be retained with Base Flows necessary for the preservation of ... values". The Base Flow provision was later set forth in more detail under 173-500 WAC, with a specific hydrological methodology set forth in the Western Washington Instream Resource Protection Programmatic EIS document at Appendix D (see Attachment 1). Under said Water Resources Act of 1971 nineteen major river basins in the state had some level of planning activity completed including the setting of "Instream flows". All of these basins, including the Columbia and Snake Rivers, incorporated the adoption of Base Flows, or a combination of Base and Minimum Flows, dependent upon the degree to which the stream system was a natural flow system or a system that had available stored water for release.

Much later 90.82 RCW was passed, enabling another broad-based water resource planning activity led, to some degree, by a variety of public and private interests in the given watershed planning area. This currently proposed 173-518 WAC is one effort within what came to be known as the 2514 water resource planning activity named after the legislative bill number. At this stage the 2514 water resource planning effort had the mandatory provisions for considering water quantity for existing and future water use and water supply and. the option to address water quality, instream flows, aquatic and riparian habitat and water storage issues. Subject basin took the option to address all the noted issues. The State provided funding for a variety of study efforts relating to these functional water resource elements. The currently-proposed 173-518 WAC (see Attachment 2), inclusive of the Dungeness River Basin, is under the auspices of a 2514 planning effort.

Commenter

Kris G Kauffman, Water Rights Inc 1

Response

Ecology agrees that the rule is under the auspices of a 2514 planning effort. See response to Comment # 66.

Comment # 551

What section in the state statutes provides Ecology with the authority to override RCW 90.44.050 with an agency rule? Since in the proposed rule it seems the availability of reserves or mitigation can not be assured in all cases, the rule if adopted would override RCW 90.44.050 in those cases.

P.21 of the CBA states that “new permit-exempt well use may not occur where an existing municipal water supplier can provide service”. What constitutes the statutory authority that overrides permission to withdraw public groundwaters under RCW 90.44.050, which contains no such qualification?

Commenter

Pearl Rains Hewett 53; Randy Simmons 33, 38; Kaj Ahlburg 31, 36

Response

Please see the response to Comment # 546.

Comment # 552

Under state law, the waters of Washington collectively belong to the public and cannot be owned by any one individual or group. What is the state law on air? If the Department of Ecology and the tribes are not claiming ownership of the water then how are they able to transfer the quantity of it for anyone's use and ask for mitigation? How do you sell something you don't own? If the water belongs to all of us collectively, then collectively we should be able to choose.

Commenter

R Doreen Emerson 2

Response

Please see the general responses on Prior appropriation: what's fair? and Federal Reserved Water Rights.

Comment # 553

In 1967 the State of Washington passed the Minimum Water Flows and Levels Act to address the need to protect instream flows for anadromous fish, wildlife, and recreational uses. This legislation was based on the recognition that increasing population pressures associated with rapid development have adverse impacts on water availability for human consumption, salmon habitat requirements, and other uses. In 1998 the state passed Watershed Planning legislation (ESHB 2514) as a means of addressing water management planning on a local level. Two watershed planning units were established for Clallam County, the Dungeness River Management Team (DRMT) and the Elwha-Morse Watershed Management Team (EMMT), to develop recommendations for managing water resources that address quantity, quality, instream flows, and fisheries habitat. The Lower Elwha Klallam Tribe has participated in Watershed Planning in Water Resources Inventory Area (WRIA) 18 (EMMT) for over 12 years. This effort culminated in the Elwha-Dungeness Watershed Plan in 2005.

Commenter

Doug Morrill & Matthew Beirne, Lower Elwha Klallam Tribe 1

Response

Thank you for your comment. In actuality, the Elwha Dungeness planning unit is comprised of two planning teams: the Dungeness River Management Team established following adoption of the Dungeness Quilcene Water Resources Management Plan in 1994, and the Elwha Morse Management Team established in 1999 to undertake watershed planning. Each team recommended actions in their planning areas followed by joint meetings to address issues and

actions covering the entire WRIA. Statutory language requires watershed planning to occur on a WRIA basis.

Comment # 554

I am concerned about the new water program proposed. Currently there are laws that forbid denying access to property so that property owners can enjoy and take full advantage of uses on their properties.

Why, then is the DOE allowed to deny property owners access to water?

Commenter

Deb Kahle, Windmere Sunland 1

Response

Property owners do not enjoy a right to water absent beneficial use of water under the surface water and groundwater codes. Please see the general response relative to Prior appropriation: what's fair?.

Comment # 555

Delay the rule until it is determined that DOE has the statutory authority to impose these limitations.

Commenter

RA Pilling, Clallam County Republican Party 8, H8

Response

Thank you for your comment. The recommendation to adopt instream flows for the Dungeness River has existed in some form since 1994, further delay is not appropriate. Ecology does have stator authority to impose the limitations in the rule. Please see the responses to Comment # 546 and Comment # 66 and the general response regarding Motivation and authority for adopting the rule.

Comment # 556

Why is it, that the public can not have a vote on the purposed water rule for the WRIA 18?

Commenter

Richard & Jill Pinder 18

Response

The process leading to the current rule proposal is based on the Watershed Planning Act, RCW 90.82. That process provides for local public participation, and includes a watershed plan adoption process through the county commission, and rule adoption that must comply with the Administrative Procedures Act, Chapter 34.05 RCW; not a general election. Also see the response to Comment # 232.

Comment # 557

We have heard a rumor that the Clean Air and Water Act of 1977 exempts all ag uses (both crops and stock watering) under the proposed Water Resources Management Program for the Dungeness portion of the Elwha-Dungeness Water Resource Inventory Area (WRIA) 18. Is that true?

Commenter

Jacques M Dulin 19

Response

No.

Comment # 558

By statute Ecology only has the right to establish "minimum baseflows" and not "maximum flows" with regard to rivers and streams in this state. (RCW 90.22 and 90.54) Why then is Ecology ignoring the precedents already set by these and other statutes/cases and insisting on setting the CFS that must be reached in the Dungeness River and streams within WRIA 18 at a "maximum" flow. This has been reached one time since the year 2000.

Commenter

Helen L Watkins 3

Response

Thank you for your comment. Please see the response to Comment # 66 and the general response to Science/fish.

Comment # 559

It seems that water banking is not authorized by any statute.

Commenter

Elaine & George Chandler 4

Response

Water banking, and use of the state's trust water rights program to accomplish it, is specifically authorized by RCW 90.42.100.

Comment # 560

Proposed Rule Violates State Water Code Requirement That Adequate Potable Water Supply for Human Domestic Needs Be Provided.

The Proposed Rule's failure to provide sufficient water supply through the proposed violates RCW 90.54.020(5), one of the fundamental requirements of the state's Water Resources Act. This provisions states that "Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." The policy enacted by the Legislature that adequate potable water for human domestic needs "shall be preserved and protected" could not be stated more clearly.

An instream flow rule that violates statutory authority by adopting more than minimum flows while failing to provide sufficient water for future domestic uses clearly violates the Water Resources Act. The Proposed Rule fails to include any "adequate potable water supply for human domestic needs." This legal flaw in the rule was noted by Ecology staff:

. . . We intend to appropriate a new water right under 90.54.020(3) to fish and habitat which is 73% of the river. We appropriate 0% to domestic use under 90.54.020(5) . . .February 28, 2012 email from Tryg Hoff, Exhibit A.

Commenter

Bill Clarke, Washington Realtors/Sequim Realtors 1 ; Bill Riley, Washington Realtors 4

Response

Please see the response to Comment # 66. The water code does not require that a potable water supply be provided. Washington's system of water rights is based on the prior appropriation system. The water code does not contain an absolute preference for domestic use over other uses.

However, Ecology does recognize the value of having water available for future domestic needs, and has incorporated reserves for domestic purposes within the rule. Please also see Comment # 164.

Comment # 561

Proposed ISF and Consistency with Local Land Use Plans and Zoning – Further Analysis of Land Use Conflicts is Required.

REALTORS® are greatly concerned that the availability of water in the Proposed Rule is inconsistent with land use plans and zoning adopted at the local level. Throughout WRIA 18, our members have assisted clients with transactions in which future development of vacant parcels relies on the use of exempt wells. Hundreds of such parcels of developable land exist within WRIA 18, and are part of Clallam County’s land use plan adopted under the Growth Management Act. While the owners of these parcels believe water will be available in the future, the reality is that the Proposed Rule does not provide the water supply necessary to meet “human domestic needs.”

One of the ironies of the conflict with land use plans and zoning created by Ecology’s Proposed Rule is that it is the exact conflict that the Legislature sought to avoid through the watershed planning process – a process implemented in WRIA 18. Under RCW 90.82.070(1)(e), each watershed plan shall include “an estimate of the water needed in the future for use in the management area.” Because of watershed plan was developed for WRIA 18 and approved by the Clallam County Commissioners, this information should be put to use. Specifically, Ecology should review the amount of water necessary to implement the County’s land use plan and ensure that sufficient water is made available to avoid a conflict between its own Proposed Rule and the Growth Management Act.

A meaningful analysis of the future conflict between ISF rules and local land use plans has been notably absent from the recent ISF rules adopted by Ecology. This is unfair both to the local governments who have spent significant time and expense to complying with the planning requirements of the GMA, and to local landowners who have purchased vacant land that at the time of purchase was buildable – but in the future may not be because of the limited water reservations in the ISF Rule. REALTORS® request that during the formal rulemaking period, Ecology provide a meaningful analysis of whether the water available for future domestic use in WRIA 18 will allow for implementation of local land use plans based on existing zoning.

Further, under the APA, Ecology is required to “coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.” RCW 34.05.328(1)(i). The primary regulatory impact of the Proposed Rule will be to limit or condition rural development in certain areas of WRIA 18, and to make Clallam County

water availability decisions for land subdivisions under RCW 58.17.110 and building permits under RCW 19.29.097 subject to the requirements of the rule. Obviously, this is the same “activity or subject matter” regulated by the GMA itself, which requires local governments to adopt a comprehensive land use plan and zoning specifically including a “rural element” that allows rural development consistent with rural character.

At this point, we don’t see how the Proposed Rule is coordinated at all with the county’s comprehensive plan or with the specific zoning adopted in those parts of Clallam County where water supply from purveyors is not available. After spending millions of dollars and over two decades on GMA and watershed planning efforts, Ecology is now poised to adopt a rule that is inconsistent with the local land use plan by failing to provide adequate water supply – the exact opposite result intended by the GMA and Watershed Planning Act.

Finally, Ecology failure to provide sufficient water supply through the proposed ISF Rule violates RCW 90.54.020(5), one of the fundamental requirements of the state’s Water Resources Act. This provisions states that “Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs.” The policy enacted by the Legislature that adequate potable water for human domestic needs “shall be preserved and protected” could not be stated more clearly. An ISF Rule that violates statutory authority by adopting more than minimum flows while failing to provide sufficient water for future domestic uses clearly violates the Water Resources Act.

Commenter

Bill Clarke, Washington Realtors/Sequim Realtors 2 ; Bill Riley, Washington Realtors 3;
Dennis Schultz, Olympic Stewardship Foundation 13

Response

Ecology disagrees that adopting a rule to protect instream flows is inconsistent with GMA simply because water would not be available. GMA provides an explicit requirement to protect water resources and make affirmative determinations of adequate water supply [RCW 36.70A.020 (10) and .070 (5) (c) (iv), and RCW 19.27.097]. The watershed plan, adopted by the Clallam County Commission, included recommended minimum flows. The recommended flows must be adopted by Ecology into rule.

If an inconsistency exists, the County is both in the position to resolve it and has the responsibility resolve it. As a governmental entity that took part in the planning process (it was an originating government), the County, like Ecology, is obligated to adopt ordinances to implement the watershed plan.

Please see the response to Comment # 371. Ecology agrees that adequate and reliable water for domestic use is an important objective. Consequently, Ecology has proposed a rule that provides

water for it and balances that need with the need to protect instream flows and existing water rights. Please also see the general responses regarding Motivation and authority for adopting the rule ; Prior appropriation: what's fair?; Mitigation: who pays?; and the Groundwater permit exemption.

Comment # 562

New Ecology Policy of Closing Basins to Exempt Wells and Requiring Mitigation On A Project-By-Project Basis is Costly and Complex for All Involved.

The Proposed Rule is the latest iteration of Ecology's new model of instream flow rules – a model that should be abandoned and replaced with something that is simpler and less costly to both regulated entities (homeowners and local governments) as well as to Ecology. Under the rules adopted by Ecology in the 1970's and 1980's, instream flow rules generally included an exemption for domestic use, and sometimes a domestic exemption coupled with a potential in-home domestic exemption. (see, e.g., WAC 173-511-070, Nisqually Basin Instream Flow Rule)

This exemption meant that while Ecology would use the rule to reach its desired outcome of closing basins to new surface and groundwater withdrawals, that at least the in-home domestic portion of exempt uses would remain lawful. This ensures that homeowners have a valid legal water supply, and can meet the requirement in RCW 19.27.097 and RCW 58.17.110 to show proof of water supply, but would still allow Ecology to adopt and regulate against an instream flow level.

Further, the provisions of RCW 90.44.050 provides that certain withdrawals are exempt from the general permit requirements of the water code. Under Ecology's Proposed Rule, all new water uses, including exempt uses must obtain mitigation. This mitigation consists of a portion of an existing water right through the Dungeness Water Exchange. Thus, the ability to use an "exempt" well is now conditioned on the requirement to purchase a portion of a permitted water right – the exempt well is no longer exempt from the permit process.

Ecology's new generation of instream flow rules creates new costs and complexities for all parties involved by inserting the agency and its various untested applications of water law to small exempt uses. As seen in Upper Kittitas County, Skagit County, and Jefferson County, the structure of new Ecology rules makes it extremely costly for homeowners to know whether water is legally available or obtain legal water supply. At their worst, Ecology's new rules close vast areas of land to even in-home domestic water use as no legal water supply is available: there are no water rights to transfer directly or indirectly through a water bank or water exchange and no reasonable way for homeowners to mitigate. Local government land use decisions are greatly complicated, as Ecology is stuck with unmanageable rules of its own making. As an example, Ecology's Skagit Basin instream flow rule resulted in a moratorium

on all new exempt wells in a certain part of the basin, which affected whether Skagit County could find that water supply was available for purposes of issuing a building permit. Skagit County inquired of Ecology as to whether water supply was legally available under Ecology's own rule, and was informed as follows:

On behalf of the Department of Ecology (Ecology), I am responding to your email of June 13, 2012 concerning the water right issue related to Thomas Crane's application to Skagit County for a building permit.

On May 30, 2012, Jacque Klug of Ecology sent a letter to Mr. Crane which explained that there is "legal uncertainty associated with your water withdrawal that results from your failure to have a proper building permit," because while it appears that Mr. Crane's water use commenced prior to Ecology's June 27, 2011 issuance of the notice that the Carpenter-Fisher is closed to new water appropriations, his property was not included in Ecology's accounting of water uses under the reservation, which is currently over-allocated by approximately 3,000 gallons per day. Consequently, Ms. Klug informed Mr. Crane that:

Because we understand that your well is the only source of water supply for your home, and you may have a water right that vested prior to the closure, we will not enforce the closure against you at this time so that you may obtain a building permit and come into compliance with a Skagit County building permit. Please be aware that your water right could be subject to regulation in the future. This could mean being directed to cease using water.

Subsequent to this letter, Skagit County staff requested Ms. Klug to provide a "yes or no" answer as to whether Mr. Crane has a lawful right to water that can support the County's issuance of a building permit. I am writing you now to provide the County with clarification on Ms. Klug's letter to Mr. Crane.

As you are aware, the Washington Supreme Court recently held in *Kittitas County v. Eastern Washington Growth Management Hearings Board* that it is the counties' (and not Ecology's) responsibility to determine whether applicants for subdivisions under RCW 58.17.110 and applicants for building permits under RCW 90.27.097 demonstrate evidence of an adequate legal water supply to enable the counties' issuance of subdivision approvals and building permits. *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 178-180, 256 P.3d 1193 (2011). The Supreme Court further pronounced in that decision that Ecology has a role to assist the counties in making determinations of whether adequate water supply is available in making land use decisions. *Kittitas County*, 172 Wn.2d at 180. In that vein, as the administrator of the Skagit River Basin Instream Flow Rule, WAC 173-503, Ecology offers the following recommendation to the County.

For the reasons explained in Ms. Klug's letter, it is not possible to provide a "yes or no" answer as to whether Mr. Crane has a lawful non-interruptible right to water from the

Carpenter-Fisher reservation. However, because it presently is not certain that Mr. Crane has a lawful water right, Ecology recommends, at this time, that the County determine that Mr. Crane has not demonstrated evidence of an adequate water supply to support issuance of a building permit under RCW 19.27.097. Ecology is working to develop a broader subbasin-wide mitigation effort for property owners in the Carpenter-Fisher basin which may provide mitigation for Mr. Crane's groundwater withdrawal. Ecology will provide a different recommendation in the future if mitigation for Mr. Crane's water use can be secured, either through his own effort, or through Ecology's current program to develop mitigation to allow for new uses of water in the Carpenter- Fisher Subbasin notwithstanding the closure.

Ecology recognizes that having an unpermitted, inhabited residence is at odds with your public health and safety responsibilities under the County's Building Code and is willing to work with Skagit County to resolve the situation. Yet, given the legal uncertainty associated with Mr. Crane's water use, Ecology believes it would be a disservice to affirm such an uncertain water right through a building permit approval at this time, especially since Ecology is actively working on mitigation projects that may provide legal coverage for Mr. Crane's withdrawal. June 25, 2012 email from Alan Reichman, Assistant Attorney General – Ecology Division, to Will Honea, Chief Civil Deputy Prosecutor, Skagit County.

The length and complexities of Ecology's response to Skagit County's basic question, and the ultimate conclusion "that it is not possible to give a yes or no answer" demonstrate the unnecessary complexities that Ecology's new rules introduce to local water availability decisions. Average citizens will be seeking to buy vacant lots and will need to understand "is water supply available" – a yes or no answer is needed in a timely manner for the real estate transaction to function properly and to protect consumers.

REALTORS® believe that if Ecology seeks to address impacts from exempt withdrawals on instream flows, it should do so in a way that does not impose complex and costly regulatory impacts on landowners and local governments. This can be done through Ecology's existing authority in the water acquisition program and trust water statutes. Regulation of small water uses that have little or no measurable impact on streamflows imposes significant costs with little environmental gain.

Commenter

Bill Clarke, Washington Realtors/Sequim Realtors 5

Response

Thank you for your comment. Please see the general response on Small impacts.

Comment # 563

Ecology Lacks Authority to Delegate Functions Necessary to Administer A State Regulation to a Private Entity, and Such Delegation Violates Trust Water Statute

Under the Proposed Rule, Ecology continues its recent practice of closing a basin to all new water rights and exempt uses, and then allowing new water uses to occur if mitigated. The Proposed Rule is unique, however, in that it includes reliance on a private entity, the Dungeness Water Exchange, to provide the mitigation necessary to relieve landowners from the impacts of the rule. For both legal and policy reasons, this rule structure is unlawful and ill-advised.

Ecology's Proposed Rule provides that "water use may be mitigated through the purchase of credits available through the Dungeness Water Exchange." WAC 173-518-070(3)(a)(i). The Dungeness Water Exchange is not part of Ecology or under Ecology's control, rather, it will be created by Washington Water Trust, a Washington non-profit corporation. As described by Ecology,

The statement 'Washington Water Trust (WWT) will control water rights' is inaccurate. What's true is that WWT will be the administrator of the Dungeness Water Exchange. This organization will act as an exchange to bring voluntary buyers and sellers of water rights together.'" April 10, 2012 email from Sally Toteff to Pete Church-Smith [Exhibit F].

The Proposed Rule cites Ecology's legal authority for this type of "water exchange" process as Chapter 90.42 RCW, the state's trust water statute, and "Dungeness water exchange" is defined as "a water bank pursuant to the Water Resources Management Act, chapter 90.42 RCW. Within RCW Chapter 90.42 are the water banking provisions that relate to the envisioned water exchange process. However, this statute makes clear that water banking authority rests with Ecology – there is no statutory to delegate this function to a private entity. RCW 90.42.100(1) states that "The department is hereby authorized to use the trust water rights program for water banking purposes statewide." (emphasis added) Further, the water banking statute provides that water banking may be used "to provide a source of water rights the department can make available to third parties on a temporary or permanent basis for any beneficial use under chapter 90.03, 90.44, or 90.54 RCW. RCW 90.42.100(2)(c). (emphasis added).

Ecology's intended delegation of the proposed rule's mitigation functions to the Washington Water Exchange also violates other provisions of the trust water statute. For example, the statute makes clear that trust water rights are to be managed by Ecology, not other parties: "A trust water right acquired by the state shall be placed in the state trust water program and managed by the department. . . ." RCW 90.42.040(1)

Commenter

Bill Clarke, Washington Realtors/Sequim Realtors 6

Response

Ecology respectfully disagrees. This rule does not require anyone to use a private water bank. The rule requires mitigation to offset the impact to streams of new consumptive water use. Anyone not wanting to use the Dungeness Water Exchange can propose mitigation of their own, submit their plan for Ecology's review and approval, and then implement the plan to satisfy the rule's mitigation requirement. This is the same process the Dungeness Water Exchange will use to obtain approval of its own mitigation plan. Once approved, it allows creation of mitigation credits in conformance with the rule. Those credits could then be marketed to third parties. Everyone must follow the same mitigation plan review and approval process, there is no delegation of authority as Ecology reviews and accepts (or not) all proposed mitigation plans.

Comment # 564

Proposed Rule Must Be Reviewed To Determine Whether It Is Constitutional

The Proposed Rule imposes its regulatory burden solely on water uses that are junior to the priority date of the adoption of the rule. Because all senior uses are not subject to the rule, even though most junior uses will be small withdrawals of water under the exempt well statute, Ecology should review the proposed ISF Rule to determine whether it meets constitutional requirements. In 2008, the Washington State Court of Appeals, Division I, issued a decision invalidating a King County ordinance in part on grounds that King County failed to show that the regulatory restriction on property owners subject to the ordinance was proportional to the impact caused by those property owners. *Citizens' Alliance for Property Rights v. Sims*, 145 Wn.App 649 (2008).

Small exempt groundwater withdrawals will have little or no impact on surface waters in comparison to large groundwater withdrawals or diversions directly from the surface water source. Thus, there is no "proportionality" in the proposed ISF Rule. As the Court said in the CAPR decision,

These holdings are consistent with the fundamental purpose of the Takings Clause, which is not to bar government from requiring a developer to deal with problems of the developer's own making, but which is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 669, citing *Burton v. Clark County*, 91 Wn.App. 505, 521-22 (1998) and quoting *Dolan v. Tigard*, 512 U.S. 374 at 384.

Ecology's Proposed Rule clearly lacks the proportionality necessary to pass muster under a constitutional analysis. We believe Ecology should review the Proposed Rule under the Attorney General's Memorandum for Avoiding Unconstitutional Takings of Property established under RCW 36.70A.370 during the formal rulemaking process.

The prior appropriation doctrine, the basis for Washington's water rights system, is the same "first in time, first in right" system adopted in most Western states. The purpose of this legal system was to provide an economic incentive for settlement of Western lands, not ensure proportionate allocation of responsibility for environmental impacts. Ecology's Proposed Rule uses the prior appropriation doctrine in a blunt fashion – exempting all water uses senior the Proposed Rule while subjecting all junior water uses – regardless of the impact caused by any specific junior or senior water right. For this reason, the Proposed Rule is constitutionally suspect.

Guidance required by the Washington State Attorney General's Office on avoiding unconstitutional takings of private property reaches the same conclusion:

Because government actions are characterized in terms of overall fairness, a taking or violation of substantive due process is more likely to be found when it appears that a single property owner is being forced to bear the burden of addressing some societal concern, when in all fairness the cost ought to be shared across society. Advisory Memorandum:

Avoiding Unconstitutional Takings of Private Property, Washington State Attorney General's Office, p. 15 (December 2006).

In addition to the regulatory takings analysis, regulations are also subject to substantive due process requirements. The 14th Amendment of the U.S. Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law . . ." U.S. Const. Amend. 14 § 1. The test for whether a regulation violates a property owner's substantive due process rights has three parts:

- (1) Whether the regulation is aimed at achieving a legitimate public purpose;
- (2) Whether the regulation uses means that are reasonably necessary to achieve the stated purpose; and
- (3) Whether the ordinance unduly oppresses the property owner.

Guimont, 121 Wn.2d 586, 609 (1993), *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, cert. denied, 498 U.S. 911 (1990).

For example, in a State Supreme Court case concerning a statute requiring the owner of a closing Manufactured Housing Community (MHC) to pay relocation assistance, the Supreme Court found a violation of substantive due process in that the statute imposed all of the burdens of funding low income housing impacts on a single class of property owners, regardless of their level of impact:

“Likewise, in this case, the costs of relocating mobile home owners, like the related and more general problems of maintaining an adequate supply of low income housing, are more properly the burden of society as a whole than of individual park owners.

. . .An individual park owner who desires to close a park is not significantly more responsible for these general society-wide problems than is the rest of the population. Requiring society as a whole to shoulder the costs of relocation assistance represents a far less oppressive solution to the problem. *Guimont v. Clarke*, 121 Wn.2d 586, 609 (1993),

Similarly, Ecology’s Proposed Rule imposes all of the regulatory and financial burdens of the rule on junior exempt well users, regardless of the actual level of impact caused by an individual exempt well. While the prior appropriation establishes a legal framework for water rights based on priority date, that priority date system is not intended to supersede fundamental constitutional limitations.

Ecology’s past public investments in Dungeness Basin streamflow protections provide an example of streamflow protection methods that as the *Guimont* Court stated, “require[s] society as a whole to shoulder the costs” of a “general society wide problem.” Conversely, imposing the regulatory burden of streamflow protection solely on future exempt well users, who have the smallest level of impact and whose water uses are furthest removed from streamflows, raises similar constitutional issues as those in *Guimont*.

Commenter

Bill Clarke, Washington Realtors/Sequim Realtors 12 ; Bill Riley, Washington Realtors 8 ; Dennis Schultz, Olympic Stewardship Foundation 17

Response

Ecology disagrees. Please see the general response pertaining to Prior appropriation: what’s fair?. Ecology’s proposed rule is consistent with water rights law, technical and scientific understanding related to hydrology, hydrogeology, and fisheries science, and with the watershed plan adopted by the Clallam County Commission in 2005. The rule does not take anything away from prospective users as they have yet to establish a property interest in water. Indeed, the rule benefits prospective users as it provides them an opportunity to establish a reliable water supply that might not otherwise be available given the over-appropriated nature of the Dungeness basin.

Comment # 565

Prior appropriation has been the rule since before territorial days. Why is administrative appropriation now necessary?

Commenter

Bruce Larsen 6

Response

Please see the general responses pertaining to Motivation and authority for adopting the rule, and Prior appropriation: what's fair?; and the response to Comment # 546.

Comment # 566

Why are the loss of the expectation losses not a takings under both the US and Washington Constitutions?

The attorney general's office has a takings analysis for state actions. Was this analysis completed for this project? If so, will the analysis be made public so that the public can evaluate the litigation risk? Even if it is not made public in the textual form, should it be public in financial terms in the cost benefit analysis?

Commenter

Bruce Larsen 8

Response

Thank you for your comment. The loss of an expectation is not a taking because under the law a water right does not become a vested property right entitled to legal protection until water is put to beneficial use by an individual. Ecology therefore believes this rule does not result in a taking and did not conduct a takings analysis for this rule. The rule does not take anything away from prospective users as they have yet to establish a property interest in water. Indeed, the rule benefits prospective users as it provides them an opportunity to establish a reliable water supply that might not otherwise be available given the over-appropriated nature of the Dungeness basin.

Litigation

Comment # 567

We are concerned that if you were to pass the rule in its current form, against the opposition of local government, local business, and local property owners, it would only result in expensive and unproductive litigation.

[There is a] high potential that private citizen groups will in fact litigate to overturn the Rule should it be passed in its current form. I for one, and others I am aware of, will in fact financially support such litigation. Before warned

I am not one who wishes to litigate but if this rule is forced on our district without independent facts and figures that clarify and justify its implementation, I will join the many landowners who are considering a class action suit to protect our property rights.

Commenter

Dick Pilling, Port Angeles Business Association 13; Dr Charles E Kramer 3; Wilbur F Hammond Jr 3

Response

Thank you for your comment. Please see general responses related to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, and Science/fish. The rule, once adopted, may be challenged by any party on the basis of a procedural or substantive concern. All citizens' rights to due process are respected by the state through the APA.

Comment # 568

All the information in the DOE's internal emails, failed science, and outright fabrications will serve as a corner stone for litigation. I guarantee the the sun will shine on the truth in a court of law. You just can't make it up as you go along. You heard the folks at the Sequim Community Church, 300 to 1 against this rule making. Science, common sense, and reason will triumph for the people. Legal action will follow as this jambdown will not be allowed to stand.

Commenter

Dan Shotthafer 4

Response

Thank you for your comment.

Comment # 569

Ecology must put science and the citizen's rights first and abandon internal policies, agendas, and the precautionary principal completely because incorrect determinations that result in direct harm to the citizens or the loss of use of their property could be considered to be violations of the citizen's civil rights (federal and state) and takings and if these takings are not fully supported by comprehensive scientific study that meets the peer review criteria of the

GSA and USGS, the agency could be liable for significantly more costs than the agency realizes, however, these costs are not only to the citizens, but will also be realized in the State trying to defend itself in civil rights actions and in inverse condemnations cases.

Commenter

Steven Neugebauer 2

Response

Thank you for your comment. See general responses related to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, and Science/fish.

Comment # 570

I believe that the litigation resulting from the WIRA 18 rule has been greatly underestimated by the Dept. of Ecology.

Commenter

Jim Hardie 2

Response

Thank you for your comment.

Comment # 571

The Department of Ecology (DOE) is proposing a number of significant limitations on water usage in our area. I am concerned that these limitations will, likely, result in lawsuits over what could be construed as a government "taking" of land.

Your proposal does not take into account the effect on the local economy and the high cost of likely litigation because what you propose is a "taking" of land, an infringement upon our Constitutional rights that will lead to lawsuits to defend those rights.

How will Wria 18 save Litigation costs? Lawyers here will consider that a "taking" that will have to be compensated by the State and will likely result in thousands of lawsuits. Please explain fully.

I am a landowner that will be directly affected by this rule and stand to lose my irrigation rights and will be forced to pay a mitigation fee for a well permit on 13 acres that I have owned for 8 years. I purchased this particular property for my retirement home and the ability to be self-

sufficient from a small farm operation. I feel you are proposing to take a portion of my property rights without just consideration or compensation.

Further, if the Dungeness Basin is closed, something that DOE has no statutory authority to do, real estate values will take an even greater hit than the 35% drop of the past 3 years. If the loss in real estate value was not a real economic taking, the concept of compensation for lost value, including eminent domain, would not be recognized at law. It is.

Commenter

David Kruth 3; Wilbur F Hammond Jr 2; Jeremy Fodge 2; Alan Barnard 2; Barbara Bentley 2; Mark & Jackie Bragdon 4; Danni Breen, John L Scott Sequim 2; Ron Carlson 2; Roger Clark 2; Rhonda Curry 2; Pat Davis 2; Jerald R Dow 2; Gene Farr 2; Nancy Louise Froh 2; Daniel E Gase, Coldwell Banker Uptown Realty 2; Deborah Groesbeck & Bob Conklin 2; Richard & Ruth Hale 2; Donald & Ella Hoffeld 2; Kelly Johnson, Windermere RE Port Angeles 2; Sarah Kincaid 2; Lee Lawrence 2; Colleen & David Lyons 2; Harvey & Margaret Martin 2; Jim Mitchell 2; Mary Mitchell 2; Jim & Bea Muir 2; Terry Neske 2; John & Morgan Nolan 2; Virginia A O'Donnell 2; Julia Opeka 2; Patricia J Orella 2; Maureen Pfaff, Olympic Peninsula Title Company 2; Lynda Rathman 2; Doc Reiss, City of Port Angeles Planning Commission /Windermere Real Estate 2; Ardyth Schaumburg 2; Susan Sparks Smith, Silpada 2; Janet Stevenson 2; Linda L Wishart 2; Richard Wolf 3; M Worman 2; Carol Yearout 2; Maxwell Anderson 2; Jim & Bea Muir 2; Jacques M Dulin 6; RA Pilling, Clallam County Republican Party 2, H2; Ray Gruver 3; Elaine & George Chandler 2; Richard & Martha French 2; Carol Rutledge 3; Carolyn Money 2; Ross Krumpe 17; Neville & Gayle Aitken 2

Response

Please see the general response pertaining to Prior appropriation: what's fair?. Prospective users have no inherent or intrinsic right to water – a water right is based on beneficial use in conformance with custom (common law) or statute. Ecology has long-established statutory authority to withdraw water from appropriation and to find that water is not available.

Comment # 572

I fear that this will all get tangled up in the legal system for years to come. I also fear that we (and people like us) will foot the bill both personally (to hire lawyers to fight this to the end), and as taxpayers (to fund the government lawyers), as I can't imagine that citizens who own property, with a similar purpose for retirement living, are going to stand for this type of radical environmentalist agenda and subsequent governmental intrusion into our most personal of rights!

Commenter

Richard Brough 3

Response

Thank you for your comment. Please see the general responses related to Motivation and authority for adopting the rule, Prior appropriation: what's fair?, and Science/fish. Please also see the response to Comment # 564.

Comment # 573

One of the main reasons for this Water Management Rule, is the threat of a lawsuit, or lawsuits. The estimate of the predicated lawsuit is a 14.1-27.7 percent predictability. We are going to cost the residents of the Eastern portion of Clallam County a major hit to their rural quality of life, an increase in county and state enforcement personnel, the expense of a new Water Exchange bureaucracy, mitigation and metering costs, and a reduction in the value of raw land, for a less than 30% chance of a lawsuit? It seems to me that, with the Rule, there will be lawsuits, by those whose property has been devalued, due to lower water use availability, the costs, and the chance that there might be no outside water available.

To foist this Water Management Rule on well users, will cost them much more than the perceived benefit. We saw no threatened lawsuits. If there were threatened, then, bring them forward, into the light. With the Rule, there will be lawsuits from property owners, who will see their rights dwindle. Why was that not considered?

Commenter

Sharon H Case 4; Marguerite A Glover 26

Response

Thank you for your comment. The possibility of litigation intended to protect instream flow habitat was considered in the Cost Benefit Analysis. The rule, once adopted, may be challenged by any party on the basis of a procedural or substantive concern. All citizens' rights to due process are respected by the state through the APA.

Comment # 574

As area property owners personally experience the ramifications of this rule and realize for themselves the lack of due process and the history of its manipulated inception, it will bleed further distrust into our local government leaving disgruntled property owners with no choice than to seek legal remedies which will open up the entire rule process & protocol to future litigation. Which we understand will target non-constitutional issues as well.

NONE would choose to create a fiasco that will have to be legally mopped-up later with our taxpayer dollars.

Commenter

Deborah Norman 6, 8

Response

Thank you for your comment.

Comment # 575

The City of Sequim recognizes the efforts of the Department of Ecology to try to deal with the many conflicting interests in water rights regulation. The City also recognizes the lack of legal authority for DOE to deal with extremely significant issues such as limiting the 5000 gallon per day exempt wells. However, the City encourages DOE to offer executive request bills to change the statute. It is respectfully suggested that attempting to do indirectly what is not lawful to do directly is a dangerous course fraught with potential legal challenges.

Commenter

Craig A Ritchie, City of Sequim 31

Response

Thank you for your comment.

Comment # 576

Clallam County is concerned about the numerous Short Plats that were approved based on ONE well that established the availability of water to the numerous, vacant parcels of land that were legally developed. What about the legal costs that we may incur, should these land divisions be challenged due to sub basin closures?

Commenter

Sheila Roark Miller, Clallam County 7

Response

We appreciate your concern about the potential risk associated with water availability decisions related to lots and building permit approvals previously made by the County. Ecology and the Attorney General have, since 1997, provided widely available advice relative to group uses and the groundwater permit exemption. The Supreme Court has ruled on cases coming from application of these opinions. If Clallam County has followed the advice in AGO 1997 No. 6, that risk should be relatively small.

Comment # 577

We do not believe that the proposed rules are logical, lawful nor beneficial and we question the integrity of the process leading up to these proposed rules.

Commenter

Susan Bauer, Peninsula Development District 3

Response

Thank you for your comment.

Comment # 578

The Rule must be able to be enacted quickly, fairly, and without ambiguity, so that your agency will not be tied up in court, fighting one lawsuit after another and cause extended periods of economic uncertainty.

Commenter

Howard V Doherty Jr, Jim McEntire, & Michael C Chapman, Board of Clallam County Commissioners 4

Response

Thank you for your comment.

Comment # 579

I've also thought of bringing suits, which I think Shultz talked about.

Commenter

Roger Short H5

Response

Thank you for your comment.

Comment # 580

If this rule is enacted as it is presently drafted, your staff will probably be completely occupied with defending the DOE rather than assisting communities in managing the water sources. Class action lawsuits against DOE are likely to result from property owners who feel they are

being unfairly restricted from the water rights they expected to continue to have when they bought their property.

Commenter

Diann Dickey, John L Scott 2

Response

Thank you for your comment.

Comment # 581

The largest city in your proposed WRIA 17 rule was supposed to have a vote at the Table. The revised basin excluded Port Angeles, so Sequim was the largest city. How come Sequim was not given a voting position in forming your rule? Doesn't this make your rule invalid since you didn't follow the legislative rule? Isn't this going to open up lots of court challenges and expenses to the State (taxpayers) because of law suits? You might consider adding to your Economic Benefit Analysis that you probably will keep all of the Peninsula lawyers fully employed for a long time fighting your rule. Can you rename this rule "The full employment act for Peninsula Water lawyers"? That may help the flawed Economic Benefit Analysis justify the expense.

Commenter

David Kruth 4

Response

Thank you for your comment. Please see the response to Comment # 296 for your questions about Sequim's participation in watershed planning. The Administrative Procedure Act requires we evaluate the cost and benefit of the rule itself. We don't evaluate the costs of rulemaking, including prospective defense of the rule, as they are not a result of the rule's requirements. All rules run a risk of litigation.

Comment # 582

DOE Dungeness Water Rule and DOE Shoreline Management Update

Clallam County Code Title 15
Public Peace, Safety, Morals

15.02.120 Public Nuisance

Compliance with the terms and conditions of this chapter shall constitute minimum health, sanitation and safety provisions and material noncompliance with said terms and conditions shall constitute a public nuisance and be subject to all criminal, civil and equitable remedies as such.

Chapter 15.30 Public Disturbance

Disturbing the Public Peace in Clallam County

Since Jan. 26, 2011 the Clallam County commissioners and elected WA state representatives have been aware that the presence of federal and state agencies have been disturbing the public peace and become a public nuisance to the private property owners in Clallam County.

With the WA State DOE invasion of Clallam County for the DOE Dungeness Water Rule and DOE Shoreline Management Update, they are guilty of both. DOE is disturbing the peace and they have become a public nuisance to the private property owners in Clallam County.

To date, no action has been taken to protect us, by the following elected officials, WA State representatives, Rep. Van De Wege, Rep. Tharinger, or Senator Jim Hargrove. Or by our Clallam County elected officials, Mike Doherty, Mike Chapman or Sheriff Benedict.

We the People of Clallam County have documented grievances against.
WA State DOE Dungeness Water Rule and SMP taking of property value
Olympic National Park as Inholder and (Wild Olympics)
WA State Dept of Fish and Wildlife unconstitutional trespass and search
Our unresponsive elected officials.

Can Clallam County Home Rule Charter help us?

Washington statutes allow counties to adopt, by public vote, a "Home Rule Charter." Adopting a charter allows counties to adopt a "constitution" that can change their form of government and/or create requirements for the operation of government beyond those required in the State constitution.

Pearl Rains Hewett

ONP Inholder

Private property owner Lake Sutherland

Marine and Freshwater shoreline owner

(read on if you are interested)

The testimony of the Lake Sutherland home owners at the Jan. 26, 2011 SMP Forum with regard to the surveillance of their private property by unidentified white boats, aircraft and the

unconstitutional trespass of the WA State Dept of Fish and Wildlife certainly disturbed their peace.

The denial of entry by Olympic National Park employees, to the Rains Family Inholder property at the Elwha, "Access Denied", certainly disturbed the peace of that family.

The unconstitutional trespass and search of private property by the WA State Dept of Fish and Wildlife on Lake Sutherland was reported to Commissioner Mike Chapman, the Sheriff of Clallam County and at a Commissioners meeting.

The WA State Dept of Fish and Wildlife employees did knowingly, without probable cause, without permission of the property owner and without a search warrant trespass and search all private property around Lake Sutherland.

The DOE Dungeness Water Rule taking of water rights and metering of well is vigorously opposed by private property owners of Clallam County.

The designation of the Wild Olympics and Wild and Scenic Rivers is vigorously opposed by private property owners of Clallam County.

The DOE SMP taking of use and value of private property is vigorously opposed by private property owners of Clallam County.

All of the violations and takings are from privates property owners.

Commenter

Pearl Rains Hewett 3, 4, 5

Response

Thank you for your comment. Please see the response to Comment # 564.

Comment # 583

There are many parcels of undeveloped properties that out of area people purchased with the idea of building a home in the future when they will be retiring. They purchased these lots knowing that water would be available to them either through a private well, a community well, or a public water system. I would expect these owners will be filing a class action law suit if the rule is adopted as written because in some cases, water may not be available to them.

Challenges in the law are inevitable.

Justification of the rule as saving the state money by avoiding lawsuits is ridiculous. It certainly will create more lawsuits than it will avoid.

Commenter

Doug Hale, Coldwell Banker Town & Country 2 ; W David Sharman 6; J Marvin Chastain 2

Response

Thank you for your comment. The rule, once adopted, may be challenged by any party on the basis of a procedural or substantive concern. All citizens' rights to due process are respected by the state through the APA. Please see the general responses pertaining to Prior appropriation: what's fair?, and the Groundwater permit exemption.

Comment # 584

A thorough unbiased investigation as to the scientific merit of your arguments should be initiated, undertaken, and published. Commensurate with an equally unbiased investigation of the economic ramifications of the proposed legislation. Without the aforementioned studies I believe any proposed legislation will only result in litigation.

Commenter

Andrew Watkins 3

Response

Thank you for your comment. The rule, once adopted, may be challenged by any party on the basis of a procedural or substantive concern. All citizens' rights to due process are respected by the state through the APA. Please see the response to Comment # 671 and the general responses to Science/fish and the Groundwater model.

Comment # 585

I do not believe that your scientific research supports your proposed rule. The benefits clearly do not outweigh the burdens. I would not hesitate to commence or join a class action lawsuit to prevent any further infringement of our property rights.

Commenter

Robert E Onnen 1

Response

Thank you for your comment. Please see the general responses to Science/fish and the Groundwater model. Ecology has found the benefits outweigh the costs, see the Cost Benefit Analysis.

Comment # 586

The Department of Ecology (DOE) is proposing a number of significant limitations on water usage in our area. They should not be construed as a government "taking" of land. Citizens and landowners have a responsibility to stewardship. These rules begin to address this stewardship.

Commenter

Anne Shaffer, Coastal Watershed Institute 2

Response

Thank you for your comment.

Comment # 587

Craig Ritchie made some very valid points where your rule is not following the Revised Code of Washington or current law. He found 9 pages of errors where the rule as written does not follow WA law or statutes. I submit as written this is going to quadruple the litigation because it does not follow WA state laws.

Commenter

Anonomous 1

Response

Thank you for your comment.

State Should Pay for the Mitigation

Comment # 588

We consider it essential that the rule be made contingent upon the necessary funding being appropriated and spent to purchase the required mitigation credits, and that the rule be automatically suspended by its terms if this does not occur during the next legislative session.

Your own economist Mr. Hoff wrote on March 2, 2012 that "What usually made the Benefits outweigh the costs in past rules is we gave away water in a reserve for another 20 years with some conditions. In this rule we do not do this so it all falls on the cost side of the balance sheet."

Commenter

Dick Pilling, Port Angeles Business Association 11

Response

Thank you for your comment. Ecology supports pursuing funding for a Dungeness water solutions package as a complement to this rule. Ecology is developing a budget proposal for the FY 2013-15 biennium that would offset the cost of domestic water use related to the mitigation requirement under the rule. It would also fund a variety of stream flow improvement projects recommended by the Local Leader Working Group. Where Ecology has identified funds available within its budget to temporarily reduce the burden placed upon new domestic water users, it has chosen to make that funding available.

This rule differs from other rules with a domestic reservation of water in that the reservation in this instance has a mitigation requirement. That affects the cost and benefit calculations.

Comment # 589

Our organizations are writing to request that the Washington Department of Ecology ("Ecology") not adopt the proposed Dungeness Basin Water Management Rule. Instead, we ask that Ecology develop a simpler, fairer, and less costly approach through which the agency uses capital funding to protect streamflows.

In the past two decades, Ecology has spent tens of millions of dollars in public funds in the Dungeness Basin to reduce the direct impacts on streamflows caused by large surface water withdrawals. A fraction of the cost of this recent public investment in senior water rights would offset future junior exempt well impacts throughout the Dungeness Basin.

As seen throughout the state, Ecology's new policy of requiring exempt well mitigation on a project-by-project basis simply does not work. Exempt well mitigation disputes of the agency's own making consume significant agency staff resources, impose unwarranted regulatory burdens and costs on landowners, and make local building permit and land use decisions more complicated- all to address extremely small consumptive uses of water whose impacts on streamflows are difficult to precisely determine.

If water rights are now available for the Dungeness water exchange to function as promised by Ecology, then these same water rights should be used by Ecology to mitigate for impacts on

streamflows caused by consumptive water use. If such water rights are not available, then the proposed rule should not proceed, as the absence of the promised mitigation will create the same morass of "red zones" and moratoria caused by Ecology's exempt well regulations in other counties. Recent experience has shown that Ecology should not prohibit exempt wells in hopes that homeowner- developed, non-profit, or for-profit water mitigation proposals will suffice.

In 2012, to address the exempt well moratorium caused by Ecology's Skagit Basin Rule, the Legislature provided capital funding for the agency. In prior decades, significant capital funds were provided for water acquisition and instream flow protections throughout the state.

If Ecology believes that future exempt well uses in the Dungeness Basin are of such concern, then Ecology should continue using capital funds to protect streamflows. This approach will ensure consistency with the county's Growth Management Act comprehensive plan and protect landowners from the financial ruin of moratoria seen in other counties, while allowing Ecology to offset future exempt well impacts to the same extent as would occur in the proposed rule.

Please consider the wisdom of our request and do not adopt the present rule, but work with our organizations to find a solution that addresses the agency's streamflow concerns without creating an unmanageable regulatory structure that is costly and unnecessary.

Commenter

Washington REALTORS®, Washington Farm Bureau, Building Industry Association of WA, WA Cattlemen's Association, Washington State Grange, Association of Washington Business, North Peninsula Builders Association, Sequim Association of REALTORS®, Jefferson County Assoc. of REALTORS® 1, 4; Bill Clarke 17; Helen Watkins H1, H4

Response

Please see the response to Comment # 588. Ecology agrees that capital budget funding has successfully brought about flow restoration in the Dungeness River mainstem. It is up to the State Legislature to decide if future capital budget funding will be used to address continued streamflow restoration and, potentially, mitigation for some new uses of water. The rule does not preclude the Legislature or other party from providing mitigation funding, rather than the new water user. The rule sets the framework for the mitigation objectives and an accounting of impacts relative to the reserves and maximum depletion amounts. Absent other funders' acceptance of the mitigation obligation, the new water user is required to fulfill it. That is true (assuming the new water user wishes to have a reliable water supply instead of an interruptible water supply) of every other instream flow rule adopted by Ecology since 1976.

The mitigation program through the Exchange would deliver mitigation projects that improve streamflow during the critical periods defined in the rule and may otherwise improve aquatic habitat. The situation you referred to as a "morass of 'red zones' and moratoria" (referring to

the mitigation banks in the Upper Kittitas) is avoided through a reserve for domestic purposes of use. A finding of reliable or adequate water needed by the county for its building permit and land use approval is excluded from the morass you referred to. Water availability for other purposes of use, whether for irrigation or any other non-domestic purposes, will be affected by both the minimum flows and closures. Ecology does not agree that this rule, or other Ecology rules, create a morass. Water is simply not available for new beneficial uses unless effective mitigation is provided.

The Dungeness Water Exchange has been co-developed by Clallam County and Washington Water Trust, with Ecology's technical and financial assistance and is intended to facilitate mitigation transactions for new water users. The Exchange can function regardless of the source of the mitigation funding.

Comment # 588

In my opinion if Ecology wants to implement this rule, then Ecology should foot the bill.

Commenter

Richard French 4

Response

Please see the response to Comment # 588.

Comment # 591

Ecology should follow the Skagit County approach and have the State buy the required water (enough to protect our exempt well status) through an appropriation in its capital budget. This would negate the need for mitigation (as a side-note mitigation is not required under NEPA) and would also be a less burdensome alternative as required under RCW 34.05328.

Instead of requiring "mitigation" payments, Ecology should follow the Skagit County approach of having the State purchase the required water rights through an appropriation in its capital budget. This would also constitute a less burdensome alternative, as required by RCW 34.05.328 (1)(e), and cure the most serious problems with the cost/benefit analysis for the proposed rule currently being upside down

Commenter

Pearl Rains Hewett 19, 22; Randy Simmons 9, 12; Kaj Ahlburg 7, 10; Helen L Watkins 7

Response

Please see the responses to Comment # 588 and Comment # 589. Changing the funder would not necessarily be less burdensome – it shifts the financial burden to other parties. Who pays does not necessarily alter the institutional framework needed to match and apply funding to projects to deliver effective mitigation.

Comment # 592

We request that a simplified solution to the Water Exchange mechanism (i.e. securing the right to use water for development) be explored. In particular, the State capital budget might support bulk purchase or long-term lease of additional instream flow conservation (or other projects that mitigate groundwater withdrawals), obviating the need for each new permit applicant to visit a local water bank.

Commenter

Howard V Doherty Jr, Jim McEntire, & Michael C Chapman, Board of Clallam County Commissioners 5

Response

Please see the responses to Comment # 588, Comment # 589, and Comment #591.

Comment # 593

We am extremely concerned with the impact the new in stream rule will make to our community. We believe the cost outweighs the benefits of the Rule in its current form and that a simplified solution to the Water Exchange mechanism (i.e. securing the right to use water for development) be explored. In particular, the State capital budget might support bulk purchase or long-term lease of additional in stream flow conservation (or other projects that mitigate groundwater withdrawals), obviating the need for each new permit applicant to visit a local water bank.

Commenter

Don & Patty Brueckner 1

Response

Please see the responses to Comment # 588, Comment # 591, and the final Cost Benefit and Least Burdensome Analysis.

Comment # 594

As an alternative to the proposed rule, Ecology should (1) Analyze future buildout and associated consumptive water use from new exempt wells in sub-basins of concern; (2) Determine whether that level of consumptive water use has any measurable effect on streamflows; and (3) If an impact can be shown, utilize its authority under the Trust Water Program and water code to acquire water rights and implement other mitigation strategies.

Over the past few decades, Ecology has invested millions of dollars in streamflow protections in the Dungeness Basin directed at senior surface water rights that have significant direct effects on streamflows. Because of this, irrigation withdrawals have less of an impact on streamflows than occurred decades ago. There is no reason the agency cannot spend a fraction of that amount of money to address any cumulative streamflow impact that may be caused by junior exempt wells in the future.

This type of approach would result in protections to instream flows without conflicting with the county's land use plan and zoning, the reasonable expectations of rural landowners, or burdening the county's land use permitting process and average citizens with water restrictions and mitigation requirements that have failed in other parts of the state. In addition, this non-regulatory approach would spare Ecology the time and expense of making itself part of the local subdivision and building permit process, functions that Ecology is neither authorized, funded, or structured to adequately perform.

Commenter

Faye Nelson, Washington Realtors 3; Heidi Hansen, Sequim Association of Realtors 3

Response

Washington Water Trust, under contracts and grants from Clallam County and Ecology, has evaluated a variety of scenarios in the development of the mitigation strategy to be used by the Dungeness Water Exchange.

Please also see the response to Comment # 588.

General Economic Impacts

Comment # 589

Cowboy Poet Baxter Black said, "Common sense is illegal and no consideration is given to economics."

Commenter

Carol Johnson, North Olympic Timber Action Committee H2; Jim Bower H1

Response

Thank you for your comment.

Comment # 596

The Department of Ecology (DOE) is proposing a number of significant limitations on water usage in our area. I am concerned that these limitations will ultimately stifle development, decrease land values, and adversely impact the business-generated and real estate-related tax bases.

Commenter

RA Pilling, Clallam County Republican Party 1, H1; Jeremy Fodge 1; Alan Barnard 1; Barbara Bentley 1; Mark & Jackie Bragdon 3; Danni Breen, John L Scott Sequim 1; Ron Carlson 1; Roger Clark 1; Rhonda Curry 1; Pat Davis 1; Jerald R Dow 1; Gene Farr 1; Nancy Louise Froh 1; Daniel E Gase, Coldwell Banker Uptown Realty 1; Deborah Groesbeck & Bob Conklin 1; Richard & Ruth Hale 1; Donald & Ella Hoffeld 1; Kelly Johnson, Windermere RE Port Angeles 1; Sarah Kincaid 1; Lee Lawrence 1; Colleen & David Lyons 1; Harvey & Margaret Martin 1; Jim Mitchell 1; Mary Mitchell 1; Jim & Bea Muir 1; Terry Neske 1; John & Morgan Nolan 1; Virginia A O'Donnell 1; Julia Opeka 1; Patricia J Orella 1; Maureen Pfaff, Olympic Peninsula Title Company 1; Lynda Rathman 1; Doc Reiss, City of Port Angeles Planning Commission /Windermere Real Estate 1; Ardyth Schaumburg 1; Susan Sparks Smith, Silpada 1; Janet Stevenson 1; Linda L Wishart 1; Richard Wolf 2; M Worman 1; Carol Yearout 1; Maxwell Anderson 1; Ray Gruver 2; Elaine & George Chandler 1; Richard & Martha French 1; Carol Rutledge 2; Carolyn Money 1; Ross Krumpe 16; Neville & Gayle Aitken 1

Response

Ecology indirectly evaluated impacts to property values through costs for water mitigation (or foregoing benefits of water use). While it was not explicitly called out as such, this cost reflects a reduced willingness to pay for property. Ecology has reorganized the document to clarify this point for readers. Ecology has also, in the final Cost-Benefit Analysis, expanded the range of these impacts to incorporate public input on the possible impacts where mitigation water is unavailable, and on the tax base explicitly. Please also see Comment # 664.

Ecology has expanded the use of the Office of Financial Management's Input-Output model, illustrating prospective second-round impacts (including jobs impacts) of the rule.

Comment # 597

We are very opposed to this new water plan you are proposing. In our neighborhood, there are 5 properties that have not been developed, and now, thanks to this new water plan may never been due to the expense involved. Our property values have already decreased due to the economy and will further decrease if this plan is implemented.

This area is already a depressed area and will continue to get worse as no one will be able to afford to build here. There seems to be no logical reason for this plan, so please listen to the people that live, and work, here.

I am adamantly opposed to the implementation of the proposed Dungeness water plan. I think it is unnecessary, ill-conceived and will have a severe long lasting impact on the economy of the area.

Commenter

Sydney & Carol Treat 1; Jack Tatom 1

Response

Please see the response to Comment # 596.

Comment # 598

The economic consequences will be devastating to our economy. As chairman of the board of a local bank I regularly see the results of the economic impact of the uncertainty created by the proposed rules. Businesses, home owners and property owners waiting to build their dream homes are all affected.

Commenter

Richard G Kott 3

Response

Ecology disagrees with the assertion that the consequences to the economy will be devastating. The rule will not affect those businesses and homes relying on existing water systems with adequate rights to serve them. Homes and business affected by the rule will be those that need a new groundwater appropriation. They will need to meet the mitigation requirement of the rule and will need to measure their water use. These are described in the cost benefit analysis.

Please also see the response to Comment # 596.

Comment # 599

The land values will drop precipitously for potential home sites if water is not allowed without purchasing a water right allotment, if in fact water is actually available. The water rule says that water can be shut off when the water level is below the desired optimum stream flow for fish. Who would want to purchase property when the water flow is already occasionally below the desired stream flow rate? See note 1 below (DOE land value losses – personal example which affected me)

Note 1) My father, about 30 years ago, purchased a small saltwater front lot in Allyn, and also a partially treed, saltwater view property (with a stream) near Manchester as retirement investments to support my mom after he passed away. About 7 years ago, shortly before my mom died she gave both properties away free because of DOE rule changes which made her property worthless. Yet, she still had to pay taxes on this view and waterfront property. It crippled her finances and none of us three children wanted to pay the taxes on this property which DOE wetland/ waterfront rules made it useless.

Commenter

Warner J Litchfield 9, 17

Response

Future water use mitigated through the exchange or an independent mitigation plan will not be subject to interruption when instream flow levels are not met. Please also see the response to Comment # 596.

Comment # 590

Each and every one of you who own property will be directly affected by this. This means everything to your children and your grandchildren, all the land and all the things, all the real estate and the investment properties that you have here in this state -- if you want to use the word "investment." Because I can tell you now, if this continues, they'll never make another investment property in the state of Washington.

Commenter

Richard Hale H1, H3

Response

Thank you for your comment. Please see the responses to Comment # 596 and Comment #598.

Comment # 591

I urge you to place on hold the rule making process until a satisfactory peer reviewed scientific analysis is performed. This should be coupled with an economic cost benefit analysis. Furthermore to ease the burden of economic stagnation on residents DOE should implement a temporary plan that allows new construction to move forward without future consequences until the new rules are implemented.

Commenter

Richard G Kott 4

Response

Thank you for your comment. Ecology respectfully disagrees with your recommendation to put the rule on hold. Ecology is confident in the studies used to develop the rule, and they received adequate peer review. Please also see the response to Comment # 671.

Comment # 602

Land owners, stemming back as far as the 1800's are affected by the rule. Many expect their great-grand children to move onto their property to assist them as they age. Some expect to pass on acreage as part of an estate, or to sell parcels to support their retirement, but will be economically encumbered by the increased cost of purchasing a mitigated water right.

Commenter

Sheila Roark Miller, Clallam County 5

Response

Please see the response to Comment # 596.

Comment # 592

We are constantly seeing more and more new government regulations, many of which make it harder for people to make ends meet and stifle business. If government agencies continue to burden taxpayers with more and more senseless rules such as the proposed Dungeness Water Rule, we will soon see a “forever stagnant” economy, no jobs, no businesses and no source of funding for government agencies and programs. We all lose. This regulation will adversely affect a lot of people.

Commenter

Andy Sallee 5

Response

Ecology did not explicitly evaluate indirect impacts on jobs, as the rule does not directly impact existing businesses that continue to operate as they currently do. For illustrative purposes, however, Ecology has expanded the use of the Office of Financial Management's Input-Output model, illustrating prospective second-round impacts (including jobs impacts) of the rule.

Please also see the response to Comment # 596.

Comment # 593

The Department of Ecology (DOE) is proposing a number of significant limitation on water usage in the Dungeness Valley (WRIA 18). I am a concerned resident that also works in the economic development field on the Olympic Peninsula. We are a distressed rural county. Everything that happens on the Olympic Peninsula is all about JOBS. This proposed set of rules will not only stifle any kind of growth, but will also adversely impact economic development. How can new jobs be created or businesses grow with this set of rules in place?

Commenter

Susan Bauer 1

Response

The proposed rule is not free of costs. However, it will not devastate growth and it will not preclude new job formation. It will result in water being reallocated from less valuable current uses to more valuable prospective uses. That process has worked throughout the western United States and has been a key element of state water codes since they were first adopted in the early 1900s.

Please also see the responses to Comment # 596 and Comment # 603.

Comment # 594

What is not mentioned is the need for jobs in this state and that is what should be addressed rather than all this money being spent by the Dept of Ecology.

Commenter

Nelson & Carol Topper 2

Response

Please see the response to Comment # 603.

Comment # 606

The Peninsula Development District (PDD) is a two county economic development district serving both Clallam and Jefferson Counties. Our mission is to foster cooperative efforts in the development and implementation of local and regional plans that will increase the economic activity in the area. The proposed water use limitations do just the opposite. They will stifle development, adversely impact economic development and result in fewer jobs in an already distressed area.

Commenter

Susan Bauer, Peninsula Development District 1

Response

Please see the responses to Comment # 596, Comment #598, and Comment # 603

Comment # 607

You will cripple an already anemic building industry in this area, and when you do, I'll gladly join the lawsuit since I may be one of those put out of business.

Commenter

Mike Cameron 3

Response

Please see the responses to Comment # 596 and Comment # 603.

Comment # 595

There is also the question of how this will impact the economy. I don't believe enough time has been spent looking at this.

Commenter

Nell Clausen, Estes Builders 2

Response

Thank you for your comment. Ecology respectfully disagrees. The rule implements recommendations of the locally developed watershed plan. Local governments, the Tribe, and representatives of the irrigation districts, river property owners, sport fisheries, and state resource agencies considered the impact on the economy when forming recommendations.

Comment # 609

I further call the legality of the action into question as well as the economic value to our community. I dare say the harm you will visit on the residents of our area will be far reaching and economically disasterous to literally thousands of tax paying property owners

Commenter

W David Sharman 2, 5

Response

Please see the responses to Comment # 596 and Comment # 598. Ecology is confident that the rule is within the agency's legal authority.

Comment # 596

I am here to represent a voice of caution on behalf of agriculture in the Dungeness basin. This basin, like the Chimacum Creek basin, has some of the absolutely best soils for agriculture in the world! The agricultural base has already been decimated by urban residential growth, leaving only a fraction of the former open space available for cultivation, all at a time when we see a resurgence of interest and activity in consumers for "eating local" for the health benefits of fresh, more nutritious food which would once again make agriculture profitable! At the same time, fuel prices have quadrupled, making food "from there" far more expensive, and traveling "there" to shop becomes more difficult, making food "from here" much more attractive. Ultimately, maintaining the wherewithal (that is, the farmland and farmers) to grow enough food to feed ourselves locally seems like a better and better idea.

Safety and health are not the only positives. We are seeing small farm agriculture, growing for local and nearby markets, become an economic driver in Jefferson County, and know that Clallam is experiencing similar growth in this sector. There are tremendous opportunities for economic development, increasing the tax base of businesses, and creation of jobs in the small ag area.

None of this can happen without water. Closing the basin to new development in Chimacum valley has killed the opportunity to develop new uses for old ag land and new, small niche growing operations on the rural residential 5, 10, and 20 acre parcels.

Commenter

Dr Diane Johnson, Chimacum Grange #681 1

Response

The rule does not close the basin to new development, nor does it restrict outdoor water use, as was done in the Chimacum subbasin. Ecology acknowledges the rule requires mitigation for new uses, indoor and outdoor, and irrigating large areas of new crop land without an existing water right may not be economically feasible. Still, irrigation water is available from the Dungeness Water Users Association in many areas of the basin. Please also see the responses to Comment # 596 and Comment # 603.

Comment # 597

I am one that is directly affected by this rule and I find it one of the most ill conceived rules ever put forth by this state.

This rule will destroy not just growth in this area but farming which we have been trying to protect.

Commenter

Bud Williams 1

Response

Ecology disagrees. The rule will neither destroy growth nor farming. Please see the Cost Benefit Analysis.

Comment # 598

Delay the rule until a review of the "unintended consequences" on property owners, tax bases, area development, etc

Commenter

RA Pilling, Clallam County Republican Party 9, H9

Response

Please see the response to Comment # 596.

Comment # 613

Here is a typical example of the disastrous consequences of the Rule for small farms in the Dungeness Valley not having irrigation rights and attempting to operate off wells. As you know, or should know had DOE done a proper cost benefit analysis and an SBEIS, the Dungeness Valley has a growing organic farming industry. The Rule will absolutely stop that growth and the attendant new job creation.

Small farms start small. The capital and operating costs are enormous (hence the cost of organic produce is many times greater than giant corporate non-organic US and foreign farms). First, there is the cost of the land. It has been as high as \$260,000 for 5 acres in 2008, and runs on the order of \$95,000 to \$125,000 per 5 acres today. Add to that \$15,000 per well (we pay up front the capital cost of permits for well and the electrical transformer, meter base, meter, trenching and wiring for PUD which then charges us monthly for the electricity). The per well cost includes a minimal pump house and well completion). Then there is the tractor and implements some \$50,000. A modest 24' x 36' barn structure runs \$30,000. Even modest irrigation equipment: hoses and tripod sprinklers will run several thousand, and drip systems are even more.

Total capital investment is over \$200,000. No loans available from banks or the State of WA, much less the DOE or you personally are available.

Then we take the Mother Nature Risk ride. We have to prepare the soil (plow, disc, harrow), plant, weed continuously, and water sparingly hoping for enough rain. We have to guess what will sell. If you plant, say organic rye, you will have sown last fall and will harvest this Sept or October. No income in the meantime. Diesel fuel for the tractor over the last year has run from \$4 to \$5 per gallon; at a minimum of 400 – 500 hrs we are looking at \$2000 - \$3000 per year.

So assuming one has enough money to start an organic farm, it necessarily starts small, with the hope for survival until an income stream is established. Then you try to grow. If you started with 2 dozen fruit trees and did not use the 5000 gpd, may be second year you add 20 to 100 more. You expand the rows of berries and vegetables.

You have to generate outlets and hope for success by Nash's and Red Rooster Grocery.

But under the Rule, as you have recently changed the terms, if you are at the 20 fruit trees level now, you will not be able to add more next year because your use "will have changed". Is that true? How do you answer these small farmers and the local fruit growers association? Will they

be able to add another ag well? What if they want to build a home on, say, an acre of their 5 – 20 acres?

Clearly the Rule prevents the establishment and growth of organic farming in our valley and stifles the jobs and healthy eating this farming creates, not to mention the pressure to loose open space to more lucrative development, able to pay for mitigation rights. I note that 5000 gpd is 40 homes at the 125 gpd domestic use the Rule would permit.

Commenter

Jacques M Dulin 18

Response

Thank you for your comment. Groundwater users relying on the permit exemption, including small farmers and fruit growers operating under the industrial use category of the groundwater permit exemption, have up to 5 years to complete their project (“perfect” the water right) from the time they first regularly and beneficially use water. Therefore, if the water use began less than 5 years before the effective date of the rule, the farm may continue to finish the project and use up to the 5,000 gpd limit of the exemption without being considered a new use of the groundwater. To expand beyond the 5,000 gpd limit of the exemption, a farmer must either apply for and receive a water right (which will require complying with this rule), transfer an existing water right, or receive water from one of the existing irrigation districts or companies in the Dungeness watershed. Please also see the responses to Comment # 596 and Comment #603.

Comment # 614

Ecology’s economic assumptions are not valid as are the stream flow estimates for the last 25 years.

The damage that will be done to the County’s economy in the category of diminished property values and slowed growth have not been considered.

Commenter

Gary Terrell 1

Response

Thank you for your comment. Ecology has added a clarifying summary section to the cost benefit analysis.

Ecology implicitly evaluated impacts to property values through costs for water mitigation (or foregoing benefits of water use). While it was not specifically labeled as such, this cost reflects a reduced willingness to pay for property – Ecology has reorganized the document to clarify this distinction – please refer to the Final Cost-Benefit Analysis. Ecology has also, in the final Cost-Benefit Analysis, expanded the range of these impacts to incorporate public input on the possible impacts where mitigation water is unavailable, and on the tax base explicitly.

Please also see the response to Comment # 596 and please refer to the Final Cost-Benefit Analysis for a detailed analysis of these economic impacts.

Comment # 599

We are in an economic crisis. The contrived regulatory controls of the Dungeness Water Rule will make this problem much worse.

Commenter

Karl Spees 2

Response

Thank you for your comment.

Comment # 616

Since 2004 I have owned a 5-acre parcel along Cassalery Creek, on Vine Maple Lane, zoned Ag, with the intention of building on it in a few more years. However I may choose to sell it instead, as I am happy with my current home.

I am deeply concerned about this proposed rule and the effect it will have on my future ability to obtain water rights for myself for reasonable cost, or to be able to sell the property w/o existing rights. The value of the property has already taken a huge hit since I bought it in 2004, and any further decrease in its value would be devastating to me financially.

I purchased the property with the understanding that I would be able to pay to drill a well and then I would be all set for water.

Commenter

Kathleen Cooper 1, 3

Response

Property values rise and fall as the local, regional, and national economies wax and wane. Property values are often significantly supported by perception and that will not change. An understanding of what is required to use water under this rule may or may not be reflected in the value of the property as seen by a prospective purchaser.

Please also see the response to Comment # 596 and the general response on Prior appropriation: what's fair?.

Comment # 617

REALTORS® note the irony that the real estate industry would take issue with the structure and purpose of the Dungeness Water Exchange, as it likely could provide the only relief from the impacts of the rule on landowners. The point is not that mitigation should not be discussed or that water exchanges are without merit. Our point is that this type of mitigation (or what is known about it at this point) is far more costly and complicated than what is necessary to address future consumptive impacts from exempt wells and other water uses.

Moreover, Ecology's new policy of closing basins to exempt withdrawals with hopes that water supply or mitigation is brought forward by 3rd parties feels like a series of evolving water policy experiments. Ecology's regulatory methods and rulemaking analysis are changing from basin to basin and imposing huge costs on landowners, local governments, and the agency. In some areas (Skagit), homeowners have no viable mitigation. In other areas (Kittitas), some select areas were spared the economic consequences of moratorium only because of the unique existence of the Suncadia water bank and the profit motives of other water rights holders.

Commenter

Bill Clarke, Washington Realtors/Sequim Realtors 7

Response

The basic framework for transferring water rights has been contained in Washington's water code since its enactment in 1917. The explicit requirement in state law to protect base flows on perennial streams has existed since enactment of RCW 90.22 in 1969. Ecology agrees that there are simpler and cheaper ways to accomplish mitigation. However, absent a willing party's acceptance of responsibility for mitigating others' impacts, the regulatory response (for example to adopt instream flows and close fully appropriated basins) must be consistent with authority given to Ecology by the Legislature. Ecology's regulations must reflect the unique circumstances of a particular basin, hence the different regulatory approach noted by the REALTORS.

Please also see the response to Comment # 596.

Ecology agrees that water is finite, and that in the long run, it will still be a limiting factor for the subbasin (among many areas of the state and world). Even with better water management, beyond the 20-year planning horizon of Ecology's analyses, water users and state and local governments will need to make decisions about how best to use the water resource available.

Comment # 618

I own an acre of undeveloped land within WRIA 18, in the outskirts of Sequim, which I bought for an investment and hope to sell one day to someone that wants to build a house. I feel very unfortunate to be in this position and am not happy about the new Dungeness water rule that will be imposed on landowners with undeveloped land. One of the things I have been unhappy about during this process over the last few years, is the lack of concrete information by the Department of Ecology on how this will be affecting people like me, bottom line: what is this going to cost a future homebuilder?

After attending the question and answer session before the meeting in Sequim on June 28th, I became aware that a mitigation fee will have to be paid before a building permit will be issued. The fee will range from \$500 to \$3500 with three levels that have not been determined yet. As a past resident of the same area, living on an acre with vegetable and flower gardens, I propose that the middle level of mitigation fee be set at \$1500 for the potential to use that amount of outside watering.

Commenter

Debi Munro 1

Response

Thank you for your comment. Ecology does not set the price of mitigation certificates. The price will reflect the actual cost to acquire water rights and construct and operate projects that generate mitigation credit. We also note that permit exempt under RCW 90.44.050 may only be used to irrigate up to one-half acre of non-commercial lawn and garden. Irrigation of a full acre requires a water right permit.

Comment # 619

The Department of Ecology (DOE) is proposing a number of significant limitations on water usage in our area.

As the director of the Coastal Watershed Institute, I am not concerned that these limitations will ultimately stifle development, decrease land values, and adversely impact the business-generated and real estate-related tax bases.

Commenter

Anne Shaffer, Coastal Watershed Institute 1

Response

Thank you for your comment. Please also see the response to Comment # 596.

Disagreement about Economic Analysis

Comment # 620

We are here tonight to comment on a rule born by an agenda, built on flawed assumptions, and jammed through by biased committees. Removing the economist writing the economic impact report because they didn't like his assessment is symptomatic of the whole water rule process. The committee was stacked with agency personnel and environmentalists. People actually impacted by the rule need not apply.

Commenter

Steve Marble 1, H1

Response

When the Legislature passed the Watershed Planning Act, RCW 90.82, in 1998, it made a significant commitment to local water management. The Legislature said that if local planning units could resolve water management issues or disputes by consensus using the watershed planning process and participants it prescribed, then Ecology and other participating governmental entities must adopt rules to implement the recommendations. For the participating governmental entities, RCW 90.82.130(3) specifically requires:

“...The obligations on state agencies are binding upon adoption of the obligations, and the agencies shall take other actions to fulfill their obligations as soon as possible, and should annually review implementation needs with respect to budget and staffing; (b) for counties, the obligations are binding on the counties and the counties shall adopt any necessary implementing ordinances and take other actions to fulfill their obligations as soon as possible, and should annually review implementation needs with respect to budget and staffing; or (c) for an organization voluntarily accepting an obligation, the organization must adopt policies, procedures, agreements, rules, or ordinances to implement the plan, and should annually review implementation needs with respect to budget and staffing.

The Legislature expressed its support for the consensus process by streamlining some of the rule adoption procedures under the Administrative Procedures Act, RCW 34.05, allowing a simplified or more streamlined rule development process. RCW 90.82.080(1)(b) provides:

“...The department shall undertake rule making to adopt flows under (a) of this subsection. The department may adopt the rules either by the regular rules adoption process provided in chapter 34.05 RCW, the expedited rules adoption process as set forth in RCW 34.05.353, or through a rules adoption process that uses public hearings and notice provided by the county legislative authority to the greatest extent possible. Such rules do not constitute significant legislative rules as defined in RCW 34.05.328, and do not require the preparation of small business economic impact statements.

Yet another way that the Legislature expressed its support for consensus-based planning was to explicitly state that the adopted watershed plan is a primary expression of the public interest. RCW 90.82.130(4) provides:

“ After a plan is adopted in accordance with subsection (3) of this section, and if the department participated in the planning process, the plan shall be deemed to satisfy the watershed planning authority of the department with respect to the components included under the provisions of RCW [90.82.070](#) through [90.82.100](#) for the watershed or watersheds included in the plan. The department shall use the plan as the framework for making future water resource decisions for the planned watershed or watersheds. Additionally, the department shall rely upon the plan as a primary consideration in determining the public interest related to such decisions.”

Ecology was not required to do the Cost Benefit Analysis (CBA). Ecology chose to perform the CBA, like we do with virtually all our rulemaking, because we want to know and want the public to know the costs and benefits of our rules.

We have heard concerns about the costs associated with the rule and disagreements between Ecology staff and legal counsel largely stemming from emails published in the Sequim Gazette. Unfortunately, some of these early estimates of the cost of the proposed Dungeness rule contained inaccurate estimates of the costs of the rule. These costs were greatly inflated based on two flawed assumptions: 1) that all undeveloped lots or parcels are guaranteed a prospective right to use water in the future under the state water code, and 2) that proposed rule language would preclude the ongoing use of permit exempt wells. First, Ecology has consistently concluded, and our legal counsel in the Attorneys General’s office has confirmed, that a property owner must first drill a well and put the water to beneficial use in order to develop a legally vested water right. Second, and more importantly the proposed rule will not block future permit exempt well uses.

A team of economists developed the cost benefit analysis for the rule. The economist that did some preliminary work on it asked to be reassigned to another project and his request was granted.

Please also see the response to Comment # 614.

Comment # 621

RCW 34.5.328(1)(d) states that any “rule” is illegal if its benefits do not exceed its costs. According to Tryg Hoff, the Ecology in-house economist, the “rule” does not meet the legal requirements of the RCW. As quoted in the Sequim Gazette, “Tryg Hoff, the agency economist first assigned to create the rule’s cost-benefit analysis, argued repeatedly that the costs of the rule would far outweigh the benefits. Under Washington law the benefits of any new rule must be greater than the costs.” (Sequim Gazette, June 6, 2012). It’s no wonder Hoff was removed from the DOE rule-making team shortly after his statement, after not falling in line with the “predetermined outcomes”.

The internal behaviors by DOE recently brought to light in regards to the removal and replacement of key player Hoff was altogether disappointing. It is a sobering slap in the face to the people and a perfect example of cronyism. Any attempt at this point by DOE to try to exonerate their exposed action would only appear as a governmental whitewash at best. I believe if DOE and our elected officials choose to look away while WRIA 18 moves forward without heeding the cry of constituencies, the advice of local area experts, and the written comments made by DOE’s own former analyst Tryg Hoff, then the people by default have embraced a government control driven regime. If no action is taken to make this right by those sworn to defend the people against internal governmental corruption, and WRIA 18 is adopted in this manner, our Commissioners and Elected Officials will also be painted with the strokes of DOEs unscrupulously dipped brush here in Clallam County.

DOE needs to immediately address and correct obvious internal integrity issues and processes.

I am very troubled by the comments in the emails that were referenced in the Sequim Gazette article of June 6. I have requested and received copies of the those emails, over 1,700 pages of what I call "duck and cover" by certain members of the Department of Ecology. It is obvious that your department was seeking a certain "outcome" and when the the individual assigned the responsibility to do the cost-benefit analysis could not provide your predetermined outcome, you applied enough pressure that the individual "asked" to be reassigned. Having spend more that 30 years in positions of management in the private sector, I assure you that your methods were somewhat juvenile and obvious that you need a training session on how to conduct an employee exit.

Another interesting email reads;" You can disagree with me all you want but you better check with your attorneys! It's clearly bad policy to put millions of gallons of water for fish over a few gallons for people. Or God forbid, not protect the water for the people at al. Like I said this rule smacks of anti growth." Is this when you made the decision that "that guy needs to change jobs"?

Interesting article and interesting how Mr. Hoff was ousted from his task.

Was he relieved for cause or for just telling the truth? Especially where he states in an e-mail "Like I said this rule smacks of anti growth."

We don't feel the rules/constraints are warranted, and DOE's own former economist, Mr. Hoff, indicated that the probable costs of implementing the rule far out-weighed the potential benefits that would be achieved upon implementation. By the way, why was he transferred to another area after voicing his concerns? Very interesting, or telling, don't you think?

DOE's economist, Mr. Hoff, indicated that the probable costs of implementing the rule far out-weighed the potential benefits upon implementation. Shortly after Mr. Hoff voiced his concerns, he was relieved of his duties and transferred elsewhere in the department. Something smells bad here.

Commenter

Sue Forde 6; Richard French 3; George Chandler 1, 4; Deborah Norman 5, 15; Terri & Milo Walker 2; Richard & Martha French 5

Response

Please also see the response to Comment # 620.

Comment # 600

I continue to quote, "It's clearly bad policy to put millions of gallons of water for fish over a few gallons for people or, God forbid, not protect the water for the people at all." Like I said, this rule is antigrowth. That's a quote by one of your members. We heard earlier by the Department of Fish and Wildlife, it's more important for the fish than it is for you people here.

Commenter

George Chandler H3

Response

Thank you for your comment. Ecology respectfully disagrees with your assertion that this rule considers water for fish more important than water for people. Ecology has a statutory obligation under RCW 90.82.080 to adopt instream flows as recommended in an approved watershed plan. In addition, Ecology has a statutory obligation under RCW 90.54.020 to protect instream resources. The measures in this rule are intended to help protect stream flows by establishing instream flow levels and requiring mitigation for new withdrawals. This rule also establishes reserves of water to ensure there will be water available for domestic use, consistent with RCW 90.54.020(5) which calls for protection of water in a potable condition to satisfy human domestic needs.

Comment # 623

It is of real concern to our family how the Department of Ecology reacted when confronted with opposition to WRA 18 by one of its own. As we understand it, your in-house Economist on March 19th wrote a memorandum to the 'rule making team' that the evaluated draft proposal did not meet the legal requirement outlined in RCW 34.05.328 (1) of the Administrative Procedures Act.

Then, two days later this same individual sent written notice to his supervisor informing him that he found that he could not support the proposal as it was unlawful and he could not keep his professional integrity intact by supporting it.

The Department of Ecology responded by removing this person from the team. (Probably worse than that actually!--my supposition).

So how are we to believe that this proposal has merit when your own people who oppose it are handled in this manner

Commenter

John Mackay 1, 3

Response

Please see the response to Comment # 620.

Comment # 601

In addition to the well-articulated objections of the above-identified groups, the Rule and the DOE process do not meet the maximum net benefits test of WA Statute, RCW 90.54.020.

The DOE's reasons for rejecting Tryg Hoff's economic analysis showing the costs of the Rule to the Dungeness Valley would be \$41.9 Million (which far exceeds the benefits of possibly preserving an unknown number of fish that .77cfs additional water might support), is Steve North's erroneous assertion that "the value of the [water] use does not attach to the use until it is established". That is, he asserts that a prospective use has no value.

It is clear to me as a small farmer (organic wheat and rye; orchard and tree nursery) that Mr. North has no experience in futures markets, much less agriculture futures. We suggest he follow CNBC's morning financial news. We can sell the rights to our crop even before it is planted. Check out corn and wheat futures.

Mr. North is wrong; Mr. Hoff is correct, and forcing Mr. Hoff out was political retaliation. DOE simply did not like the truth of the economic analysis because it wants to cram the rule down our throats.

It has been a 10-year exercise of governmental mismanagement – bureaucratic make-work by remote, un-affected government workers who ignore the inconvenient truth, that the Rule does not stand the smell test, much less the maximum net benefits test.

DOE politicians did not like the reality of the economic analysis, so you forced Mr. Hoff out and got a toady to tell you what you wanted to hear and needed to cram the rule down the throats of the citizens of the Dungeness Valley. It has to stop.

We urge you to withdraw the Rule and do not restart the process until you can meet the maximum net benefits test.

Commenter

Jacques M Dulin 3, 5, 7, 10, 11, 13, H1, H5,

Response

Ecology disagrees with the characterization of the process used to develop the watershed plan, the proposed rule, and the Cost Benefit Analysis. A maximum net benefit test is not required for this rule. Please see Department of Ecology Water Resources Program Policy Interpretive Statement 2025, available at this link:

<http://www.ecy.wa.gov/programs/wr/rules/images/pdf/pol2025.pdf>

Please also see the response to Comment # 620.

Comment # 602

They have an in-house economist. His name was Tryg Hoff. He did the analysis. He's a very experienced gentleman. He came up with the cost of about \$42 million and the benefits to be almost intangible. That is upside down. Oh, gosh. We can't have that guys, is the DOE speaking, because we can't pass the rule if we adopt what our economist said. So they argued with him, hassled with him, and finally forced him out. Then they got the guy from Jefferson County, who gave them a very nice convenient review, and now the Cost Benefit Analysis, all of a sudden, is positive. So now, they can go forward with the rule. It is B-S, and I'm not so far from the farm that I can't smell it.

Commenter

Jacques Dulin H2

Response

Thank you for your comment. Please see the response to Comment # 620.

Comment # 603

Rules are not supposed to cost more than the benefit they provide. Ecology opted to conduct a cost benefit and impact study here and also in 17. These economic analyses are required to meet certain standards. They are required to not only show, but also to explain the real cost and benefits. An internal Ecology emails suggests that the rule is upside down by possibly twenty to one or more.

Commenter

Teren MacLeod, Government Affairs in Jefferson County H2

Response

Thank you for your comment. Please see the response to Comment # 620.

Comment # 604

When Mr. Hoff refused to buckle under to political pressure as to how his economic analysis should be prepared and was removed from the rule making team, the analysis was prepared in just a few weeks by employees lacking any familiarity with the WRIA 18 rulemaking process, resulting in this flawed final result.

Commenter

Dick Pilling, Port Angeles Business Association 9

Response

Please see the response to Comment # 620.

Comment # 605

Rules are not supposed to cost more than the benefit they provide. Ecology has opted to conduct a cost-benefit analysis and small business economic impact study here and in 17. These economic analyses are required to meet a certain standard and meet the maximum net benefits test. They are required to show real costs and benefits, and we, the public, are meant to see and be able to understand those real costs and benefits.

An internal Ecology e-mail suggests the draft Rule for 18 is “upside down by a massively negative cost benefit ratio.” This does not seem to be an isolated case. In WR1A-17, each returning salmon was valued at \$5,000 over a 16 year life span. That same study, the SBEIS for 17, showed, as a benefit, 819 jobs created from the Rule, with 384 in construction! We have instead experienced a steady decrease.

Commenter

Teren MacLeod, Jefferson County Association of Realtors 2; Teren MacLeod, Government Affairs in Jefferson County H3

Response

Please see the responses to Comment # 620 and Comment # 624.

Comment # 606

Tryg Hoff, in a February 29, 2012 email said that "exempting in-house domestic use would only consume 2/10 of 1% of the river over a 100 year build out." This man was an accomplished economist for Ecology, for decades. I certainly agree with him that the impact on property values (and parallel reductions in taxes for some properties, that will have to be made up by the rest of the taxpayers), quality of life, the cost of the mitigation, water right transfers through the Water Exchange, additional staff and hours needed at our County Department of Community Development, and much more, certainly outweigh the small benefit achieved from this proposed Dungeness Water Management Rule. The benefits we all attain without the Rule are much more tangible, than what is written in the Cost Benefit Analysis.

Commenter

Marguerite A Glover 21

Response

Thank you for your comment. Please see the response to Comment # 620.

Comment # 630

That a State DOE Economist agreed that there is no economic benefit to the proposed Dungeness Water Rule, only enforces the belief that the State Department of Ecology is deceiving Clallam County citizens.

This action does not instill trust in the DOE

Commenter

CM Muller 4; Sheila Roark Miller, Clallam County 9

Response

Please see the response to Comment # 620.

Comment # 631

I am very troubled by the comments in the emails that were referenced in the Sequim Gazette article of June 6. And I thank the Gazette reporter for getting all of those emails. That's over 1700 pages of emails. I haven't gone through all of them, but I've gone through a lot of them. A lot of what I saw, I would describe as duck and cover from the Department of Ecology and by certain members of the Department of Ecology.

It is obvious that your Department received a certain outcome and when the individual assigned the responsibility to do the Cost Benefit Analysis could not provide your predetermined outcome, you applied enough pressure that the individual asked to be reassigned -- that's in the emails -- and then you tried to cover it up. Cover-ups don't work. Emails last forever.

Having spent more than 30 years in positions of management in the private sector, I can assure you that your methods were somewhat juvenile and, obviously, you need a training session on how to conduct an exit interview. They do have some good training sessions. I was fired one time, I understand.

It is obvious from the emails that your proposed rule is in violation of the state rule requiring that probable benefits of the rule are greater than the probable costs. You have heard several people talk about that. I don't have to go through that.

Are you prepared to stand here and say you're going to put your name on a proposal that you know is in violation of the state rule?

An interesting email read and I quote, "You can disagree with me all you want, but you better check with your attorneys."

Commenter

George Chandler H2

Response

Thank you for your comment. Please see the response to Comment # 620.

Comment # 632

Ecology's own economist, Mr. Tryg Hoff, is on the record with a formal notice that the costs of the rule exceed its benefits and that it fails under RCW 34.05.328 (1)(d). The economic analysis now served up by Mr. Hoff's successor is indeed a "cooked" analysis that is "ignoring the economic evidence", as Mr. Hoff was pressured, but refused, to prepare.

Commenter

Pearl Rains Hewett 18; Randy Simmons 8; Kaj Ahlburg 6

Response

Please see the response to Comment # 620.

Comment # 633

DOE's own economist, Mr. Hoff, indicated that the probable costs of implementing the rule far out-weighed the potential benefits that would be achieved upon implementation. It should be noted that shortly after Mr. Hoff voiced his concerns, he was relieved of his duties and transferred elsewhere in the department.

Commenter

CM Muller 3; Jeremy Fodge 5; Alan Barnard 5; Barbara Bentley 5; Mark & Jackie Bragdon 7; Danni Breen, John L Scott Sequim 5; Ron Carlson 5; Roger Clark 5; Rhonda Curry 5; Pat Davis 5; Jerald R Dow 5; Gene Farr 5; Nancy Louise Froh 5; Daniel E Gase, Coldwell Banker Uptown Realty 5; Deborah Groesbeck & Bob Conklin 5; Richard & Ruth Hale 5; Donald & Ella Hoffeld 5; Kelly Johnson, Windermere RE Port Angeles 5; Sarah Kincaid 5; Lee

Lawrence 5; Colleen & David Lyons 5; Harvey & Margaret Martin 5; Jim Mitchell 5; Mary Mitchell 5; Jim & Bea Muir 5; Terry Neske 5; John & Morgan Nolan 5; Virginia A O'Donnell 5; Julia Opeka 5; Patricia J Orella 5; Maureen Pfaff, Olympic Peninsula Title Company 5; Lynda Rathman 5; Doc Reiss, City of Port Angeles Planning Commission /Windermere Real Estate 5; Ardyth Schaumburg 5; Susan Sparks Smith, Silpada 5; Janet Stevenson 5; Linda L Wishart 5; Richard Wolf 6; M Worman 5; Carol Yearout 5; Maxwell Anderson 5; Jim & Bea Muir 5; Dick Pilling, Port Angeles Business Association 8; Nola Judd 3; RA Pilling, Clallam County Republican Party 6, H6; Ray Gruver 6; Carol Rutledge 6; Ross Krump 20; Neville & Gayle Aitken 5

Response

Please see the response to Comment # 620.

Comment # 634

We have serious concerns about the validity of the economic data used by your agency to justify this rule. One of your own economists has expressed grave concerns which was the basis for a Sequim Gazette article on the subject within the last few weeks.

I am asking/demanding/requiring/stipulating/ that the Dept. of Ecology spend more time cleaning up their own environment regarding the alleged and seemingly apparent manipulation of data for WRIA 18. It's time to stop the pretense and acknowledge that serious mistakes have been made and the the citizens of Clallam county will not ignore the errors and misinformation that has been presented to us. The integrity of your process has been damaged beyond repair from my point of view. How can you validate your position now that the emails and original economic analysis are public?

It is indeed a sad statement regarding the lack of integrity displayed by Dept. of Ecology. The decision to disregard the internal data of your own employee smacks of the "fix is in." You owe a fiduciary responsibility to the citizens that your pending rule will impact. As a taxpayer I am truly dismayed by the process to date.

Commenter

Daniel W Tash 1; William & Richelle Paulbitski 1; R Doreen Emerson 13

Response

Please see the response to Comment # 620.

Comment # 635

I was in attendance the WRIA18 at the Sequim Community Church on 6/28/12. I was furnished with a copy of the Tryg Hoff e-mails that were sent within the Dept of Ecology and after reviewing them I was horrified at the attitude of most of your employees toward the peoples' business. Your comment on page 107, that Tryg is "not a believer" is most shocking. He is a government employee and he appears to rightly believe that working in behalf of the citizenry is a government employee's first concern. His personal belief system doesn't enter into the discussion.

Commenter

Robert C McGonigel 1

Response

Please see the response to Comment # 620.

Comment # 636

The revelation of e-mails from a high-ranking official are especially unsettling.

Commenter

Jane Manzer 2

Response

Thank you for your comment.

Comment # 637

I used to own a home along the Dungeness River. In 1997 the so-called "Pinnacle Express" visited the peninsula and created extreme flooding along the river. The flooding caused a dead, very large Cottonwood tree at the western edge of the river to uproot and opened a hole in a very professionally constructed built dike to fail. The high water flooded my property and several others along the river but my residence was not flooded.

My neighbors and I wanted to rebuild the dike to protect our properties. We were met with much opposition by various organizations including the Department of Ecology. I do not remember the DOE person who was assigned the project but I can tell you that we were able to prove that the science your agency was quoting was extremely flawed. To top that, the man was so out of his mind with a water issue that I, and my neighbor forcefully escorted him to my gate and told him to never return. He never returned and to my knowledge no other DOE

official showed up. To be fair I also ordered a Clallam County Planner off of my property because he was overly unprofessional. He left County employment shortly afterward. We did obtain a permit and rebuilt the dike.

This brings me to my point of this message. It would appear that DOE is still acting in an unprofessional manner with this WRIA 18 issue. Instead of reassigning the DOE economist who found fault with the DOE position, he should have been promoted and conducted a peer-review study for the good of the citizens.

Commenter

Robert Kavanaugh 1

Response

Ecology does not agree that its employees act in an unprofessional manner. Please also see the response to Comment # 620.

Comment # 638

The firing of the economist who questioned the data smacks of a government entity that is trying to “pull one over on the public” and could also be seen as a direct threat to any Ecology employees who share our concerns about the validity of the study.

Commenter

Doug Hale, Coldwell Banker Town & Country 5

Response

Please see the response to Comment # 620.

Comment # 639

DOE’s recent actions regarding the restriction on water usage in the Dungeness area are alarming for many reason. As a pass Planning Commissioner, I am familiar with environmental impact statements and qualify planning processes. A fundamental element in all considerations is the economic impact of the proposed actions to be taken. As reported in the media and other sources the economic analysis provided by your department, for your proposed regulations, is at best questionable and corrupted.

Commenter

Ray Gruver 1

Response

Please see the response to Comment # 620.

Comment # 640

What has been the economic impact to the other counties in Washington State where DOE has imposed water rules?

Commenter

Richard & Jill Pinder 2

Response

Over the past 35 years, Ecology has adopted instream flow rules in about half the Water Resources Inventory Areas in the state. Each rule is somewhat unique and reflects varying levels of local planning input. The Upper Kittitas rule, for example, prevented access to all new water uses under the groundwater permit exemption unless they were first mitigated by a pre-1905 water right held in the Trust water Right program. Since July 2009, individual landowners, homebuilders, and developers have collectively received permits or permit-exempt water budget neutral determinations allowing for more than 1,300 new homes to be built. Like the Sequim area, the Upper Kittitas economy is heavily reliant on new home construction. The Upper Kittitas CBA and SBEIS are available on Ecology's website.

Please also see the cost-benefit analyses for those rules adopted after 1995, including: Lower Skagit, Upper Skagit, Stillaguamish, Quilcene-Snow, Lewis, Salmon-Washougal, Walla Walla, Wenatchee, Entiat, and the Main Stem Columbia,

Comment # 641

Why is the WRIA 18 Dungeness Watershed Rule even being considered when the State DOE economist agrees there is no economic benefit to the proposed rule?

Commenter

Richard & Jill Pinder 19

Response

Please see the response to Comment # 620

Comment # 642

Your own economist, Tryg Hoff, argued that the costs of the rule by far outweighs any benefits. In Hoff's opinion, the rule "will probably save less than 1 CFS of water from the rivers and streams throughout the watershed (over a 20 year period)." When Mr. Hoff expressed his concerns, according to DOE emails, he was transferred to another department after first being pressured by his supervisors to ignore scientific evidence and the law.

Commenter

Elaine & George Chandler 4

Response

The less than 1 cfs estimate of the savings was based on an incorrect growth projection for all water use in the next 20 years. Please see the response to Comment # 620.

Compensation

Comment # 643

What financial restitution will be implemented by the DOE (or other government agency) to provide for those owners who cannot afford to pay for this new water mitigation fee?

What about recompense for owners of existing wells, which in good faith, have already been paid for? Many sellers paid all the required fees and costs to have a well drilled and to be lawfully permitted per current county regulation in order to secure their future potable water use – what about them? Will they be given fair restitution, or will they be required to stand in line with the rest who have never invested in drilling, improving or permitting a currently approved well?

If there will be fair restitution for those owners mentioned in [above] will the taxpayers be funding it?

Commenter

Deborah Norman 12

Response

Compensation or restitution for opportunities that could have been taken at an earlier time at a lower cost (for example, if a well owner had used water) isn't provided in Washington's water laws. Therefore, no restitution or recompense, per se, is proposed in conjunction with the rule. The legislature may provide some form of financial support for the Dungeness Water

Exchange; however, that is for them to determine in future budgets. Please see the general responses regarding Prior appropriation: what's fair? and Mitigation: who pays?. If you are already using a well, you are not required to mitigate for your current uses. The prior appropriation system does not provide for a water right prior to beneficial use, and so new uses after the rule takes effect will require mitigation. All water rights are subject to pre-existing (senior) water rights.

Comment # 644

I have some property I have owned for about thirty five years. It is the site of my future retirement. I have installed a 4 bedroom septic system and well on the site. I understand that because of it's location (above the irrigation) That I may not even be able to purchase water in the future. If this is true and I can not buy water or use my existing well the money I spent to develop the land and the land itself is useless. Will there be any compensation for the land becoming useless due to new rules??

Commenter

Allan van der Waal 1, Joanne Beck 1, 2

Response

One goal of the rule is to ensure access to water in a basin where water is widely and currently unavailable. To ensure that water would be available for new homes, and to lessen the risk that new uses would be curtailed, even in locations where water is not available for mitigation, this rule establishes reserves of water for domestic use.

Mitigation water for outdoor use has not yet been identified in areas away from existing irrigation pipes and ditches, such as the southernmost part of the watershed and to the west of Siebert Creek. Some of these areas are served by public water supply, but not all. However, we have not ruled out finding water for outdoor use in any part of the Dungeness Watershed.

In addition to the reserves of water for domestic use, on Oct.12, 2009, Ecology issued a Policy Interpretive Statement clarifying that a water right is not required for rooftop rainwater harvesting for onsite household use, including gardening. This will not change under the rule.

Comment # 607

It was determined that piping the irrigation ditches would create a decrease in well yields, for the City of Sequim wells; Port Williams Well #1 and #2, and Silberhorn Wells #2 and #3; for PUD wells, Mains Farm Property Association Wells #2 and #3 (inactive), Smithfield Drive Wells #1 and #2, Loma Vista Wells #2 and #3; and PUD #1 Clallam County Carlsborg Well; and, for the Sunland Water District Domestic Wells, #1 and #2. I'm assuming that there was no

compensation for this impact on senior water users' rights, nor an ability to sell to the River or the Water Exchange, some of the water there were about to lose, and will lose, under additional piping.

Commenter

Marguerite A Glover 15

Response

Water right holders are not entitled to the continuation of an inefficient use of water that generates return flow to either surface water or groundwater. Consequently, when a water user conserves water they are not required to compensate other water users who have benefitted from that inefficient use. Whether any of the saved water can be transferred to an instream flow purpose of use or may be used for another out-of-stream purpose depends on case-specific review of whether such a change or purpose of use and/or change of place of use would result in impairment to other existing water rights.

Comment # 608

Given per foot drilling costs, [drilling to a deeper aquifer] may well cost the homeowner thousands or tens of thousands of dollars extra. How will he be compensated for, or incentivized to incur, such an expenditure?

Commenter

Pearl Rains Hewett 36; Randy Simmons 26; Kaj Ahlburg 24

Response

The rule does not require drilling to a deeper aquifer.

Comment # 647

I am a landowner of a 3.3 acre parcel that is currently on the corner of Macleay Rd and Wheeler Road. It has a well in place, power transformer installed, and a septic system designed and installed. However, due to the impact we have felt from the current economy, we have been unable to build so have put the property up for sale. Now the Dept of Ecology comes forward with this ruling that makes absolutely no sense to me and I believe will have significant impact on the value of my property. Is the State prepared to compensate me for my loss? If so, I am less concerned, but in all I have read and heard, the State has no plan to compensate for loss of value on property affected by the Dept of Ecology ruling.

Commenter

Kent Johnson 1

Response

Please see the responses to Comment # 596, Comment # 643, and Comment # 644. For more information about water availability for your specific situation please contact the Water Resources Program at Ecology's Southwest Regional Office at 360-407-6859.

Comment # 648

My reason for coming tonight pertains to Lots 7 and 8 of Fat Cat Lane that I acquired several years ago for my retirement and to enjoy farming. I have vested water rights. I understand that that is senior rights.

I've been busy working. I'm about ready to retire. There's a question whether or not I can put them to beneficial use.

I installed the pipeline with the gentleman that was sharing the use of it with me; unfortunately, he passed away and there hasn't been any continuous use. I feel that if these rights are taken from me for lack of beneficial use that, certainly, there should be some compensation.

The other pitfall is that I haven't been able to apply for a building permit to commence building on my property and if the rule is adopted prior to that, then I'm going to be faced with not only having lost my water, but to have to pay for the right through mitigation to drill a well on my property. So, potentially, I'm a double loser here.

So I just want to go on record that if property rights are taken there's just compensation, and there needs to be issues of mitigating circumstances addressed.

Commenter

Wilbur Hammond H1

Response

Thank you for your comment and for attending the public hearing. This rule will not take away property rights, and helps ensure that water will be available for new uses in the future. For more information about water availability for your specific situation please contact the Water Resources Program at Ecology's Southwest Regional Office at 360-407-6859.

Comment # 649

The proposed Dungeness Water Rule significantly negatively affects our building plans. We currently live at 193 Letha Lane in Sequim. We also own a parcel across the road from our place at 200 Letha Lane which has a non-active well and septic system in place. We built a detached garage on that property in 2011. We are currently planning on either building a house on the property or else sell it. The value of this property goes down significantly if the Water Rule goes into effect. I will not have full access to the well and it will be more difficult to sell the property if water is not readily available.

We had access to the water when we purchased the property and the price of the property included the use of the water. If we are now told that we do not have full access to our well our property value goes down.

What is going to be done to reimburse us for lost value and what is going to be done to lower our tax base since this property will be worth much less than all of the surrounding lots (all surrounding property is currently developed)?

Commenter

Gary & Carol Mitzner 1

Response

Please see the responses to Comment # 596, and Comment # 643, and Comment # 644.

Comment # 650

We have paid taxes for many years, so in what way do you plan to compensate us for our less value, thus monetary costs and losses?

Commenter

Sandra K & Nick L Larson 5

Response

Please see the responses to Comment # 596 and Comment # 643.

Comment # 651

The existence of loss of expectation rights in the use of the property was acknowledged by multiple bureaucrats at the Sequim hearing to multiple questions. How will those expectation rights be measured?

How will the loss of the expectation rights be compensated? Where will the money for this be found? Who will pay? Why should they pay? Has the legislature prepared a reserve for this possible cost? What did the Department of Ecology estimate for this cost – both in dollars and employee hours requirement? For example, will it require hiring additional lawyers and professional staff to defend? And what is the estimated cost of this?

What is the proposed budget for the settlement of the compensation of the expectation rights?

Commenter

Bruce Larsen 5, 7

Response

Only new water users in outlying areas (6.2 percent of the area) are likely to lose use value, and this value is identified in the Cost-Benefit Analysis. Otherwise, instead of losing use values, new water users will pay for mitigation water, incurring that cost instead. See updates to the Cost-Benefit Analysis and responses to Comment # 596 and Comment # 643.

Taxes

Comment # 652

When I purchase adjoining land and drill a well, so that my daughter can later move there to help me, these proposed rules would leave her without water, unless mitigation payments are made. These rules are not in effect now, or my actions would have been different. With a private well, if I decide in a few years to grow a garden (as I am encouraged to do to protect clean air) this would be an extra expense and perhaps impossible due to increased water usage. These new rules could make the adjoining land useless, my investment would be useless, and my financial security would be threatened.

With other people also having no water on property, which makes it useless, property taxes on my usable property increases.

What about the loss of a tax base, due the drop in assessment values?

In the future, if this Rule passes, as proposed, real estate agents will be asked which properties have the ability to water outside. Which properties have the ability to have greenhouses. Which ones will be able to have, and water, an orchard. Those properties that do not have these grandfathered features, will most definitely go down in value. They will have to ask far less, for their property, than what they could today. Most certainly, they will ask the County Assessor for relief from their taxes. And, as their taxes are reduced, other taxes must go up.

My third concern is in regard to cost-benefit. There is no way that the proposed WRIA 18 rule will be cost neutral. There will be property owners of currently recognized and taxed parcels of land in the Dungeness water shed that will eventually find that they have unbuildable property. These parcels will most likely be absorbed by neighboring properties for a fraction of their current value or will be repeatedly sold by tax auction to people who do not realize that they cannot build on them. The majority of people who move into the Dungeness water shed are retired. The people who want to live in the county area where wells are used want to have a yard or garden, or fruit trees etc. Properties without outside water will never achieve the value potential as properties that have outside watering ability. This will impact the tax base in a negative way.

Commenter

Aloma Blaylock 2, 4; Sheila Roark Miller, Clallam County 8; Marguerite A Glover 28; Scott Gordon 29; Gail Sumpter 10; Clarence Glover 3

Response

Please see the response to Comment # 596.

Property Values

Comment # 653

How - with any kind of a straight face - can you allege that land without the ability to put in an exempt well has the same value as land with an existing exempt well or land that has the ability to put in an exempt well without having to “mitigate” that well? Give me a break!

The loss in land values by itself would make the cost of the Rule outweigh it’s benefits. Your arrogance astonishes me.

Commenter

Pamela Cameron 6

Response

Please see the response to Comment # 596.

Comment # 654

I would like to propose that you explore the decrease of value, sales and build-outs we’ve seen on vacant Sequim City Lots from the time the City Impact Fees were imposed on those properties. Current local property statistics like these render area specific data which would better assist in the overall representation of property value for this area. Sequim being a high

senior retirement area presents a very different dynamic of value than Port Angeles, Port Townsend and surrounding areas.

Commenter

Deborah Norman 13

Response

Please see the response to Comment #596.

Comment # 609

This new rule will have a detrimental effect on property values and future development.

Commenter

Andy Sallee 2

Response

Please see the response to Comment # 596.

Comment # 610

Scenario/question: I have two one acre land listings, both in the same neighborhood, both equal size and view. Both are in your area of purchase interest, both offering you a little bit of land to grow your own veggies and some flowers when you retire here. #1 offers exterior irrigation share, but #2 does not. Both are currently assessed by the county at the same value and both are offered to you at the same price. Which one would you choose to purchase?

Respectfully Ms. Wessel, any competent buyer will choose property #1. Leaving our Seller#2 who has no share for their property to try and compete with those properties who do. Seller#2, when they eventually do obtain an offer will most likely receive a low one to compensate for the loss of exterior watering.

This is a very simplified demonstration of how loss of property value can develop. WRIA 18 is a catalyst that will change the dynamic of property value here in our area.

DOE has casually deemed there will be little or no loss of property value. Dealing with property value firsthand I 100% disagree. It will affect property owners and property value. Several recent experiences prove we are already discussing loss of perceived value with informed buyers on sales of properties in the WRIA 18 affected areas. Unlike DOE, as a Realtor®, I cannot excuse myself from taking the time to appropriately disclose to buyers who

may be affected by this rule, because that would be illegal. Furthermore doing so while in a position of public service would be morally perverse and grossly self-serving.

The above scenario only utilized an exterior irrigation water share as an example of decreased property value. However, do you believe that a domestic water share would be less important to the average real estate buyer than an exterior share? ...and thus a mitigation fee for domestic use would present less of an impact to property value?

Using normal methods of evaluation it is clear that having mitigation fees to secure domestic water use does not remove the negative effect WRIA 18 will have on property values.

How do you calculate this in order to openly attest to the people that WRIA 18 will not affect their property values because they can mitigate domestic water use? This seems casually and dangerously presumptuous—that every affected owner here in our community will have a handful of money to reconcile their domestic water use with the DOE at the time it is needed. This will certainly be a problem for many and inadvertently impose an unjust disadvantage on lower income residents.

Commenter

Deborah Norman 11

Response

Please see the response to Comment # 616. Although there is no difference in the assessed value of the two properties, quite clearly you have distinguished them (irrigation district water available versus no irrigation water) but it apparently is not reflected in the market value. As the value of that distinction is better understood, the value of the property with irrigation should increase relative to the value of the property without. If the future irrigation water use on an undeveloped parcel would not be more than a typical city lot (the “extended” irrigation package to be offered by the Dungeness Exchange), the difference in value should not be more than \$3,500 (the cost of the extended mitigation package). Please also see the response to Comment # 596.

Comment # 657

The proposed rule is going to take untold millions of dollars of value away from property owners who have yet to develop their land or who have yet to put their well to beneficial use. With the stated goal being that this is an effort to protect the in-stream flows in the Dungeness River, the benefit of the proposed rule would need to be monumental to justify the cost to the owners who will be devastated by this rule. Are the anticipated benefits monumental? Will they outweigh the financial devastation they will create? What about the cost to taxpayers to manage all of this? Will the benefits to the river justify that cost as well?

Commenter

E Michael McAleer 1

Response

Please see the responses to Comment # 596 and Comment # 598.

Comment # 658

Citizens who have purchased property for future use or hope to sell their property will feel the financial penalty.

Commenter

Karen Huber 2

Response

Please see the responses to Comment # 596, Comment # 598, and Comment # 656.

Comment # 659

The current DWR plan would further depreciate the land values of properties (not grandfathered), therefore causing a further decline in the economic health of Clallam County.

Commenter

Beth Garrison & Randy Holtkamp 7

Response

Please see the responses to Comment # 596 and Comment # 598.

Comment # 660

Every owner of property affected but unable to meet the IMPOSED deadline will be adversely affected and suffer additional property value decline as a result of this new restriction. In this time of recession hardship, it is inappropriate to enact a rule to further devalue our property.

Commenter

Florence E Blay 5

Response

Please see the responses to Comment # 596 and Comment # 598.

Comment # 661

I will personally be financially devastated by the impact these rules will have. I own several parcels that have not been built on. I intend to give them to my children someday for their future use.

Commenter

Ed Sumpter 2

Response

Please see the responses to Comment # 596 and Comment # 598.

Comment # 662

I am heavily invested in the Sequim/Dungeness area real estate for my retirement security, and I will lose tens of thousands of dollars in lost property value if this Rule is adopted.

Commenter

Steve W Smith 1

Response

Under this rule, your properties may have access to mitigation water that might not otherwise be available, because the basin is overappropriated. Please also see the responses to Comment # 596 and Comment # 598.

Comment # 663

We have purchased property to build a home and fear we will be unable to build and that the property will be worth little once the rule is adopted.

Commenter

Richard Brough 1

Response

Please see the response to Comment # 596.

Comment # 664

I suggest that your responses to those who feel their property values are diminished by the rule should explain the current situation so that these people use the correct base upon which to measure an assertion of diminished value. Many in the audience viewed the rule as something that will take away their ability to access water. The fact is the rule will reestablish access that would otherwise not be available to them under the proper administration of water law as it currently applies to the Dungeness situation (as described in the watershed plan).

Commenter

F Michael Krautkramer, Robinson Noble Inc 3

Response

Thanks you for your comment. Ecology fully agrees. Please also see the response to Comment # 596.

Comment # 665

Scroll down to see the email that I received from a client who was very interested in purchasing a 5 acre property but decided not to do so when informed of the Water Rule. This is only one of hundreds of similar situations that will occur as a result of the Rule. Has this been factored into the Economic Cost/Benefit Analysis?

“This [the Rule] would seem to have a serious impact on the property - basically would have land with little value other than hay pasture - at a price of about \$24000 per acre - would take a lot of hay to pay the bill. So, I guess I will hold off on leaping on that property or any other one without an existing well and home. Makes me think that maybe Washington is as whacky and socialist as California.”

Commenter

Roland Miller, Coldwell Banker Town & Country 8

Response

Please see the response to Comment # 596.

Comment # 666

Also, if I want to sell my home with existing water statutes; do the existing water rights for the property go away? And does the new owner have to mitigate new water rights? Will the new owner have to dig deeper wells and incur hefty drilling fees in doing such?

This will make my existing property much less valuable if this should happen and after I have worked so hard to improve my property all these years and to end up with no benefits to buying my property?

Commenter

Alaine Reeves 2

Response

Please see the response Comment # 596.

Comment # 667

Sufficient time should be allowed for the public To be made aware of the rule and its effect on their property. It will affect property values significantly.

Commenter

Don & Patty Brueckner 3

Response

Please see the response to Comment # 596.

Comment # 668

Some concerns regard the validity of the rule's economic analyses (County has noted salient concerns of impact on property values for undeveloped parcels).

Commenter

Judy M Larson, Protect the Peninsula's Future 3

Response

Please see the responses to Comment # 596 and Comment # 656.

Comment # 669

The proposed rule is so full of verifiable errors and misconceptions that it is beyond belief that you are proceeding to shove this legislation down the throats of the taxpayer land owners. Your statements about the minimum impact this will have on property values is laughable, almost as laughable as your statements on the impact on the river waters that wells have now and in the future.

Commenter

Steve W Smith 2

Response

Thank you for your comment. Please see the Cost Benefit Analysis.

New/Independent Economic Study Needed

Comment # 611

Before wasting any more of the tax payers money, the Cost/Benefit Analysis should be re-done to include the following items

- a. The result of devalued land prices due to the rule. In doing this, appraisers and REALTORS® should be involved. They are the only ones that really know what will happen if the rule proceeds forward – not a desk jockey who has never been in the business.
- b. The loss of revenue to the County in tax money due to the devalued land and home prices, which will in turn affect the economy.
- c. The loss of money to the County in loss of sales tax revenue when small businesses dependent upon water cannot operate. This should include the loss of sales tax revenue that will result from business going elsewhere because the Dungeness watershed area is no longer conducive to development.
- d. The cost of lawsuits that will be brought by hundreds (class action) who object to the uncompensated taking of their property, which is what DOE will be doing when you cause it to devalue.
- e. The cost to the State, and therefore to the tax payers, if the aforementioned lawsuits result in the courts awarding huge sums when the suits are successful.

All of these factors, and probably others, should be included in a true Cost/Benefit Analysis, such as has already been done by one of DOE's own economists, but was discarded because it didn't agree with DOE's incorrect preconceived notions

Commenter

Roland Miller, Coldwell Banker Town & Country 4, 5

Response

Thank you for your comment. For items a, b and c on your list, please see the response to Comment # 596. Regarding items d and e, the APA requires we evaluate the rule itself. We don't evaluate the costs of rulemaking, including prospective defense of the rule, as they are

not a result of the rule's requirements. All rules run a risk of litigation. Please also see the responses to Comment # 620 and Comment # 671.

Comment # 671

The CBA must be thoroughly re-evaluated and include pertinent local data by reputable, knowledgeable, local experts in field. It seems clear that the full economic impacts of the proposed rule have not been taken into account, and that further study of these impacts needs to be done before a legal finding can be made that the adoption of the rule will result in benefits greater than the cost of implementing the rule, and before a finding can be made that adoption of the rule will result in the Least Burdensome Alternative. Please delay the rulemaking timeline until an independent economic study is completed and the results are made available for review by all affected by your decision.

Commenter

Karen Pritchard 3; Pearl Rains Hewett 13, 20, 65; Randy Simmons 3, 10, 55; Kaj Ahlburg 1, 8, 53; Deborah Norman 16; Wilbur F Hammond Jr 1; Juan C Perez 2; Susan Bauer, Peninsula Development District 2; Jim & Cathy Drescher 2; Mark & Jackie Bragdon 2; Scott Gordon 33; Cathy Reed 4, 6; Daniel W Tash 2; Shawn West, NTI Engineering & Land Surveying 1; Elaine & George Chandler 6; Richard & Martha French 6; Wendy Bonham 2; William & Richelle Paulbitski 2; Jerald R Sinn 6; Terri & Milo Walker 1, 3; Robert Kavanaugh 2; Jo Anne Estes 4

Response

We've heard concerns about the cost benefit analysis associated with the Dungeness rule and requests for additional review of our economic analysis. These concerns largely stem from emails between Ecology staff and legal counsel. Unfortunately, early estimates of the cost of the proposed Dungeness rule contained inaccurate estimates of the costs of the rule. These costs were greatly inflated based on two flawed assumptions: 1) that all undeveloped lots or parcels are guaranteed a prospective right to use water in the future under the state water code, and 2) that proposed rule language would preclude the ongoing use of permit exempt wells.

First Ecology has consistently concluded, and our legal counsel in the Attorneys General's office has confirmed, that a property owner must first drill a well and put the water to beneficial use in order to develop a legally vested water right. Second and more importantly the proposed rule will not block future permit exempt well uses.

Additional economic review will not change the answers to the two assumptions above; therefore we have concluded the best course of action is to rely on our existing review process that includes a final review of the changes to the economic studies, as well as comments and responses related to them, by an on call employee of Ecology who is a professor of economics at Clark College in Vancouver. Please also see the response to Comment # 620.

Comment # 672

As has been widely reported, there is uncertainty among many of our citizens regarding the integrity of the process leading up to the Rule's economic analysis and therefore its validity. We urge you to undertake an independent validation of the study's results, and the assumptions that underpin it. This will allay many of the concerns voiced at your public hearing held in Sequim on June 28.

Commenter

Howard V Doherty Jr, Jim McEntire, & Michael C Chapman, Board of Clallam County Commissioners 3

Response

Thank you for your comment. Please see the response to Comment # 671.

Comment # 673

The cost benefits of the environmental impact statements are slanted to make this rule look good. There's no official review of these reports by an independent economist; it's all in-house.

Commenter

Dennis Schultz, Olympic Stewardship Foundation H4

Response

Thank you for your comment. Please see the response to Comment # 671.

Comment # 674

If the Clallam County commissioners are questioning the integrity of the Department of Ecology's(DOE) economic analysis of the Dungeness Water Rule how could you possibly go any further until an independent economic analysis is done?

You can't!

I demand that the Department of Ecology stop the rulemaking timeline until an independent economic study is done.

Commenter

Keith Olson 2, 4; Ross Krumpe 12, 14

Response

Thank you for your comment. Please see the response to Comment # 671.

Comment # 675

To say that an independent economic analysis is needed is an understatement of my thoughts on this matter. An independent economic analysis is required! The Dept. Of ecology is supposedly trying to do the right thing. There are many roads we can travel on our water to the right thing. The Dept of Ecology has taken a wrong road in this journey. It's time to stop, take a look around, and find a path that all of us can travel together.

Commenter

R Doreen Emerson 14

Response

Thank you for your comment. Please see the response to Comment # 671

Comment # 676

I note that the County Commissioners of Clallam County have proposed an independent review of the Economic Benefit Analysis of the subject Rule, which is what I have stated, in a previous comment, should be done. If the Department of Ecology is so sure that their Economic Benefit Analysis is correct, why are they afraid of an independent review? Yes, it might delay the Rule for a few months, but the making of the Rule has been going on for more than 10 years; so why not a few more months?

Commenter

Roland Miller, Coldwell Banker Town & Country 7

Response

Thank you for your comment. Please see the response to Comment # 671

Comment # 677

If it has been five years since a study has been done, why is a current (2012) cost analysis not being done to assess the economic impact to Clallam County? Should a current analysis be done by an independent research group?

My opinion is the proposed WRIA 18 water rule is too incomplete, and should not be adopted until an accurate cost study has been done to better understand: What the egomaniac impact will be on residential, commercial and farms that require irrigation to sustain crops.

Commenter

Richard & Jill Pinder 11, 12, 23

Response

Thank you for your comment. Please see the response to Comment # 671. [Please note that both the draft and final cost benefit analyses were written and published in 2012.]

Comment # 678

The proposed rule, along with the economic and financial data, is to say the least, thin. There seems to be an agenda driven by an ideology that is very narrow in focus. In addition to a series of questionable events concerning the DOE actions, we now have knowledge of a trove of emails that are at least suspect, and need to be fully investigated. before any rule is proposed.

A thorough unbiased investigation as to the scientific merit of your arguments should be initiated, undertaken, and published. Commensurate with an equally unbiased investigation of the economic ramifications of the proposed legislation.

I would recommend a postponement of your proposed legislation until the scientific and economic merits sustain your views.

Commenter

Andrew Watkins 1, 2, 4

Response

Thank you for your comment. Please see the response to Comment # 671 and the general response to Science/fish.

Comment # 679

Please consider putting the rule making timeline on hold until an independent economic impact study can be done. Not one done by the DOE, such as Mr. Hoff already did, that was probably ignored because the study did not say what the DOE wanted it to say (based on Mr. Hoff's removal from his position upon publishing the study).

The citizens of Clallam County are not going to have the DOE making decisions for us without proving to us through an independent economic impact study that these rules are lawful, logical and beneficial to us.

Commenter

Susan Bauer 4

Response

Thank you for your comment. Please see the response to Comment # 671 and Comment # 620.

Comment # 680

Has not Ecology admitted to an Abuse of Discretion with regard to the internal controversy over the cost benefit analysis (CBA) originally performed by Mr. Tryg Hoff, one of Ecology's own economists? According to e-mails obtained by the Sequim Gazette, Mr. Hoff stated that the costs would be far greater than the benefits under this rule due to the loss in property values . In his original analysis Mr. Hoff stated that the costs could be as much as \$500 million and far outweighs the benefits.

It was suggested by Mr. Hoff's superior that he amend his analysis which he refused to do. He is on the record with a formal notice that the costs of this rule exceed the benefits and that it fails under RCW 34.05.328. Mr. Hoff asked to be removed as the economist charged with performing the CBA if his superior was going to insist that he do a biased CBA. Ecology removed him from the study. The subsequent analysis was performed in the manner suggested by Mr. Hoff's superior at Ecology.

The manner in which the CBA was done and the controversy it raises puts the validity of the final CBA into question. Due to this the rule making process must be put on hold until and "arms-length" and fully independent economic study can be performed. Not having a study done by a fully independent firm with no connection to Ecology would result in expensive litigation in which Ecology has put themselves in a very weak position.

Commenter

Helen L Watkins 1

Response

Please see the response to Comment # 620 and Comment # 671.

Comment # 681

At this point, the rule making time line should be stopped. An independent economic study should be made.

This process needs to be stopped, a new economic study done and allow the public to weigh in.

Commenter

Don & Patty Brueckner 2, 5

Response

Thank you for your comment. Please see the response to Comment # 671.

Comment # 682

Cost Benefit Analysis Is Based on Legally Flawed Baseline And Must Be Redone

Ecology's Cost/Benefit Analysis ("CBA") relies heavily on two legal theories in order to produce cost/benefit numbers that enable adoption of the rule. The first is a new legal theory unveiled by Ecology that contradicts the agency's position in similar rulemakings in other basins. Ecology's initial CBA was based on the premise that until Ecology closed the basin, the owner of vacant land could in the future obtain a residential building permit relying on the exemption in RCW 90.44.050, and that this provided economic value to the landowner. Following this analysis, the draft CBA resulted in numbers in which the costs outweighed the benefits, in violation of the Administrative Procedures Act. Consequently, Ecology received advice from the Attorney General's Office, which advised as follows:

One issue I see that is contrary to the baseline we discussed last week when we were all on the phone is that you are assuming that people who have yet to establish an exempt use in the basin (prospective users) have a current legal right to the exemption and in turn you attach a value to that right (a million bucks for all exempt uses). This is simply not true. A prospective user has no legal right to the use of the exemption until the exemption is established. If a basin is closed and they have yet to establish a beneficial use of water, they have lost nothing other than an expectation . . . March 19, 2012 email from Steve North, and other Cost/Benefit emails [Exhibit K]

This conclusion and direction from the AG's Office is contrary to the agency's conclusion in 2009, in the exempt well rule adopted in Upper Kittitas County. In that rule, the agency concluded that "Without the rule, landowners could be expected to continue to develop groundwater supplies under the legal authority of the exemption from permitting found in RCW 90.44.050 and without any mitigation." WAC Chapter 173-539A, Upper Kittitas Groundwater Rule Concise Explanatory Statement, page 5.

While it is true that a water right matures into a vested property rights only after it is applied to a beneficial use, this is a different question than whether an exempt well is legally available to a landowner, and what the priority date is for that withdrawal. The more straightforward analysis is that at all times before the Proposed Rule is adopted, an exempt well would allow the landowner to obtain a residential building permit from Clallam County; after the rule is effective, it would not. RCW 19.27.097 requires the local government to determine whether adequate potable water supply is available for a building needing potable water supply. The Washington Supreme Court recently confirmed this requirement that ". . . GMA provisions, codified at RCW 19.27.097 and 58.17.110, require counties to assure adequate potable water is available when issuing building permits and approving subdivision applications." *Kittitas County v. Eastern Washington Growth Management Hearings Bd.* 172 Wn.2d 144 (2011)

Under existing law and county ordinance, Clallam County's application form for this portion of residential building permit review references both RCW 19.27.097 and a Joint 1993 Department of Ecology and Health document titled Guidelines for Determining Water Availability for New Buildings. (Exhibit L). An exempt well that met the various water quality related provisions would be considered adequate to obtain a residential building permit. That is current legal baseline in Clallam County.

Further, Ecology's baseline conclusion that the loss of the ability to use an exempt well caused by an Ecology regulation has no cognizable economic impact on the landowner is demonstrably false. In some Snohomish County areas of the Skagit River Basin, Ecology's rule created a moratorium on new exempt wells, and thus residential lots were deemed not buildable by Snohomish County. In one example, this reduced the property tax valuation of a 1.03 acre lot from \$122,000 in 2011 to \$40,800 in 2012; a second example shows a reduced value of a 20 acre parcel from \$236,000 in 2011 to \$39,300 in 2012. (Exhibit M)

Commenter

Bill Clarke, Washington Realtors/Sequim Realtors 13

Response

Ecology respectfully disagrees with your interpretation of the baseline in Clallam County prior to rule adoption. Any party who currently develops under a permit exempt use in WRIA 18 is a

junior user at risk of regulation to protect senior water rights. The rule provides economic certainty to prospective users by ensuring that by mitigating their use, they are at significantly less risk of curtailment in times of shortage. Please also see the response to Comment # 671.

Comment # 683

It appears to us that the Department of ecology is barging ahead with water limitations that will probably be detrimental to the economy of the area. We think it would be more prudent to do a thorough economic study which shows no or minor economic impact on the area.

Commenter

William & Anne Notman

Response

Thank you for your comment. Please see the response to Comment # 671

Comment # 684

We have clients who have wells drilled into all 3 of the aquifers in the Dungeness Valley and we personally live in a home with a well. We know there is a substantial amount of water moving underground out to the Straits. Some of these clients do not live here yet on the property they own with wells drilled and some have property without wells.

My concern is that the WRIA 18 proposed rules are taking a “one size fits all approach” around the State of Washington and we know that is not the case with the Sequim - Dungeness Valley. It would appear that the Cost Benefit analysis is flawed and needs to be redone by a private third party entity for a fair and accurate analysis.

Please comment on the Cost Benefit analysis errors.

Commenter

Ronald L Gilles 2

Response

The water resources management program for the Dungeness is tailored to the watershed and not a State-wide one-size-fits-all approach. This rule adopts recommendations from the locally developed Elwha-Dungeness Watershed Plan adopted by the Clallam County Board of Commissioners in 2005. Please also see the response to Comment # 671.

Economic Analyses – General

Comment # 685

We have thoroughly analyzed the proposal, the preliminary Cost Benefits and the Least Burdensome Alternative Analyses, and the Small Business Economic Impact Statement. We believe that the economic analyses are incomplete, that the benefits of the proposed rule do not exceed its costs, and that it does not constitute the least burdensome alternative to achieve the desired results; thus, we believe that the rule as currently drafted does not comply with RCW 34.05.328(1)(d) and (e) and, therefore, contradicts state law. We are submitting a more detailed formal comment, but I would like to summarize quickly the principal points here in the next two or three minutes.

The economic analyses did not address at all the following:

- Decrease in property values of the properties subject to the proposed water restrictions.
- The effect on the local economy's jobs and tax revenues due to decreased demand for land, building, well drilling, and landscaping. When you increase the cost of something demand declines unless the price and demand is zero, which is not for any of these goods.
- The analysis also underrates the cost of mitigation by the injured parties if the rule goes into effect as currently proposed.
- The Cost Benefit Analyses greatly inflates or it creates out of nothing supposed benefits and understates costs to arrive at the desired result. This is evidenced by ecologist or economist, Mr. Tryg Hoff, who we applaud for his courage and integrity, who wrote on March 19, "This is the formal notification to the WRIA 18 Rule writers, if you value the draft rule presented on March 15 for the Dungeness watershed, it does not meet the legal requirements outlined in RCW 34.05.328(1)(d) of the Administrative Procedures Act."

We believe the whole economic analysis is fatally flawed. It ignored the conclusions of their own economist who went on record complaining about being pressured by his supervisor to ignore scientific evidence and break the law. It was then prepared by someone who was totally unfamiliar with the process in this phase in just a few weeks after Mr. Hoff was reassigned.

You have also failed to consider the least burdensome alternative which would meet similar and easier ways, as has been done in Skagit County, by having the State, through its capital budget, purchase a de minimus amount of senior water rights necessary to compensate for the alleged effect of future previous exempt well usage. This would allow doing away with the water exchange and owners' mitigation fees as well, which would cost millions to implement and millions more to monitor and administer. By contrast, purchasing the .77 cfs of water in

your house as needed, could probably be done for a one-time incentive of less than half a million dollars.

We, therefore, respectfully request that you prepare new preliminary Cost Benefit and Least Burdensome Alternative Analyses and Small Business Economic Impact Statement addressing the points raised above and in more detail in a formal comment letter, that you make your presentation of rule contingent upon funding by the state of acquisition of the necessary senior water rights as was done in Skagit County, and that you remove the well metering requirement substituting for it a methodology on estimated permits and well usage through elective use patterns.

Commenter

Kaj Ahlburg, Port Angeles Business Association H1

Response

Please see the responses to Comment # 596, Comment # 620, Comment # 642, Comment # 749, and Comment # 755.

Comment # 686

We also ask that the economic impact analyses be independently reviewed and acknowledged, and be reflective of the unique nature of the communities they engage.

Commenter

Teren MacLeod, Jefferson County Association of Realtors 6

Response

Thank you for your comment. Please see the response to Comment # 671.

Comment # 687

The Cost Benefits and Least Burdensome analysis and Small Business Economic Impact Statement are flawed, incomplete and incorrect. The DOE employees who wrote this proposed law and accompanying 'justification' reports, have ignored many of the actual costs of the rule and exaggerated the benefits to economically justify passing the rule. These employees have shown a complete disregard for professional honesty and integrity. Consideration should be given to the future of their employment in a state agency. These analyses are flawed just like the analyses prepared for the WRIA17 Rule 173-517. Attached are our (Olympic Stewardship Foundation) comments on WAC 173-517 (WAC 173-5-7 DAS), analyses of the documents (SBEIS Analysis DAS, Benefit Analysis DAS), and DOE's response to our petition to DOE to

repeal the WRIA17 Rule (DOE Response WRIA17). Also attached is our petition to the Legislative JARRC Committee to review the rule and the Committee's reply (WA Petition SBEIS 12-30-9 and JARRC Reply 6030-100001). We agree with the letter to DOE by Dick Pilling, Port Angeles Business Association, and the comments presented by Kaj Ahlburg at the public comment meeting 6/28/12.

Commenter

Ross Krumpe 3; Dennis Schultz, Olympic Stewardship Foundation 2

Response

Thank you for your comment. Please see the response to Comment # 620 and Comment # 671. Please also refer to the final cost benefit analysis and the small business economic impact statement for WRIA 17.

Comment # 688

I believe that the conclusions of the Dept. of Ecology economic impact study for the implementation of the WIRA 18 Rule are seriously flawed. I believe it will have a catastrophically negative impact on our community. I recommend that the Dept. of Ecology delay implementation of the WIRA 18 rule until they have conducted another independent third party economic impact study for the WIRA 18 Rule.

Commenter

Jim Hardie 1, 3

Response

Thank you for your comment. Please see the responses to Comment # 671, Comment # 596, and Comment # 598.

Comment # 689

I'm writing to let you know that I oppose the new water rules you are going to put into effect. All you will do is set up a draconian water exchange program that will harm the taxpayers of this area and create a huge, costly government oversight organization

I simply ask that you cease and desist until you evaluate the economic consequences of your proposed water program.

Commenter

Dan Hendrickson 1, 2

Response

Thank you for your comment. Please see the responses to Comment # 598 and Comment # 671.

Comment # 690

We believe that these defects in substance and in process, quite possibly involving serious violations of the Administrative Procedure Act, can only be cured with new Preliminary Cost Benefit and Least Burdensome Alternative Analyses and Small Business Economic Impact Statement.

Commenter

Dick Pilling, Port Angeles Business Association 10

Response

Thank you for your comment. Please see the response to Comment # 671.

Comment # 691

We are concerned about the actual economic impact that the rule will have on current and future water users in the basin, as well as the impact on the economy of the region. We ask that Ecology reconsider the economic analysis done to date to fully encompass the impact of closing the basin through the proposed rule.

Commenter

Washington REALTORS®, Washington Farm Bureau, Building Industry Association of WA, WA Cattlemen's Association, Washington State Grange, Association of Washington Business, North Peninsula Builders Association, Sequim Association of REALTORS®, Jefferson County Assoc. of REALTORS® 2; Helen Watkins H2

Response

Thank you for your comment. Please see the responses to Comment # 671 and Comment #682.

Comment # 692

Ecology Must Conduct Accurate Small Business Economic Impact Statement and Cost Benefit Analysis of Proposed ISF Rule.

Under the APA, Ecology is required to conduct both a Small Business Economic Impact Statement (SBEIS) and Cost-Benefit Analysis. REALTORS® ask that unlike the recent SBEIS and cost-benefit analysis conducted in the WRIA 17 rulemaking, that the analysis for the proposed ISF Rule specifically analyze (a) negative economic impacts to construction and real estate caused by limiting the water available for domestic use; (b) increased development costs associated with mitigation plans; (c) reductions in property value to landowners; and (d) lost local and state tax revenues associated with unbuildable property.

We hope that Ecology's economic analysis in WRIA 18 will avoid whatever methodology resulted in the extremely dubious conclusions in WRIA 17. For example, the WRIA 17 analysis concluded that as a consequence of adopting the instream flow rule, 819 new jobs will be created. For example, 384 jobs would be created in the construction sector, and 20 jobs in real estate. It is absurd for Ecology to assert that a rule placing a fixed limit on the supply of water available for future residential growth would result in a net gain of over 800 jobs, and specific gains in residential construction and real estate that would not occur otherwise. While we understand that the role of an agency in rulemaking is to produce analysis that defends the agency decision, the conclusion that instream flow rules actually create jobs in real estate and construction that would not exist absent the rule does not pass the straight face test.

Commenter

Dennis Schultz, Olympic Stewardship Foundation 14; Bill Riley, Washington Realtors 5

Response

Please see the responses to Comment # 596 and Comment # 614.

Comment # 612

Your economic analysis is completely corrupted and our tax dollars are being wasted .

Commenter

Dan & Lois Perry 4; Ross Krumpe 10

Response

Thank you for your comment. Please see the responses to Comment # 596 and Comment #614.

Comment # 613

Your Economic Analysis simply doesn't work - It's just hype. - See the Clallam County Commissioners's letter, and read the multitude of other responses.

Commenter

J Marvin Chastain 4

Response

Please see the responses to Comment # 596 and Comment # 614.

Comment # 695

We urge you to withdraw the Rule and do not restart the process until you can meet the maximum net benefits test.

Commenter

Jacques M Dulin 23

Response

Please see the responses to Comment # 596, Comment # 614, and Comment # 620.

Comment # 696

Can you tell me what the REAL benefit of these rules are? What is the cost of implementation and would it outweigh the benefits by a factor of 10?

Commenter

Susan Bauer 2

Response

The real costs and benefits are identified in the Cost Benefit Analysis. A real benefit of the rule is access to reliable water for prospective users that might not otherwise exist, due to the unlikelihood of regulation or curtailment for mitigated uses. Ecology does not expect the costs to exceed the benefits. Please also see the response to Comment # 603.

Comment # 697

Per Executive order 12898, the Environmental Justice section of NEPA, Agencies are required to study the effects of actions on minority and low income populations that would be impacted by an action. The Sequim/Dungeness area has long been known as a retirement area with a large population of retirees who are on a fixed income and/or Medicaid. Under what is commonly called "Obamacare" the portion of the population on Medicaid will grow. (Not just retirees but all low-income people in the population). Why were the impacts on the retirement

(and therefor the fixed income) and low income population encompassed by WRIA 18 not a part of the studies done by Ecology? The economic impacts to these parts of our population will be significant and should be included in any economic study performed.

Commenter

Helen L Watkins 5

Response

Executive Order #12898 is a federal executive order and it affects rulemaking by the federal government. The proposed rule would be an action by the State of Washington, rather than a United States executive branch agency, and it follows the State's Administrative Procedures Act, RCW 34.05.

Comment # 698

Ecology Is Required To Complete Maximum Net Benefits Analysis

RCW 90.54.020(2) states that "allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost." This means that as part of the rulemaking process, Ecology must perform a maximum net benefits analysis. At least one Ecology staff member raised this point during the rulemaking process:

RCW 90.54.020 lays out how water is supposed to be appropriated. In 2012 we intend to appropriate a new water right under 90.54.020(3) to fish and habitat which is 73% of the river. We appropriate 0% to domestic use under 90.54.020(5). How does this pass the Maximum Net Benefit test? February 28, 2012 email from Tryg Hoff, Exhibit A.

It is yet unknown whether the rule would pass the Maximum Net Benefit test because Ecology has not done one. Ecology's Policy Statement on Maximum Net Benefits, Policy 2025, concludes that while Ecology will perform a maximum net benefits analysis for some types of instream flow rule making, it will not complete a maximum net benefits analysis when adopting instream flow rules such as the Proposed Rule, but will complete this analysis when adopting a rule creating a reservation of water for uses other than domestic use under RCW 90.54.050. That is, simply because the rule includes an extremely limited reservation of water for indoor domestic use (that exists only if mitigation does not materialize). Ecology avoids the Maximum Net Benefit test requirement by relying on an agency policy that violates the statutory requirement. The decision to not perform a maximum net benefits analysis is also discussed in an Ecology document prepared as part of the rulemaking process.

In this document, Ecology comments acknowledge that if a maximum net benefit test was performed, it could prevent adoption of the proposed rule:

Yikes this section is a problem – see my comment.

We are not doing a maximum net benefits analysis for the WRIA 18 rule – this is consistent with WR program policy: POL-2025. That policy says we don't do it to set flows or for domestic only reservations. For us to use this in the Dungeness we need to either explain why it isn't required or delete this whole section of the focus sheet.

Ann Wessel comments to 3/5/12 Economic Analyses Required for Proposed Water Resource Management Rules, Exhibit O.

However, under the terms of Ecology's own rule, it is clear this test is required. The Proposed Rule defines "allocation" as "the designation of specific amounts of water for beneficial uses." Proposed WAC 173-518-030. The Proposed Rule sets instream flow levels as water rights or "allocations" of water for instream purposes: "Instream flows established in this rule are water rights and will be protected from impairment . . . " Proposed WAC 173-518-040(3). In addition to the allocation of water for instream flows, the rule also establishes reservation of water for indoor domestic use under RCW 90.54.050(1). The rule is clearly an allocation that requires a maximum net benefits analysis, and Ecology's policy concluding that such analysis is not necessary is unlawful.

Commenter

Bill Clarke, Washington Realtors/Sequim Realtors 15

Response

Please see the response to Comment # 620. Ecology's Policy No. 2025 clearly states that it will not perform a Maximum Net Benefit Analysis on two kinds of reservations of water: those for instream flow purposes and those for domestic water supply. Ecology does not believe this policy violates the statutory requirement in RCW 90.54.020.

Cost Benefit and Least Burdensome Analyses

Comment # 699

The Economic Analyses fail to adequately quantify the benefits of the proposed rule; these benefits are much higher than enumerated.

An instream flow rule with appropriate flow protections will increase the financial health of public water systems, increase property values for those served by public water systems,

discourage sprawl, improve the ecosystem services and benefits of open space, and encourage water conservation. Such benefits were improperly excluded from the economic reviews.

The benefits of water metering are likewise not enumerated; only costs are shown. Benefits include the ability of the meter-owner to monitor leakage in the water system and thereby reduce costs of pumping, the ability to prove the continuous use of a specific quantity of water if faced with a legal challenge to the user's water right (such as in an adjudication or a civil lawsuit), and the ability to pass along quantity and time-specific water use information to successors in interest.

The heightened values of improved public health were improperly devalued or excluded from the economic analyses. The proposed rule encourages new development to tie into a public water system where the availability of such a water source is timely and reasonable. Public water systems are mandated to supply safe drinking water and undergo strict oversight by the Department of Public Health. Thus, not only will the rule encourage newcomers to develop property where safe drinking water is assured, the rule also discourages them from "drilling holes in the ground" that pose a risk of further contaminating existing aquifers.

Larger public water suppliers such as the City of Sequim and Clallam PUD will also benefit from a broader customer base. The City of Sequim, especially, seems poised to be able to gain financially from selling its reclaimed water. Such economic benefits to water utilities were improperly omitted from the economic analyses.

Commenter

Shirley Nixon 5, 6, 7, 8, 9

Response

Ecology has included discussion, where appropriate, of qualitative benefits of the rule, in the final economic analyses.

Comment # 700

Why did Ecology use in the CBA a discount rate that is inconsistent with their other instream flow rule analyses?

Commenter

Michael E McAleer 3; Michael & Michael E McAleer H4

Response

Appropriate discount rates are necessary depending on what flow is being discounted. Ecology used a discount rate appropriate to the flows of money that are impacted by the proposed rule. To illustrate impacts of alternate discount rates, Ecology has added a sensitivity analysis to the Cost-Benefit Analysis.

Comment # 701

Why does Ecology utilize hypothetical impairment claims? Where is the statutory authority to do so?

Commenter

Pearl Rains Hewett 54; Randy Simmons 44; Kaj Ahlburg 42

Response

Ecology used available information about hydrology, hydrogeology, fisheries science, water rights, water use, water law, and then made judgments about consequences relative to the presence or absence of the rule. Cost Benefit Analyses under the Administrative Procedures Act, RCW 34.05 are a comparison between a baseline condition (without a rule) and the condition with the rule.

Comment # 702

Include an Appendix to qualify the terms, definitions, while making it more user friendly for the common person.

Commenter

Sheila Roark Miller, Clallam County 1

Response

Ecology added Appendices B through F to make its analysis of the costs and benefits more accessible to readers.

Comment # 703

To say that this Rule will be a huge benefit to the Dungeness Watershed community is a fallacy. Currently, properties are able to have wells drilled, and to use them. There is no reason to close our basin, as we are using less and less water, all the time. Irrigation/Agricultural water was the biggest water use, in the past. The irrigators have cut their water usage dramatically.

The entire impact of all the permit exempt wells is very small. The Cost-Benefit Analysis is not a true picture of what is occurring in our Valley.

Commenter

Sharon H Case 6

Response

Please see the response to Comment # 596, Comment # 603, and Comment # 614 and the general responses on Motivation and authority for adopting the rule and Prior appropriation: what's fair?. The rule is expected to have benefits that exceed its costs. It implements recommendations made by the Watershed Planning Unit and adopted by the County Commission.

Comment # 704

As a longtime resident of Clallam County, I urge you (the DoE) to reconsider imposition of WRIA18 on the citizens of Clallam County. The science is faulty and the long term costs to the citizens of the county far outweigh the benefits. The agency has heard knowledgeable and caring people speak to this issue, almost all in opposition, with facts and experience.

The DoE should act in the best interests of all users of water in the Dungeness Valley and stop this action.

Commenter

Charles Putnam 1

Response

Please see the response to general response on Motivation and authority for adopting the rule. Ecology has confidence in the scientific analyses used to develop the rule and does not agree that the cost of the rule will outweigh the benefits. Please see the final Cost Benefit Analysis.

Comment # 705

Costs associated with the control of new use from in-stream diversions is not separated from costs from new use from wells. In-stream irrigation and large water system diversions will account for >99% of the impact of Dungeness River flow rates while individual residential well uses account for <1%. Yet the cost to residential well users represents the vast majority of the costs associated with the implementation of this rule. The cost to irrigation districts and water systems is relatively small. The cost benefit analysis should be broken out into two

separate analyses in order to show that the costs far exceed the benefits for individual residential well users. Using your current cost benefit methodology results in individual well users paying for a substantially disproportionate share of the impact they have on river flows.

Commenter

Glenn Bingham 1

Response

Please see the responses to Comment #588 and Comment # 603. Ecology does not disagree with the commenter's conclusion as to where costs will be felt. New water users will bear the cost, unless the legislature or a local government legislative authority approves funding to offset the cost of mitigation for their impacts on the affected surface water bodies within the rule area. Please also see the general responses to Prior appropriation: what's fair? and Mitigation: who pays?.

Comment # 706

My understanding is that the "restoration" plans/process for the Dungeness River and the small streams has run, and will run, concurrently with the Rule process. Certainly, reductions in water supply (and, in small stream flow, which I will have to address in a separate formal comment), are an economic impact, and are not a "benefit."

Commenter

Marguerite A Glover 16, 17

Response

Thank you for your comment. Ecology believes and has clearly stated in its analysis that instream flow protection improvement that benefits fish is a benefit. That does not mean it is without cost. Please also see the response to Comment # 603.

Comment # 614

Your benefits vs; costs analysis should be more transparent. Explain your costs and corresponding benefits such as: How many more fish will be in the river and at what cost? What happens to property values between the water haves and have nots? How many fish are in the Dungeness today and what are your projections in 5-10-20 years?

Commenter

Carol Johnson, North Olympic Timber Action Committee 3

Response

Please see the responses Comment # 596 and Comment # 614.

Comment # 708

The economic assumptions are questionable. Property values will be negatively impacted, there will be small business impacts in construction and real estate industries, and internal analysis by DOE questions the economic assumptions and process. It appears that least burdensome alternative really was not considered.

Commenter

Jerald R Sinn 1

Response

Please see the responses to Comment # 596 and Comment # 614.

The Least Burdensome Analysis documents Ecology's consideration of the burdens associated with the proposed rule and how, if possible, they could be lessened while still accomplishing the purposes for which the rule was proposed.

Comment # 709

Who benefits from this rule?...in the face of a negative value from a cost/benefit analysis?...who's decision is it and with what authority?

Commenter

Charles Blood 7

Response

Both junior and senior water right holders, future water users, as well as members of the public and tribes benefit from the proposed rule, through water supply certainty and habitat protection. Please refer to the cost benefit analysis for additional explanation. There is a reasonable likelihood that the probable benefits of the proposed rule exceed the probable costs.

Please also see the response to Comment # 620.

Comment # 710

The need for an economic benefit have not been determined. You cannot show that the benefit is greater than the cost

Commenter

Bill Hermann 2

Response

Please see the response to Comment # 709 and the final cost benefit analysis.

Comment # 711

We also are aware from the article in the Sequim Gazette, that your proposal to mitigate water rights does not meet the criteria of having a benefit that outweighs the expense and is therefore in violation of Washington statutory requirements

Commenter

Elaine & George Chandler 3

Response

Please see the response to Comment # 709 and the final cost benefit analysis.

Comment # 712

Ecology can always find someone who will provide the desired cost/ benefit results.

The cost benefit analysis currently used is a very superficial, one sided analysis. If one computes the cost per each lost fish caused by not implement the rule, one should also compute the number of jobs lost x (times) the income per job x (times) the same number of years that would be lost from the community with implementation of the rule. With fewer homes in the county, based on the supposed lack of water for the fish, there is also a lack of business revenue. Each new home would bring in about \$300,000 in construction and material cost to the county. It would also add close to \$30,000 per new home per year just in living expenses and taxes. The new residents would also employ more people for their desired services.

Just 1000 new homes would generate \$300,000,000 in construction/material income plus \$30,000,000 per year in living expenses. This doesn't even take into account the living expenses of the additional people who would be supporting these new families.

Commenter

Warner J Litchfield 8

Response

Please see the responses to Comment # 596 and Comment # 592.

Comment # 713

What is the estimate (or budget) for the Department of Ecology employee time needed to promulgate the new Dungeness water rule? There were at least ten bureaucrats in attendance at the Sequim hearing, so this cost has to be large. At what employee level is that time and what is the financial cost including the benefits provided to the employees? Was this a factor in the cost benefit analysis of this project?

Commenter

Bruce Larsen 2

Response

The cost benefit analysis does not evaluate the costs of rulemaking, including the cost of staff time. The Administrative Procedures Act requires we analyze the effect of the rule not the cost of developing the rule. Please also see the responses to Comment # 298.

Comment # 714

The cost of paying for water from a well was not figured in the cost benefit analysis.

All of these points of opposition [property value impacts, metering, paying for water use, landscaping, and limits on consumptive use] have related costs which were not addressed in the Cost Benefit Analysis. Before moving further, I think it is imperative that you address the costs I have mentioned, as well as others which exist, of which I am unaware. I think that if you do a more thorough cost benefit analysis, you will find that the costs exceed the benefits, and that the rule should not be approved or implemented as is.

Commenter

Marnee Foldoe 5, 9

Response

The Preliminary Cost Benefit Analysis analyzed property value impacts (it has been updated to call these out explicitly, see response to Comment # 596). This is the impact of paying the

costs of mitigation, or where water is not available in excess of the domestic use reserve, the impact of reducing water use (consumptive, outdoor). It also addressed the costs of metering. Please see the final cost benefit analysis for further explanation.

New Uses/Homes/Mobile Homes

Comment # 615

The rule would take away free water from more than 5,000 parcels of land. Why does the Cost Benefit Analysis (CBA) ignore the economic impact of doing so?

Commenter

Michael E McAleer 1; Michael & Michael E McAleer H2

Response

Please see the response to Comment # 596.

Comment # 616

Use the correct references, concerning new homes and manufactured homes. Those figures were provided by the Clallam County Community Development Permit Center.

Commenter

Sheila Roark Miller, Clallam County 2

Response

Ecology has corrected this reference in the Final Cost-Benefit Analysis. Thank you for pointing this out.

Comment # 617

Ecology's cost benefit analysis says that 457 mobile homes in the area would build a permanent house on-site in the next five years. Most people living in mobile or manufactured homes consider them their permanent or secondary homes. Even if the owners decide to replace a manufactured home with one constructed on-site, does not mean that it would required more water use. I hope that the words about mobile homes will be modified, or stricken, from the cost benefit analysis.

Commenter

Marguerite A Glover 2; Sharon H Case 3

Response

Ecology's use of these homes is as a proxy for people who might prospectively increase water use on land on which they currently live. Ecology agrees that not ALL of these homes would be replaced or augmented with homes constructed on site, but has conservatively assumed they all would when calculating the costs of the proposed rule. If fewer than all would increase water use, then the costs would be lower than those estimated.

Comment # 718

Table 3 in the CBA projects 162 to 403 new domestic uses per year. How can this be accurate when Clallam County estimates an average of 65 new building permits per year outside a service area? Please explain the calculations.

Commenter

Pearl Rains Hewett 62; Randy Simmons 52; Kaj Ahlburg 50

Response

The 162 new domestic uses per year is based on the building permit record over the years from 1987 to 2008. The 403 new uses per year is based on population projection. It is not appropriate to project 20 years of future development based on the past 2 or 3 years of development. The current economic downturn, while protracted, is not expected to last that long.

Comment # 719

In the CBA, Ecology refers to a significant increase in water-use if "mobile homes" are removed from a property and a permanent home is then built on that site. Are you talking about RV's and trailers on properties or on Mobile/Manufactured homes? Please make a revision that makes this language very specific.

Commenter

Helen L Watkins 8

Response

Ecology has clarified language in the Final Cost-Benefit Analysis to clarify the proxy for prospective increases in water use on occupied properties. Thank you for your comment.

Certainty in Development/Property Values

Comment # 720

The cost benefit analysis does not include among costs the decrease in property value of the properties subject to new restrictions. This decrease is larger than just the amount of estimated mitigation fees, because under the rule as proposed there is no ironclad guarantee that in all affected watersheds at all times there will be available either reserves or mitigation credits at a price known in advance. Uncertainty in the business world has a very real, and often considerable, cost attached to it, ignored by your analysis.

Commenter

Dick Pilling, Port Angeles Business Association 2

Response

Ecology agrees that uncertainty has costs. Though there may not be ironclad certainty that mitigation will be available everywhere at a particular price, there is also uncertainty associated with new uses that are not mitigated. Ecology has attempted to characterize and address uncertainty, not ignore it. Ecology has included in the Final Cost-Benefit Analysis a sensitivity analysis for prospectively higher mitigation prices. Ecology assumed, based on evidence from a study of prospective mitigation supply, that the market would function. See the Final Cost-Benefit Analysis. Thank you for your comment.

Please also see the response to Comment # 596.

Comment # 721

When evaluating the loss of property values here in Clallam County, were local real estate experts (professional real estate brokers, lenders and appraisers) contacted for evaluation / opinion / information on this matter? If not, Why? It would seem prudent that a panel of local experts in those specialized fields would prove beneficial to your genuine analysis of the impact to local property value.

Commenter

Deborah Norman 10

Response

Ecology used County assessor and demographic data and information to estimate property value impacts.

Comment # 722

The section titled "Increased Certainty of Development" starting on p. 33 fails to accommodate the likelihood that water-constrained property values will decrease because WRIA 18 portends a finite, and thus negative, limit on water access. This likelihood should be part of any cost-benefit analysis.

Commenter

Dr Gerald J Stiles 6

Response

Please see the response to Comment # 616.

Comment # 723

The preliminary cost benefit analysis cites "increased certainty in development" as by far the largest "benefit" (accounting for \$62.1 million out of the \$94.1 million to offset the \$23.1 million in "costs"). However, the rule does not seem to clearly identify that development of existing parcels would be allowed for beneficial use, and refers to "future maximum allocations" in various sections, and states that "once fully and permanently appropriated, no more maximum allocated water be appropriated". Could this be interpreted as creating a de-facto building moratorium, where property owners do not have the ability to purchase mitigation and allowed to develop existing lots? How does this provide "increased certainty in development"? If that is not the intent of the rule to potentially prohibit development of an existing, subdivided lot, it needs to be better defined in the document.

Commenter

Juan C Perez 3

Response

No, it would not be fair to characterize the rule as creating a de-facto building moratorium. The rule provides that domestic water use, up to the limits of the reserves, is available to support new residential development. The reserves, coupled with a mitigation requirement to provide the ability to "refill" the reservation, provide increased certainty and a reduction in the risk of lawsuit that could otherwise preclude unmitigated development or cause interruption of existing junior uses.

Comment # 724

“Increased Certainty in Development” is entirely speculative. Do you believe it will stand up in court?

Commenter

Michael E McAleer 6; Michael & Michael E McAleer H6

Response

Yes. Please also the response to Comment # 723.

Comment # 618

No costs are shown associated with the loss of real estate values. Real estate prices drop to reflect increases in costs. If a \$3500 water mitigation fee is added to a lot then the price of the lot will drop by \$3,500. While the mitigation fee may only apply to a small minority of the lots a price drop in those lots will pull down the prices of all lots. This occurs because mitigated lots will be used for cost comparison purposes in valuing all lots. The effect of the rule will be to drop all real estate prices. At \$3,500 per lot the aggregate loss in real estate value could be \$35,000,000 or more (\$3,500 X 10,000+ lots).

Commenter

Glenn Bingham 2

Response

Please see the response Comment # 596. We agree there is a possibility of contagion, although we are unable to estimate the likelihood or magnitude. We also point out in the final CBA that property assessments may be based on the present value of the expected future stream of rents, which we would not expect to be a function of the surrounding lots.

Comment # 619

Certainty of water availability increases the value of property. The economic analyses focus too much on “lost opportunities” to develop rural land, and not enough on how much the value of land with existing water rights or more certain future water rights will increase. As has been shown elsewhere around the West where local water supplies are scarce, lenders who are knowledgeable about water law and the value of water-right certainty (unfortunately First Federal is not among these enlightened lenders, based upon their CEO’s recent misguided statements to Ecology about the water rule) are much more likely to finance transactions when written records support the quantity and validity of a water right.

Senior water right holders stand to gain financially in a number of ways under the proposed rule, yet these gains were not adequately quantified. Among the ways that senior water right holders in the basin will economically benefit:

- 1) Increased property values due to water right certainty in a water scarce basin.
- 2) The ability to sell all or a portion of their water rights to new users.

Commenter

Shirley Nixon 7, 10

Response

Thank you for your comment. We agree, although whether the focus is on lost opportunity (a cost) or a benefit, it is the difference that is significant. Comment #656, as well that of the First Federal Bank CEO, illustrates the current situation where assessed values currently do not reflect the absence or presence of a water right for the uses of water made on the property. As the value of that distinction is better understood, the value of the property with the water rights should increase relative to the value of the property without. Our analysis estimates that relative difference in value.

Comment # 727

[The CBA] does not include, or even consider, decreases in property values that would result from the proposed rule.

Commenter

Pearl Rains Hewett 14; Randy Simmons 4; Kaj Ahlburg 2

Response

Please see the response to Comment # 596.

Comment # 728

Why didn't Ecology examine depreciated land value as a result of the rule? Land with use of the exemption outlined in RCW 90.44.050 is clearly worth more than when you have to pay for water, or in some cases have the uncertainty as to whether water from reserves or mitigation will be available at all. Why did your economists fail to describe and analyze this?

Commenter

Pearl Rains Hewett 44; Randy Simmons 34; Kaj Ahlburg 32

Response

Please see the response to Comment # 596.

Comment # 729

Page 33 Increased certainty in development

Provide details of Ecology's assessment of risk that a larger (basin-wide) lawsuit would be brought by a tribe or at the federal level (e.g., because of salmon loss and tribal claims to instream flow to support the treaty right to take fish), that would halt future development in the basin. How were the cost and the probability of a successful outcome of the lawsuit determined?

Commenter

Doug Nass, Clallam County PUD #1 10

Response

Ecology has updated the cost benefit analysis to clarify the Monte Carlo simulation exercise and its purpose.

We assume the costs of litigation for a potential litigator range from \$300,000 to \$800,000 per year with equal likelihood, and the length of litigation would range from 1 to 20 years with equal likelihood. We make these assumptions based on the reported litigation costs and length of litigation of the Lummi Tribe during similar litigation. Between the two states of the world (one with the rule and one without), there is an increase of 751 to 1,369 spawning fish saved over 20 years when the rule is in place. We ascribe half of that increase in value to the potential litigator, if they choose to litigate.

We assume the potential litigator is indifferent between \$100 with certainty and a 50% chance of winning \$200 (and a 50% chance of winning \$0). Given the above assumptions, the probability a potential litigator would choose to litigate is between 14.1 and 27.7 percent.

This is meant to illustrate the tradeoffs a potential litigator faces. They derive utility from the increase in fish, but must pay costs of litigation. They will choose to litigate if the costs of litigation are sufficiently small. We also note the probability a litigator will choose to litigate is actually relatively small – close to a one in four chance on the high end. The expected avoided costs are relatively large because we have assumed that if they choose to litigate, it results in the moratorium of future development. The cost of a moratorium on development is very large, and is derived from our estimates of future developments (based on building permits and population growth) and the average value of residential improvements minus the costs of construction in the Dungeness (nearly \$33 thousand). In turn, the expected avoided costs (the

probability of the moratorium multiplied by the cost when that occurs) result in the range of \$19.9 million – \$62.1 million.

Comment # 730

One of the crucial elements of your cost benefit analysis, without which benefits would not exceed costs, is the assumption of \$22.3 million to \$66.9 million in benefits from avoided litigation. Given that there currently is neither pending nor threatened litigation these numbers are vastly inflated. There is no support whatever for your assumption of a "baseline risk of a lawsuit ... [of] 14.1-27.7 percent". Assuming costs of litigation between 50 and 150 times of the estimated \$400,000 it might cost to purchase the required 0.77 cfs of senior water rights needed to compensate for expected future permit exempt well usage, which would be the subject of this hypothetical litigation, flies in the face of common sense.

Commenter

Dick Pilling, Port Angeles Business Association 5

Response

Please see Comment # 729.

Comment # 731

There seems to be a study available now to determine the cost/benefit of this rule, which appears to show there is no benefit from a cost expenditure standpoint. Was the potential lost values of assessed property values part of the cost/benefits analysis?

Commenter

Charles Blood 6

Response

Yes. Please see the response Comment # 596.

Comment # 732

First and foremost is a glaring omission in the Cost Benefit Analysis. In the section on the costs of the rule, you neglected to mention any impact on property values. Once access to water is limited, the value of the property will decrease. Consequently, there will be a decrease in property taxes. Once this source of revenue declines, the State, as well as Clallam County, will either increase taxes, which will cause a burden on the taxpayer (and a further burden on those who have had their property devalued), or services will be cut and/or eliminated. This

will cause a burden to the residents who access the services, as well as the employees who will have their work hours reduced or their jobs eliminated. The ramifications of this go on and on, and the financial cost will be huge. There will be a negative impact on price when owners want to sell their property. The cost of the potential decrease in property values needs to be accounted for and added to the cost benefit analysis.

Commenter

Marnee Foldoe 2

Response

Please see the response to Comment # 596.

Outside Irrigation

Comment # 620

The Cost-Benefit Analysis for WRIA 18 East was done very quickly, by two new economists. The Benefits of this proposed Rule most certainly do not outweigh the Costs. We do not know if there would have been a lawsuit from the Tribe or anyone else, without the Rule. The percentage given for the "possibility of a lawsuit" was 14.1 to 27.7--less than a one-third chance.

The Cost of this Rule is estimated at \$7.7 million to \$23.1 million, over 20 years. Not taken into consideration was the devaluing of property. All real estate agents know that water is incredibly important in marketing a piece of property. Currently, anyone with an exempt well has the ability to

- ** Use up to 5,000 gallons per day for their own domestic use, and
- ** Water up to 1/2 acre of lawn or garden, and
- ** Provide stock water in unlimited quantities, and
- ** Use up to 5,000 gallons per day for commercial or industrial uses.

While all of these uses are very valuable, I don't really think the last one was given much thought, in the CBA. We are a rural area. Most of us have a garden, or tomatoes, or berries, or flowers. Many of us buy fruits or vegetables or flowers from farm stands, and farmers' markets. The ability to have greenhouses on your property, to provide produce for Sunny Farms, or restaurants, farm stands, street fairs, etc., is huge. The ability to water orchards, to sell fruit, from your own farm stand, or otherwise, is huge. The ability to water beautiful plants and flowers, and sell them, is huge. You can water a small nursery, with water from your exempt well. Without the Rule, this can be done. And, without the Rule, someone with a well, who wanted to expand to that use, could do also do it.

Also very valuable is garden/home orchard/berry watering part of the exemption. People enjoy their own produce, without pesticides. A garden is part of our rural lifestyle. And, the stockwatering portion of the exemption is also very valuable. Many of us buy local, organic beef, from farmers, or from Sunny Farms. We eat it, at local restaurants. We eat our own eggs from chickens, or buy eggs from farm stands. Some people raise rabbits or chickens or sheep or cows, for their own food. Without the ability to stock water, that choice is gone.

In the future, if this Rule passes, as proposed, real estate agents will be asked which properties have the ability to water outside. Which properties have the ability to have greenhouses. Which ones will be able to have, and water, an orchard. Those properties that do not have these grandfathered features, will most definitely go down in value. They will have to ask far less, for their property, than what they could today. Grandfathered water properties will increase in value.

The Benefits absolutely do not outweigh the Costs.

Commenter

Marguerite A Glover 27, 29, 31, H2; Scott Gordon 28, 30, 32; Gail Sumpter 9, 11, 13

Response

Please see the responses to Comment # 596 and Comment # 729.

Comment # 734

Ecology's Cost-Benefit Analysis says that 6.2% of the people in the Dungeness Watershed would have to "forego outside water use." Because these are properties above the irrigation diversions, and possibly, properties in the Bagley Creek and Casselary sub-basins, I think this figure will be higher. In addition, most of these properties do not have access to irrigation water. This will cause a dramatic reduction in the value of properties, in these areas. The CBA says that the impact is \$1,000 per household. In reality, it is much more. There is no reason, in a rural area, that those properties will be purchased by a Buyer, when there are other properties that allow outside water use. Gardens, berries, orchards, etc., are highly valued, in our rural communities.

Commenter

Sharon H Case 5

Response

Ecology has included a sensitivity analysis in the Final Cost-Benefit Analysis to examine the impacts of limited consumptive use in areas without sufficient available mitigation water resulting in larger costs to property value. Please also see the response Comment # 596.

Comment # 735

P.27 of the CBA states that the cost of foregoing outdoor water use, where neither reserves nor mitigation credits are available, is \$1,000 per household. Given the common rule of thumb of spending about 10% of the value of the house on landscaping, and given that the mean price for a detached home in the Sequim area is over \$250,000, how did you arrive at a “cost” of a mere \$1,000 for not being able to have outdoor landscaping for which the homeowner on average would have been willing to pay over \$25,000?

In the CBA you refer to a study that shows the cost of not being able to use outdoor water as \$1,000 per household. This is a very low number as the common rule is that people allocate 10% of their homes value to landscaping. The average value of detached home in the WRIA 18 area is much higher than \$100,000 even in this economy. This also does not take into account the drop in home values for homes that cannot use their wells for outdoor use. Homes that can use their wells for outdoor use will be more valuable than homes that cannot. Many of these homes will be in the same neighborhoods. Many people will simply choose not to move to or build in an area with such a restrictive rule. As seen in WRIA 17 there will be a significant economic impact. Why was the economic impact due to decreased property value not studied?

Commenter

Pearl Rains Hewett 49; Randy Simmons 39; Kaj Ahlburg 37; Helen L Watkins 9

Response

Please see the responses to Comment # 596 and Comment # 723.

Impacts on the economy

Comment # 736

Many families are moving into this area to help support farming. Through a home based industry or through Sequim's Lavender tourism, they are part of a group that sells farm-related products (soaps, oils, wreaths and other products), encouraging a lifestyle specific to this region.

Commenter

Sheila Roark Miller, Clallam County 6

Response

Thank you for your comment.

Comment # 737

Compare the economic value per fish, to that of saving family wage jobs, specifically in the construction industry. These citizens will be affected if water is not available for new construction.

Commenter

Sheila Roark Miller, Clallam County 3

Response

Please see the response to Comment # 603.

Comment # 738

Several land-dependent occupations are affected economically by this proposed rule. Lending institutions, realtors, septic designers, well drillers and contractors, to name a few.

Commenter

Sheila Roark Miller, Clallam County 4

Response

See responses to Comment # 596 and Comment # 603.

Comment # 739

The cost benefit analysis does not include among the costs the effect on the local economy of the decrease in building and ancillary (well drilling, landscaping, etc.) activities resulting from the increased cost of a home due to the need to purchase mitigation credits for domestic use and landscape watering. The only time increased cost does not result in decreased demand is when the good in question has a price elasticity of demand of zero. This clearly is not the case for houses and landscaping. The real estate, building and related industries account for about one quarter of all private employment and economic activity in Clallam County. Your cost benefit analysis and Small Business Economic Impact Statement need to be revised, using the correct price elasticity of demand for these goods, to reflect the impact of the rule on the realty, building, landscaping and related industries, and the impact of the resulting decreased sales tax receipts and increased unemployment.

Commenter

Dick Pilling, Port Angeles Business Association 3, 4

Response

Please see the response Comment # 596, and the final cost-benefit analysis. We have included an illustration of potential impacts from a percentage decrease in construction projects.

Comment # 740

Because mitigation is only required for new uses this has the effect of placing all of the costs on new businesses and new residents. As new businesses and new residents are key to growth, this will slow the economic growth of the area. No costs were associated with the resulting slowdown in economic growth.

Commenter

Glenn Bingham 3

Response

Please see the response Comment # 596 and the general response on Prior appropriation: what's fair?.

Comment # 741

[The CBA] does not include, nor even consider, the diminution in economic activity as fewer people choose to engage in the now more expensive pursuit of building a house and landscaping a garden in the covered area. It also does not include or analyze the resulting loss of sales and property taxes and decrease in employment.

Commenter

Pearl Rains Hewett 15; Randy Simmons 5; Kaj Ahlburg 3

Response

Please see the response to Comment # 596 and Comment # 603.

Comment # 742

What is the expected cost in terms of agricultural production and jobs of agricultural land taken out of production as a result of no longer being able to be irrigated because the irrigation water rights were sold to the water bank to be used for mitigation? Why is this cost not included in the cost/benefit analysis?

Commenter

Pearl Rains Hewett 52; Randy Simmons 42; Kaj Ahlburg 40

Response

Ecology expects the water market to allocate water according to the greatest benefit that can be gained from it. A reallocation of water through the market (selling and buying for mitigation) will occur if the seller can receive greater return for selling the water than from irrigation. Ecology acknowledges that if the return on selling water for mitigation, rather than using it for irrigation, is higher, it will be a net benefit for the area to make that exchange. If it occurs, this may affect the relative prices of irrigation and mitigation water, which, in turn, would shift the greatest-return use back to irrigation if that became the highest-return use. Overall, if this occurred in the basin, this is a transfer of wealth between irrigators (agricultural sellers) and homebuilders/developers (mitigation credit purchasers), and does not affect the net benefits of the proposed rule.

Mitigation costs

Comment # 743

Cost estimates are based on mitigation prices of \$500-\$3500 per new use. However, prices in other mitigation areas in the state range from \$5900 to \$10,000 according to the Dept. of Ecology staff information provided at the public hearing. There are no price limits on mitigation prices so that if demand is high the prices could soar to well above \$10,000.

Commenter

Glenn Bingham 4

Response

Other areas in the state where mitigation for new water use is required do not necessarily share attributes or costs of mitigation projects that are similar to those expected in the Dungeness. Ecology has, however, included a sensitivity analysis in the Final Cost-Benefit Analysis to examine the impacts of various other mitigation prices.

Please also see the response to Comment # 720.

Costs exceed benefits

Comment # 744

It is obvious from the emails that your proposed rule is in violation of the state rule requiring that probable benefits of the rule are greater than its probable costs. Are you prepared to stand here this day and put your name on a proposal that you know is in violation of the state rule?

Commenter

George Chandler 2

Response

Please see the response to Comment # 620.

Comment # 745

We note that State law requires under RCW 34.05.328 (1)(d) that "probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs" and under RCW 34.05.328 (1)(e) that "the rule being adopted is the least burdensome alternative for those required to comply with it".

After thorough analysis of the proposed rule, the Preliminary Cost Benefit and Least Burdensome Alternative Analyses and the Small Business Economic Impact Statement, we have concluded that the rule as currently proposed probably results in costs larger than benefits, and that it is not the least burdensome alternative. As a result, we believe that the rule is in violation of RCW 34.05.328 and, thus, contrary to State law, which always supersedes provisions of the Washington Administrative Code where in conflict.

Commenter

Dick Pilling, Port Angeles Business Association 1

Response

Please see the responses to Comment # 596, Comment # 603, and Comment # 620.

Comment # 746

The Rule proposed by the Washington State Dept. of Ecology (DOE) is flawed, will cost the people far more money than any benefit obtained, and should not be adopted.

Commenter

Sue Forde 1

Response

Ecology does not agree that the cost of the rule will outweigh the benefits. Please see the Cost Benefit Analysis.

Comment # 747

Only if such analysis [new CBA] results in benefits exceeding costs should the rule making process continue. Any other result would almost certainly result in lengthy and expensive litigation in which Ecology's position would be very shaky.

Commenter

Pearl Rains Hewett 21; Randy Simmons 11; Kaj Ahlburg 9

Response

Thank you for your comment.

Comment # 748

Who do you expect will sue claiming that the benefits of this rule don't exceed the costs? What do you expect the plaintiffs' causes of action to be?

Commenter

Pearl Rains Hewett 61; Randy Simmons 51; Kaj Ahlburg 49

Response

Ecology has no specific expectation about who may challenge the rule. Any aggrieved party may avail itself of its due process right to challenge the rule once adopted.

Litigation costs

Comment # 749

In the phony Economic Impact Statement they attribute large arbitrarily derived numbers to lawsuits that have never been threatened as justification for this rule. Why no large arbitrarily derived counter-balancing number for the law suits bound to occur should this rule be adopted?

Commenter

Steve Marble 9, H9

Response

The kind of lawsuit described in the analysis is real. Two similar, real world, examples of litigation that can directly limit new groundwater use are ongoing in the lower Skagit basin and in Johns Creek within WRIA 14. In one instance the Swinomish Tribe asserts a basin rule is

overly generous with domestic use reserves, and in the other the Squaxin Island Tribe seeks a complete basin closure because instream flows are not met.

The APA requires we evaluate the cost of the rule, although here Ecology was not required to conduct a cost benefit analysis. Please see the response to Comment # 614. We don't evaluate the costs of rulemaking, including prospective defense of the rule, as they are not a result of the rule's requirements. All rules have a risk of litigation.

Comment # 750

Under RCW 34.05.328 (1)(d) any rule is illegal if its benefits do not exceed its costs. The cost benefit calculation for this rule only passes muster because Ecology assumes benefits of \$20 million or more from avoiding litigation and \$20.5 million from “protecting” past investment in salmon restoration if the rule is passed.

If this is an accurate statement, it fails to include the high potential that private citizen groups will in fact litigate to overturn the Rule should it be passed in its current form.

Commenter

Dr Charles E Kramer 2

Response

Please see the response to Comment # 749.

Comment # 751

The cost benefit analysis does not include the estimated costs of the litigation that quite likely will ensue if the rule is promulgated without addressing satisfactorily the concerns raised in this comment letter. You need to estimate those costs, for Ecology (and ultimately the taxpayer), the County, and the industry and property owners groups that would be involved in such litigation, as well as the cost of uncertainty and delays in development during the pendency of this litigation.

Commenter

Dick Pilling, Port Angeles Business Association 7

Response

Please see the response to Comment # 749.

Comment # 752

It uses an arbitrary and outlandishly high amount of over \$20 million for benefits from avoiding litigation and increased certainty of development if the rule is passed, even though no litigation is pending or even threatened and the only uncertainty of development currently is the one caused by the threat of this rule. On the other hand it ignores the very real cost of the likely litigation if the rule is implemented as now written.

Commenter

Pearl Rains Hewett 17; Randy Simmons 7; Kaj Ahlburg 5

Response

Please see the response to Comment # 749.

Comment # 753

Based upon my experience, the cost of litigation involving ecology would far outweigh the cost of litigation among home owners or businesses by not having the new rule. Does Ecology just ignore all litigation expenses among ecology and the litigants disagreeing with Ecology? See note 2 below Ecology litigation – personal example which affected me)

Note 2) I owned a waterfront home on Lake Tahuyeh (Kitsap County). During the late 90's, Ecology caused our community to spend over \$200,000 in legal fees on three issues related to removal of decayed Peat matter which was popping up from the bottom of the lake. At the same time the Dam Safety department said we had to remove the peat matter which was a hazard to the dam. The Community along with the Dam Safety eventually prevailed against Ecology but ecology did not totally back off until they first extorted a portion of the community property to be left natural (no development). In the same time frame, Ecology records said there was an endangered "Club moss" on the undeveloped community land, but ecology did not know right where the endangered club moss was located. The community, at our expense, had to hire a botanist to do an extensive search for this "Club moss" which never existed before we could use or develop that portion of our community property. (Christine Greguare, attorney general at the time, may remember this Ecology :VS: Dam Safety issue)

Commenter

Warner J Litchfield 10, 18

Response

Your example in Note 2 presents a different sort of litigation than what is described in the Cost Benefit Analysis. Specifically, any aggrieved party has the right to appeal an Ecology action. It

is a due process right afforded by Washington’s constitution and by the Administrative Procedures Act, RCW 34.05.

The litigation described in the CBA would be most likely be brought by water users without an adequate water supply to satisfy their right or a water right holder such as the United States representing its federal reserved right. Such a legal action would seek to limit or stop water use under junior water rights. The legal action could involve a small number or a large number of surface water and groundwater users.

Comment # 754

Why is litigation part of the “baseline”? What evidence supports this assumption?

Do you have hard factual proof for the assertion that “permit-exempt uses are at an elevated risk of being litigated”?

Why does the assumption of litigation also include an assumption that development throughout the entire basin would be brought to a halt?

How exactly was the \$19.9 to \$62.1 million cost of avoided litigation arrived at?

Who exactly would have borne the assumed cost of litigation?

How is the assumed cost of litigation divided between attorneys’ fees, judgments for damages and reduced property values of the parties assumed to be losing?

On what are the assumptions regarding who would win or lose the lawsuits, and the likelihood they would be settled rather than litigated to conclusion, based?

Commenter

Pearl Rains Hewett 50; Randy Simmons 40; Kaj Ahlburg 38

Response

Please see the responses to Comment # 729, Comment # 749, and Comment # 753.

Comment # 755

The second theory underlying Ecology’s CBA is that the rule provides significant landowner benefits in terms of preventing or reducing litigation. This “litigation avoidance” is assigned a value of between \$2.4 million and \$4.7 million, with associated “increased certainty in development” being valued at \$19.8 million to \$62 million. For example, Ecology staff

researched the Dungeness rulemaking process history in order to find examples of litigation threats to provide to Ecology's economist.

Quotes from Shirley Nixon at February 7, 2012 Clallam County Board of Commissioners public hearing to gather public input on the draft rule:

'Litigation between neighbors is the only result if we don't adopt a rule.' 'Litigation will occur if a rule doesn't get adopted to protect flows.' There should be a transcript of this hearing available from the County. Is this what Tryg needs? March 12, 2012 email from Ann Wessel [Exhibit N]

Ms. Nixon's statement of "neighbors" litigating certainly cannot be in reference to the hundreds of Clallam County citizens who have appeared in large numbers at public hearings and workshops over the past few years in opposition to the rule. Further, it is difficult to understand the "litigation prevention" values assigned to the Proposed Rule, especially when recent Ecology instream flow rules have created more litigation than they have prevented. For example, since the adoption of the 2001 Skagit Basin Instream Flow Rule, there have been two Superior Court appeals to the that rule (one to the original 2001 rule, a second to the 2006 amendment to the 2001 rule); a Snohomish County Superior Court case later appealed to the Court of Appeals on a related local water resource agreement, and numerous Pollution Control Hearings Board appeals. So, while an economist may be able to create a "litigation prevention" value for analytical purposes, the court filings would conclude otherwise.

In the end, the analytical contortions underlying the Proposed Rule are simply too much for the reasonable person to bear. REALTORS® point is not that Ecology should not respond to threats of litigation from environmental attorneys or other interest groups. Rather, our point is that if certain stakeholders insist that exempt well and other consumptive water use impacts be addressed to prevent actual impairment of existing water rights, then Ecology should find a way to calculate and offset those impacts in the least burdensome and most cost effective way possible, and in a way that treats future water users fairly.

Commenter

Bill Clarke, Washington Realtors/Sequim Realtors 14

Response

Thank you for your comment. Although the REALTORS question the benefit of the rule to reduce future costs of litigation associated with water rights and water use, Ecology has attempted to identify potential future costs and discount them appropriately to reflect, as best as we can, that such litigation is not certain to occur. As demonstrated by the Skagit Basin example, Ecology agrees it is not certain that future litigation costs can be avoided.

Ecology's proposal is consistent with existing law, which, by requiring mitigation, holds new water users accountable to the rights of existing users – the central precept of the prior appropriation system of water rights law. It does not presume to permanently shift the primary burden or costs of compliance from those prospective water users to the taxpayers without legislative direction. Where Ecology has identified funds available within its budget to temporarily reduce the financial burden placed upon new domestic water users, it has chosen to make that funding available to offset the cost of domestic water use related to the mitigation requirement under the rule. The rule is also consistent with the recommendations of the watershed plan adopted in 2005. Finally, it does not preclude the Legislature or county legislative authority from enacting taxpayer funded subsidies or burden shifting to address mitigation costs.

Please also see the response to Comment #588.

Fish values/salmon restoration

Comment # 756

There are many statements in DOE's Preliminary Cost-Benefit and Least Burdensome Alternative Analyses, for the Dungeness Water Rule, which I find objectionable and/or untrue. One example is the \$5,000 value per "saved" adult spawning fish, over 20 years. DOE's projected "saved" fish number, with the projected Water Rule, runs from 751 to 1,369 fish. The salmon only live from 2 to 6 years; and, they die after they spawn. We have been "saving" fish by withdrawing less water from the River, for many years now. I question how Ecology came up with this additional number of fish that would be saved--and, why they are worth that much money. I know. Because we are avoiding a possible large lawsuit. At least, that is what Ecology is telling us.

Your assumed benefit of \$20.5 million from protecting existing salmon restoration has no basis in fact. This amount is a sunk cost of an investment in salmon restoration made in the past, on its own merits, without any contemplation of this rule. To the extent adoption of this rule would benefit salmon habitat, those benefits are captured in the assumed \$3.8 million to \$6.8 million from "avoided fish losses". Adding the \$20.5 million to these amounts constitutes double counting.

Commenter

Marguerite A Glover 1; Aloma Blaylock 7; Dick Pilling, Port Angeles Business Association 6

Response

The value of a fish is based not just on that fish (as, for example, would happen if it were a valuation of the sales value of a caught fish), but rather on public valuation of maintaining

salmon populations in the state. A salmon has its own value contribution to the population, but also has generations of offspring that add the value of population maintenance as well. This value is sourced from a local “willingness to pay” study, and is a standard value used by Ecology.

Ecology retained the cost of salmon recovery projects (as a minimum estimate of their value), as these projects are not purchases, but rather are investments in salmon populations. Moreover, they are not double-counted, as the numbers of fish assume that the recovery projects are effective even under the baseline, precisely to avoid double-counting. Ecology has attempted to clarify this in the final documents.

Comment # 757

The CBA predicts over 400 new uses per year. This is 8 times more that county records show for building permits. Did you base fish savings benefits on this? If so your fish impacts/losses are 8 times what they should be. How does this affect the imagined fish savings benefits?

How does Ecology calculate avoided fish losses? You credit a \$6.8 million dollar benefit. Please provide the documentation.

Commenter

Michael E McAleer 4, 5; Michael & Michael E McAleer H5

Response

Avoided fish losses are multi-step calculations starting by taking the estimated water use after 20 years of projected growth rate with no new water management and subtracting from that the estimated water use after 20 years of projected growth with water management from the rule. The difference between these two scenarios creates an amount of “water saved” which is then converted to a percentage of the summer stream flow that would be “saved” from being withdrawn. Using WDFW fish population estimates and studies that show a percentage decrease in the summer low flow results in the same percentage decrease in the returning adult salmon population we calculated the percent of water “saved” in each stream and the correlating percent of “saved” fish for each population in each stream. Please also see the responses to Comment # 756 and Comment # 718.

Comment # 621

In wading through in your Dungeness rule documents I've found no mention of the negative effects salmon, per se, have relative to pollution. Nor any analysis as to how this could alter your cost-benefit outcome.

Specifically, salmon spawn, die, decay, and thereby contaminate our streams and waterways. I'm far from being an expert, but I've read that salmon pollution, in itself, can be one of the most toxic contaminants of our waters, to include streams, rivers, and the Strait.

Have you made any cost-benefit analyses relative to this source of pollution? Aside from the economic benefit accrued from salmon production in itself, I doubt very seriously if there's any significant benefit to having this source of pollution present in our waterways and, in terms of ensuring public health safety, I'd guess that the cost side of the equation could be huge.

I'd suggest this could significantly alter the conclusion reached in your cost-benefit analysis. You should consider it, and amend your conclusions commensurately.

This analysis fails to account for the increased toxicity costs attendant with more salmon spawning, dying, rotting, and subsequently contaminating waterways. Informal estimates suggest that wild salmon could be the Peninsula's greatest waterway polluter.

Commenter

Dr Gerald J Stiles 1, 2, 3, 4, 8

Response

Thank you for your comment. Please see the response to Comment # 474.

Comment # 759

How is protecting existing restoration investment a function of this proposed rule? How this is achieved isn't spelled out in the rule but is still included as a benefit.

Commenter

Michael E McAleer 7; Michael & Michael E McAleer H7

Response

Please see the response to Comment # 756.

Comment # 760

The paragraph titles "Protecting Existing Restoration" on p. 35 seems to be based on the specious argument that existing restorations would devalue or decay absent WRIA 18 and cannot stand alone. If this were the case, why were these restorations enacted in the first instance?

Also, and if I recall my doctoral cost-benefit analyses correctly, this analysis violates basic cost-benefit analysis premises in that it accounts for already-expended (i.e., 'sunk') costs. All of the cost-benefit analyses with which I have been associated were exclusively forward-leaning, and never backward-leaning.

And, this section violates RCW 34.05.328 guidance in that it fails to count "probable costs" and, instead, counts 100% of previous restoration costs. Were there even a 10% likelihood of protecting existing restorations, this expected value would reflect \$2.05M rather than the \$20.5M.

Commenter

Dr Gerald J Stiles 7

Response

Please see the response to Comment # 756.

Comment # 622

Core to and apparently missing from this analysis is an explicit equation linking Dungeness CFS flow and salmon population.

P. 13 of the Analysis states that there was a low of 43 returning fish in 1993. It subsequently notes that "Water conservation . . . and an experimental hatchery program. . . may have helped bring the Dungeness Salmon back . . .(emphasis added)" but fails to provide a conclusive linkage.

This conclusive linkage should be established and provided in any subsequent analysis because it is core to this issue in that it establishes a Dungeness flow cause and effect. This analysis appears specious absent this linkage.

Commenter

Dr Gerald J Stiles 5

Response

Please see the responses to Comment # 756 and Comment #60.

Comment # 762

It double counts the benefits from "avoided fish losses" and protecting salmon restoration: the only benefit of salmon restoration is avoiding fish losses.

Commenter

Pearl Rains Hewett 16; Randy Simmons 6; Kaj Ahlburg 4

Response

Please see the response to Comment # 756.

Least Burdensome Alternative

Comment # 763

The proposed rule does not constitute the least burdensome alternative, and thus runs afoul of RCW 34.05.328 (1)(e). A much less burdensome alternative would be to have the State of Washington fund through its capital budget and purchase in advance the required mitigation credits, without charging individual property owners for water use from their permit exempt wells, similarly to the way it is being done in Skagit County. This would, for a relatively minimal expenditure (as little as \$300,000 to \$400,000 for 0.77 cfs) remove the great majority of the costs that currently cause this rule to fail the RCW 34.05.328 (1)(d) test.

Commenter

Dick Pilling, Port Angeles Business Association 10

Response

It would of course be less burdensome for new water users if taxpayers were to fund the cost of mitigation for new water users rather than to have new water users bear that cost. Such an alternative was not authorized or funded by the Legislature at the time the rule was proposed. To the extent that ecology has identified suitable funds that could be used to reduce the mitigation costs to new domestic water users, Ecology has chosen to use them to subsidize the mitigation cost. However, the alternative proposed was not a viable alternative that could have been chosen by Ecology. Also, \$300,000 to \$400,000 would not be adequate to mitigate for all future domestic or residential uses. Please see the response to Comment #588, Comment # 642 and the general response Mitigation: who pays?.

Comment # 764

The metering requirement also runs afoul of the least burdensome alternative rule. There are now sophisticated techniques for estimating well pump usage through residential electric metering, something that would clearly be less burdensome than spending \$1.4 to \$2.1 million on well meters.

Your employee Robert Barwin's e-mail dated March 12, 2012, in which he wrote "Given the relatively low costs of the metering requirement, I didn't even bother with describing a metering v. no metering alternative", shows there never was the serious consideration of less burdensome alternatives required by RCW 34.05.328 (1)(e) regarding a requirement expected to cost property owners millions of dollars.

Commenter

Dick Pilling, Port Angeles Business Association 12; Pearl Rains Hewett 24; Randy Simmons 14; Kaj Ahlburg 12

Response

Your inference is not correct. Mr. Barwin's email transmitted his first draft of the LBA to other team members. He brought to their attention the several alternatives he developed for the draft LBA to compare against one another. Also, because the total costs of metering were small compared to the costs of the other rule elements he identified for alternatives development, he did not propose an alternative specific to metering for comparison in his first draft of the LBA. The final LBA does include metering and identifies the changes in burdens if metering was not required.

Comment # 765

Why does your least burdensome alternative analysis ignore many less burdensome alternatives, such as the wholesale purchase of water rights by the state or another entity, or impounding excess spring run off water and releasing it back into the rivers in late summer, when stream flows are lowest?

Commenter

Pearl Rains Hewett 58; Randy Simmons 48; Kaj Ahlburg 46

Response

Ecology is limited to considering alternatives within our authority to implement. See the response to Comment # 763.

Small Business Economic Impact Statement

Comment # 623

In the unincorporated areas of Clallam County, there are many small home businesses and home-based industries. There are also some commercial businesses, on well and septic--but,

not that many. Most of those would be on City water or PUD water. Most of all of our small businesses would have a recharge to the aquifer, from their septic systems.

The Small Business Economic Impact Statement uses a report out of California (Gleick, et al), about "Urban" Water Conservation, to determine water use, per employee, by industry. How is this pertinent to the Sequim-Dungeness area--with the exception of those portions in commercial zones, on sewer?

What is included in the businesses that provide "personal services"? Bookkeepers? Lawyers? Hair Stylists? Counselors? Investment people? Surveyors and Engineers? If it is most of these, out in our rural areas, they will be small shops/offices, on well and septic, or on community water and septic. How and why, would they be using 1,091 gallons of water per day? This is an incredible figure!

Maybe there would be a small business who would let you know how much water they typically use. Or, you can find a few of them on small water systems--and, you could determine the gallons per day of the system. Alternatively, there must be some kind of a rural water use report, with estimates out there. I do not find most of these estimates to be realistic, for our area.

Commenter

Marguerite A Glover 5, 7

Response

Thank you for your comment. Ecology has revised the SBEIS to reflect a broader range of possible water use rates by industry.

Comment # 624

In this report, it is mentioned that Ecology has determined that "the proposed rule will not likely have disproportionate impacts on existing businesses." The reason that the impacts would not be disproportionate is because all well users will have to suffer, in the same way.

It is disingenuous to say that there will be no impacts on small businesses, and that the benefits of the Rule outweigh the costs. They most certainly do not.

Commenter

Marguerite A Glover 8, 11

Response

Ecology concluded the proposed rule will not disproportionately affect *existing* small businesses because the rule would not apply to *existing* uses of ground water or surface water that continue to use water in the same way and the same purposes they have been using water. For new small businesses that rely on a new groundwater appropriation, Ecology concluded the rule likely would impose a disproportionate impact on the smallest businesses.

Comment # 768

Any hotels that we have or might have, would be on City or PUD water or community water, and sewer. We have the Growth Management Act, in our State. These types of businesses could not exist on a well and septic. Bed and breakfasts, do. Would they fall under "rooming houses", or "camps"? Since most of these operate like a large family would (bathing, washing, cooking), how could each employee use 302 gallons of water per day? In these modern times, we generally use water efficient dishwashers, wash machines, showers, and toilets. And, these bed and breakfasts are on a well and septic system. When Ecology has figured the water use for a household, they have figured about 150 gallons per day, per house/well, 15 consumptive. Of course, under the proposed Rule, new bed and breakfasts would have to buy some outside water, to water their gardens, lawns, and flowers. In some areas, they will not be able to do this. And, in the areas in which they can, they will not be able to have the size of landscaping that existing bed and breakfasts do. This may impact their plans to the point where they will just decide not to do the project.

Commenter

Marguerite A Glover 6

Response

Thank you for your comment. See response to Comment #766. The average use per employee accounts for averaged use of people who are not employees (guests, in the B&B example). This means the average water use per employee is his use, plus his share of total non-employee use. The SBEIS has been updated to clarify this point, as well as illustrate in its appendices what would happen if per employee uses were lower than in larger urban areas

Comment # 769

The Small Business Economic Impact (SBEIS) statement should include an analysis of those who are required to comply with the rule. Why wasn't this included?

Why doesn't the SBEIS examine new businesses that would be required to follow the rule?

As described in your "executive summary" to the SBEIS, existing businesses would be affected by the proposed rule. Why was this not analyzed?

Commenter

Michael E McAleer 8, 10, 11; Michael & Michael E McAleer H8, H10, H11

Response

The SBEIS, in Appendices A and B, describes the impacts to future new businesses requiring new groundwater appropriation. Existing business that do not require a new appropriation of water are not affected by the proposed rule. Please also see the response to Comment # 767.

Comment # 770

How can the SBEIS state not find disproportional impacts if businesses vary in size, hours of labor and sales?

Commenter

Michael E McAleer 9; Michael & Michael E McAleer H9

Response

Please see the response to Comment # 767.

Comment # 771

Why does the SBEIS say there won't be costs at times, then contradict itself by saying there will be costs?

Commenter

Michael E McAleer 12; Michael & Michael E McAleer H12

Response

There is a difference between analyzing the impacts to existing businesses to comply with the rule (as required under the Regulatory Fairness Act) and providing the public an illustration of what would likely happen under prospective growth scenarios. Those businesses in the illustrative examples do not currently exist.

Comment # 772

I certainly support and think that all the questions and issues raised in the Small Business Economic Statement should be answered completely. And I would assume that Ecology has a copy of this, otherwise, you can have mine.

Commenter

Roger Short H6

Response

Thank you for your comment. Please see the Small Business Economic Impact Statement.

Comment # 773

The assumption that all industries would have equal water use per employee is clearly false. Why did you use that assumption?

Commenter

Michael E McAleer 13; Michael & Michael E McAleer H13

Response

Ecology did not make that assumption in the SBEIS. Please reference Table 3 in the SBEIS.

Comment # 774

Why is present value calculated in the SBEIS if costs only accrue in the first year?

Commenter

Michael E McAleer 14

Response

Ecology used the ranges of growth projections in Table 1 of the SBEIS, along with data on water use, to convert average costs per household or home-based business (over 20 years) to costs per larger commercial or industrial business.

Comment # 775

RCW 19.85 requires a description of how the agency will involve small businesses in the development of the rule. Why was this not done?

Commenter

Michael E McAleer 15; Michael & Michael E McAleer H15

Response

RCW 19.85.070 requires notice to small businesses when a rule is proposed for which a SBEIS is required. The SBEIS illustrates potential costs to new businesses across two appendices. RCW 19.85 requires the SBEIS address impacts to existing businesses. As such, Ecology was not required to provide a SBEIS, but did include illustrative examples of potential future impacts, though it was not required by the Regulatory Fairness Act.

Ecology did provide notice to small businesses during development of the rule. Ecology posted information on our webpage and met with the following organizations:

- Sequim Realtors
- Port Angeles Business Association
- Rotary
- Sequim Chamber of Commerce
- Clallam County Homebuilders Association
- Kiwanis
- Clallam Economic Development Commission

Comment # 776

RCW 19.85.040(1) requires the Small Business Economic Impact Statement (SBEIS) to “consider, based on input received, whether compliance with the rule will cause businesses to lose sales or revenue”. The proposed rule will have material adverse effects on the revenues and profits of realty, building, landscaping and well drilling small businesses. To comply with RCW 19.85.040(1), the SBEIS needs to be revised to reflect that.

Commenter

Pearl Rains Hewett 23; Randy Simmons 13; Kaj Ahlburg 11; Helen L Watkins 4

Response

Please see the response to Comment # 775.

Comment # 777

RCW 19.85.040(2)(d) requires that the Small Business Economic Impact Statement include an estimate of the number of jobs that will be created or lost as the result of compliance with the proposed rule. Why was this not done?

Commenter

Pearl Rains Hewett 63; Randy Simmons 53; Kaj Ahlburg 51

Response

The impact to jobs was presented on page 7 of the SBEIS. Please also see the response to Comment # 775.

Comment # 778

RCW 19.85.040 requires the agency to describe in the Small Business Economic Impact Statement the additional costs to businesses, how the agency reduced regulatory requirements, how small businesses were involved in the development of the rule, a description of the steps to reduce the costs on small businesses, and a variety of other items that must be analyzed. Why was this not done?

Commenter

Pearl Rains Hewett 64; Randy Simmons 54; Kaj Ahlburg 52

Response

Please see the response to Comment # 775.

Comment # 779

Small business impact: the cost analysis shows that the impact per small business employee to be greater than that for a larger business.

Commenter

Warner J Litchfield 11

Response

Please see the responses to Comment # 771 and Comment # 775.

SEPA

Comment # 780

A full SEPA review should be required.

Commenter

Teren MacLeod, Jefferson County Association of Realtors 7

Response

A SEPA determination of non-significance was signed on May 12, 2012 and Ecology provided a combined comment period for the document and the draft rule.

Comment # 781

Any new rule process should require Ecology to perform a full SEPA analysis, just as they as they would require of anyone else proposing changes as sweeping as this rule. Clearly this agency has demonstrated crying need for close oversight.

Commenter

Steve Marble 12, H12

Response

See the response to Comment # 780.

Other

Comment # 625

Certainly, there were wells that "went dry," or had to be drilled deeper, in the Silberhorn and Carlsborg areas [from the November 2003 piping project]. In the Silberhorn area, many people blamed this on the City of Sequim's wellfield. But, it appears, from the FEIS that much of that could actually have been from ditch piping. Why weren't people told?

Commenter

Marguerite A Glover 13

Response

Thank you for your comment. Aquifer water levels respond to both changes in recharge and changes in pumping. Information on hydrogeology and ground and surface waters shows this watershed to be complex and varied. Piping of inefficient irrigation ditches results locally in reduced water losses, enabling irrigation diversions from the river to be reduced. Many factors are at work in the watershed, including withdrawals by existing water right holders, weather patterns, changes in the irrigation infrastructure, growth, and changes in the use of land

historically dedicated to farming. Ecology received anecdotal information regarding wells impacted by the piping.

Comment # 783

My understanding is that the “restoration” plans/process for the Dungeness River and the small streams has run, and will run, concurrently with the rule process. Is there any public input allowed for these actions, or this that opportunity over?

Commenter

Marguerite A Glover 16

Response

Thank you for your question. The restoration strategy will be appended to the final report of the Local Leaders Work Group (LLWG) now available on the County’s website at: http://www.clallam.net/HHS/EnvironmentalHealth/committee_LLGW.html. As this report came from the LLWG to Ecology, there wasn’t public comment per se. However, the strategy will be discussed at Dungeness River Management Team meetings as it is drafted and implemented. You are always welcome to send your ideas to Ecology for a response from staff.

Comment # 784

About three years ago, after WRIA 17 in Jefferson County, I had a stroke. I lost the sight in my eye. I was in a very serious depression because of my feelings towards the way the government manipulates the audience and tells them the crap that it's not going to be happening, but it really does happen.

Commenter

Roger Short H1

Response

Thank you for your comment. Staff at Ecology sincerely hopes your health has recovered.

Comment # 785

It is the people you seek to regulate who afford your department with an excessive budget of greater than \$1 billion and yet your department, with all of its resources, did not even demonstrate the ability to manage something as tangible as the control the Scotch Broom.

Commenter

Steve Gale H12

Response

Thank you for your comment.

Comment # 626

I concur with the op ed piece in the Sequim Gazette dated 6/27 “written” by the editorial staff at the Gazette.

Commenter

William Cutting 1

Response

Thank you for your comment.

Comment # 627

In August 2008, we were ready to build our future home and had spent \$5,000 in building permits and engineer’s reports. Subcontractors were ready to start. Unfortunately, the sale of our current home in Alaska fell through at the last minute, and the housing market took a downturn nationwide. While our plans to build our retirement home have been put on hold, the value of our property has decreased, and our property taxes have quadrupled.

Commenter

Beth Garrison & Randy Hotkamp 2

Response

Ecology is sympathetic to your disappointed building plans. Hopefully you will be able to realize your plans in the near future.

Comment # 788

First of all, I'd like to thank everyone from Jefferson County, all of you folks who came here to tell us what happened in your county. I'd also like to thank all of our elected officials. There's Commissioner Doherty. I'm not sure if Tharinger's still here. I see our Commissioner McEntire and Sheila Roark Miller. These are the folks that we have talked to and shared our

concerns about these rules. These are the people who wanted to hear how it affects us, so thank you Elected Officials for being here.

Commenter

George Chandler H1

Response

Thank you for your comment.

Comment # 789

I applaud our county Commissioners for stepping up and hearing the citizens of Clallam county

Commenter

R Doreen Emerson 15

Response

Thank you for your comment.

Comment # 790

I want to express my utter discontent with Washington Dept. of Ecology for your uselessness and self serving agenda. When I needed you and asked for help because of contaminated well water (caused by an unlined manure lagoon which still exists, and overs spraying of said manure) you guys pass the buck. Both you and Clallam County are worthless. BTW, I still have high nitrates (from manure) as well do some of my neighbors.

I think you guys owe me an un-conditional, un-expiring, permit/ right to have a new well drilled to "safe" drinking water, not only this but I think Ecology and Clallam County should pay for the well since both entities are spineless jellyfish.

Commenter

Mike Cameron 1, 5

Response

This rule does not affect drilling a replacement well to serve an existing water use. If you have continued concerns about nitrate levels in groundwater please contact the Water Quality Program at Ecology's Southwest Regional Office at 360- 407-6271.

Comment # 791

In that my time is limited here this evening, I'll cut my comments short. You, unfortunately, I think published your notice in early June and there was a filing deadline that occurred thereafter. And it is because of your action, I put my name as a candidate this fall on the ballot because I believe that what's going on here is indicative that there is far less than adequate legislative oversight of your department. It is clear that the people need someone to represent them as well as not support bigger government over the power of the citizens

Commenter

Steve Gale H13

Response

Thank you for your comment

Comment # 792

County has plans to have Carlsburg UGA develop to such an extent as to justify costly STP. Where is the water to come from that will need the treatment?

Commenter

Judy M Larson, Protect the Peninsula's Future 7

Response

Much of the Carlsborg area will be supplied with water under Clallam County PUD #1's existing water rights, and any future water rights the PUD acquires. Future water rights shall be subject to the requirements in this rule. Some users that could receive sewer service may be relying on existing permit-exempt wells.

Comment # 793

When injustice becomes law, Rebellion becomes duty – Thomas Jefferson

Commenter

Ardyth Schaumburg 7

Response

Thank you for your comment.

Comment # 794

I would also like to ask why the PUD is being allowed to implement plans for a Sewer Treatment Plant in the Carlsborg UGA and submit paperwork to you the DOE that says the property is surrounded by light industrial on all sides when in fact it is residential on three sides.

Commenter

Lynda Rathman 7

Response

Thank you for your comment. It has been passed on to Ecology's Water Quality Program and the staff reviewing the Clallam County PUD #1 General Sewer and Facility Plan.

Comment # 795

I am very concerned that the DOE's proposal on limitations on usage of water will also eventually impact the citizens of Port Angeles. The city does not need the state government/DOE telling its people to manage their water. The city can deal with its citizens, concerning water usage, in its own way.

Commenter

Virginia A O'Donnell 7

Response

Thank you for your comment The Elwha-Dungeness Watershed Plan included water management recommendations for the Elwha-Morse, West WRIA 18.

Comment # 796

A friend of mine, a broker, came up with this little cartoon. It's really kind of cute, but it's very sad, with all the money and water flowing out of the water bank and the family there being held up by DOE. And the son has a goldfish in a bowl of water and the dog has his water dish around his neck.

Commenter

Marguerite Glover, Sequim Association of Realtors H3

Response

Thank you for your comment.

Comment # 797

One local water resource reference noted that water lost to CARAs was consumptive use. How do urban areas, or those with extensive impervious surfaces mitigate for their impacts on the watershed?

Commenter

Judy M Larson, Protect the Peninsula's Future 8

Response

Ecology does not consider water that infiltrates into the ground at Critical Aquifer Recharge Areas (CARAs) to be consumptive use. Ecology agrees that impervious surfaces can cause substantial impact on watershed hydrologic functions if they are not mitigated. Generally impacts from impervious surfaces are mitigated through implementation of stormwater management programs that are outside the scope of this rule.

Comment # 798

In 1992, twenty years ago, we got a gasoline spill in Quil[cene], contaminated water. Ecology came out and tested the well -- actually, the State Health Department did -- 1400 parts per million benzene. Ecology said it would take 20 years for it to naturally flush. All the old-timers said, don't worry about it. It will be gone in six.

It was Thanksgiving Day; we had a freeze. We came off the water tanker, tested the wells, they're clean.

Ecology comes back and says, obvious lab error, test it again; so they did. The same result; it's gone. So according their time period, it was all wrong. Their science is off.

Commenter

Jeff Monroe H1

Response

Thank you for your comment, however, comments on groundwater contamination in Quilcene are not relevant to this rule.

Commenter Index

The table below lists the names of organizations or individuals who submitted a comment on the rule proposal and where you can find Ecology’s response to the comment(s). In all cases possible, commenters are identified by name. When more than one individual signed the comment, the comment is listed under the last name of the first person listed. Comment numbers are listed below each name with the page number where that comment is located.

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8	245	7	293
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4	339	2	386

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1	126	1	401
Spees, Karl		Trudeau, Rick	
1, 2, 3	199	1	162
2	410	Ulin, Linda J	
Stevenson, Janet		1	362
1	400	Unruh, David	
2	386	1, H1	14
3	226	2	258
4	339	H2	38
5	423	van der Waal, Allan	
6	246	1	260
Stiles, Dr Gerald J		1, 2	428
1, 2, 3, 4, 8	486	Waldron, Magan	
1, 3	318	1	293
5	487	2, 4	8
6	467	3	136
7	487	Walker, Terri & Milo	
Storm, Tony and Mary Jo		1, 3	441
1	163	2	416
Stuck, Fred		4	182
1	126	5	248
Sumpter, Ed		Washington REALTORS®, Washington Farm Bureau, Building	
1, 4	300	Industry Association of WA, WA Cattlemen's Association,	
2	437	Washington State Grange, Association of Washington	
3	206	Business, North Peninsula Builders Association, Sequim	
Sumpter, Gail		Association of REALTORS®, Jefferson County Assoc. of	
1	62	REALTORS®	291, 396, 452
2	13	Watkins, Andrew	
3	103	1, 2, 4	444
4, 5	96	2	305
6	125	3	393
7	103	Watkins, Helen	
8	83	H1, H4	396
9, 11, 13	473	H2	452
10	433	H3	291
12	8	Watkins, Helen L	
Sutterlin, Dick		1	445
1	281	2	340

3	372	3	226
4	494	4	339
5	455	5	423
6	306	6	246
7	397	Wolf, Richard	
8	465	1	183
9	474	2	400
10	193	3	386
Wech, Faleana		4	226
1	221	5	339
2	249	6	423
3	242	7	246
Weiss, Rick		Worman, Joshua	
1	8	1	292
West, Shawn, NTI Engineering & Land Surveying		Worman, M	
1	441	1	400
Williams, Bud		2	86
1	407	3	226
Williamson, Tom		4	339
1, 2	97	5	423
3	363	6	246
4	26	Worman, Melvina	
5	365	H1, H3, H4	290
6	314	H2	163
H1, H4	282	Yearout, Carol	
H2, H6	16	1	400
H3, H7	98	2	386
H5	26	3	226
Wishart, Linda L		4	339
1	400	5	423
2	386	6	246