



DEPARTMENT OF
ECOLOGY
State of Washington

Concise Explanatory Statement
Chapter 173-566 WAC
Streamflow Restoration Funding

Summary of rulemaking and response to comments

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Concise Explanatory Statement

Chapter 173-566 WAC Streamflow Restoration Funding

Water Resources Program
Washington State Department of Ecology
Olympia, Washington

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Table of Contents

Introduction.....	1
Reasons for Adopting the Rule.....	1
Differences between the Proposed Rule and Adopted Rule.....	2
List of Commenters and Response to Comments.....	4
WAC 173-566-010 Purpose.....	4
WAC 173-566-020 Relation to other laws and rules.....	8
WAC 173-566-030 Definitions.....	11
WAC 173-566-100 Grant award process.....	12
WAC 173-566-120 Application.....	12
WAC 173-566-130 Phasing.....	13
WAC 173-566-140 Evaluation process.....	13
WAC 173-566-150 Funding priorities.....	14
WAC 173-566-200 Water right acquisitions.....	17
WAC 173-566-210 Water storage.....	18
WAC 173-566-220 Altered water management or infrastructure.....	18
WAC 173-566-230 Riparian and Fish Habitat Improvements.....	19
WAC 173-566-240 Environmental monitoring.....	20
WAC 173-566-300 Fiscal Controls.....	21
WAC 173-566-310 Ineligible projects and costs.....	21
Economic Analysis.....	27
Interim Grant Guidance.....	28
Suggested Considerations for Future Funding Guidelines.....	31
Other.....	32
Appendix A: Comment Index.....	33

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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: Streamflow Restoration Funding

WAC Chapter(s): 173-566

Adopted date: June 25, 2019

Effective date: July 26, 2019

To see more information related to this rulemaking or other [Ecology rulemakings](https://ecology.wa.gov/About-us/How-we-operate/Laws-rules-rulemaking) please visit our website: <https://ecology.wa.gov/About-us/How-we-operate/Laws-rules-rulemaking>.

Reasons for Adopting the Rule

The Legislature, in enacting Chapter 1, Laws of 2018 (ESSB 6091) (codified in part as chapter 90.94 RCW), directed Ecology to develop a program to restore and enhance streamflows. Prior to the Legislature enacting ESSB 6091, rural residential development was nearly precluded in some areas of the state due to the potential of adversely impacting a closed water body or stream/river where instream flows adopted into rule were not always met. The intent of the legislation was to allow continued rural development while protecting and enhancing streamflows and instream habitat to benefit Endangered Species Act-listed salmonids and other aquatic species. The proposal will ensure that projects to meet the intent of the legislation are implemented effectively.

In addition to fees collected from applicants for building permits and divisions of land where the development would rely on permit-exempt wells, the Legislature authorized \$300,000,000 to be appropriated over 15 years. The rule establishes process and criteria for prioritizing and approving funding applications, and developing and implementing funding contracts with chosen recipients. This rule will make funding decisions and contracting more transparent, consistent, and defensible.

Differences between the Proposed Rule and 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.

There are some differences between the proposed rule filed on January 15, 2019 and the adopted rule filed on June 7, 2019. Ecology made these changes for the following reasons:

- In response to comments we received.
- To ensure clarity and consistency.
- To meet the intent of the authorizing statute.

The following content describes the changes made to the rule, and Ecology's reasons for making changes. We have included clarifications in this section, but we have excluded minor edits.

WAC 173-566-010 (2)(d)

We received a comment objecting to the singling out of projects that provide access to new water supplies as a fundable project. Our intent had been to make clear that this type of project was fundable when included in a plan or rulemaking done to meet the requirements of chapter 90.94 RCW. The commenter suggested that we expand the list to all types of projects included in chapter 90.94 RCW as fundable. Instead of including a more exhaustive list, we clarified that part of the purpose of the funding program authorized in chapter 90.94 RCW was to implement those projects identified in a related watershed plan or as a part of a rulemaking process.

WAC 173-566-020 (4)

Commenter asked us to remove this section regarding cultural resource review. After consultation with an agency expert, we realized that the process can vary more than implied in the proposed rule language. We revised the language to remain informative to applicants, but made it less specific regarding process so that the information in the rule is accurate in all situations.

WAC 173-566-030 Definitions

We removed the definition of "agreement signature date" when a change in references to "retroactive costs" eliminated the use of the term within the rule.

We received comments on the definition of "consumptive use." We revised the definition to more closely mirror that found in Wikipedia.

We removed the definition of "new domestic permit-exempt wells" in response to comments.

We added a definition for "planning WRIA" to clarify that priority for funding in these basins does not end once planning has concluded.

We added a small clarification to the definition of “watershed plan” to more closely align with language used in statute.

WAC 173-566-140(4)

Removed the use of “final” in the scoring process to more clearly allow for a discretionary factor.

WAC 173-566-150

In response to comments received, we revised this section on funding priorities to better clarify:

- Priority factors always add to project scores and never take points away from them.
- Projects in the planning areas retained their priority after planning has concluded.
- Projects identified in plans or during a rulemaking process to meet the requirements of chapter 90.94 RCW were prioritized for funding.
- How benefits to instream resources were prioritized.

WAC 173-566-230

In response to a comment on the former “riparian and fish habitat improvements” section, we added “watershed functions” to clarify that upland projects that could demonstrate benefits to instream resources were also eligible for funding.

WAC 173-566-300

In this section on fiscal controls, we removed mention of the fees collected in the planning WRIAs because it was confusing.

Revised description of “retroactive costs” as those incurred before the agreement’s effective date, rather than signature date, to reflect standard agency grant and loan practice.

WAC 173-566-370

We changed the appeals process in the rule to make internal agency review of a decision optional to the appellant, and to redirect an initial appeal to a judicial body to the pollution control hearings board.

List of Commenters and Response to Comments

The following entities submitted comments on the proposed draft rule language:

- Robert Vadas, Jr.
- Jason Van Gilder, City of Sumner
- Erik Johansen, Stevens County
- Carla Carlson, Muckleshoot Indian Tribe, Fisheries Division
- Sharon Haensly, Squaxin Island Tribe
- Patrick Williams, Tulalip Tribes
- Amy Trainer, Swinomish Indian Tribal Community
- Kara Kuhlman, Lummi Indian Business Council
- Laura Blackmore, Puget Sound Partnership
- Karlee Deatherage, RE Sources for Sustainable Communities
- Kathy Minsch, Seattle Public Utilities
- Suzanne Skinner, Washington Water Trust

We have included all the comments received, verbatim, and responded to each individually. To the extent practical, the comments are organized by section of the rule. To more easily locate comments made by specific commenters, please see Appendix A: Comment Index.

WAC 173-566-010 Purpose

1. Washington Water Trust

WWT strongly supports Ecology's dual-pronged efforts through the Streamflow Restoration Act (SRA), Chap. 90.94 RCW, to protect, restore, and enhance streamflow, and to mitigate impacts of future permit exempt wells on instream flows.

Response: Thank you for your support of this program.

2. Squaxin Island Tribe

Ecology's grants must fund projects and lead to watershed plans that do more than merely offset the impacts of new permit-exempt domestic wells. Ecology's draft rules improperly define projects and watershed plans as successful if they do no more than offset new domestic permit-exempt wells. See, e.g., WAC 173-566-010(3) (Purpose), -030 (Definitions - "New domestic permit-exempt wells", "Watershed plan"), -150(2)(ii) (Funding priorities), -200 (3)(a) (Water right acquisitions). However, ESSB 6091 (including RCW Ch. 90.94) requires more by mandating streamflow "restoration" and "enhancement". See, e.g., RCW 90.94.010, .020, .030, .050, .060, .070, .080. Neither term means merely returning streams in Section 203 watersheds to their current degraded state. Virtually all of the streams in the § 203 watersheds within Squaxin's U&A have unmet instream flows. And, many of these same streams suffer from other flow-related deficiencies like high temperature (e.g., the Deschutes, Woodland, Kennedy, Johns, Goldsborough, Skookum, Mill and Cranberry). A plan that results in a degraded status quo after 20 years is incompatible with the label that the Legislature gave these plans: i.e., "watershed restoration and enhancement plans." RCW

90.94.030. Notably, that same descriptor for plans is absent in § 202, which labels them as "updated" "watershed plans". RCW 90.94.020(4).

While merely offsetting new domestic permit-exempt wells may be sufficient for streams whose flows meet instream flows, it is insufficient for unhealthy streams. In these cases, ESSB 6091 requires more to restore and enhance streamflows and fish habitat.

Additionally, Ecology must make a determination before adopting a § 203 plan that actions identified in the plan - after accounting for "new projected uses of water" - will result in a "net ecological benefit" to instream resources within the WRIA. RCW 90.94.030(c). This provision is not expressly restricted to estimating new domestic permit-exempt wells. Additionally, the word "benefit" in the phrase "net ecological benefit" ("NEB") is commonly understood to mean more than ending up with the degraded status quo in 2038. "Benefit" means "an advantage or profit gained from something." The "benefit" part is missing if the situation in 2038 is merely the current degraded situation.

Response: The rule does not regulate the content of the watershed plan updates under RCW 90.94.020 (ESSB Section 202), or the watershed restoration and enhancement plans under RCW 90.94.030 (ESSB Section 203). Nor does the rule apply to net ecological benefit (NEB) determinations. Please see the revision to WAC 173-566-010(2)(d) which clarifies that projects identified within completed plans are eligible for funding.

3. Squaxin Island Tribe

WAC 173-566-010(2)(c) ("Purpose"): RCW 90.04.030(b) describes offsetting domestic permit-exempt wells, not only "new" domestic permit-exempt wells as described in the rule. The rule's language should stay true to the governing statute.

Response: We assume that the commenter is referring to RCW 90.94.030(3)(b) which uses the term "offset *potential* impacts to instream flows associated with permit-exempt domestic water use." Use of the word "potential" would imply a possible future impact rather than an actual existing impact. RCW 90.94.030(3)(c) refers to "*new* projected uses of water" and RCW 90.94.030(3)(d) uses the term "offsetting *new* domestic water uses of the subsequent twenty years." Therefore, Ecology has determined the rule language and use of the word "new" is aligned accurately to the governing statute.

The funding rule in no way limits groups planning under RCW 90.94.020 or RCW 90.94.030 from going beyond simply offsetting new permit-exempt domestic uses within their plans. The revision to WAC 173-566-010(2)(d) also clarifies that all projects identified within the completed plans are eligible for funding.

4. Squaxin Island Tribe

Also, Ecology must include in plans an estimate of the "cost of offsetting new domestic water uses over the subsequent twenty years, including withdrawals exempt from permitting under RCW 90.44.050." RCW 90.94.030(3)(d). This mandate is also not restricted to new domestic permit-exempt wells. And, Ecology's restrictive view is inconsistent with RCW

90.94.030(e), which requires that plans include estimates of "the cumulative consumptive water use impacts over the subsequent twenty years, including withdrawals exempt from permitting under RCW 90.44.050". Again, this is not as restrictive as Ecology's interpretation.

Response: Thank you for your comment. This rule does not apply to the planning processes and the minimum standards identified in RCW 90.94.020 and RCW 90.94.030. This comment is outside the scope of the rule.

5. City of Sumner

The City of Sumner requests that the phrase "offset the consumptive use impacts from new domestic permit-exempt well impacts" along with variations of the same, be replaced with "offset the consumptive use impacts from new domestic well impacts, including withdrawals exempt from permitting." This phrasing is found directly in ESSB 6091 Section 203 (3)(d) and (e).

Specific instances of this phrase in the proposed WAC include, but are not limited to: 173-566-010 (3), 173-566-030 Watershed plan definition, 173-566-150 (2)(a)(ii), 173-566-150 (2)(b)(i), 173-566-200 (3)(a), 173-566-210 (2)(b). Additionally, the Definitions section contained in 173-566-030 does include a definition for "New domestic permit-exempt wells" but fails to define "domestic well."

We reference the following sections of ESSB 6091 in support of the City's language revision request:

1. Section 304 of the act outlines the goal of the program to "restore and enhance stream flows by fulfilling obligations under this act." Using the phrase "offset domestic well impacts, including withdrawals exempt from permitting" more closely aligns with that stated goal since the actions described in Section 301 involve permitted water withdrawals. Given that the appropriation to achieve this goal is in the same part of the act as the actions in Section 301, funding for Section 301 should be prioritized rather than excluded.
2. Section 202 (4)(b) and Section 203 (3)(b) describe plans required to address, "At a minimum... impacts to instream flows associated with permit-exempt domestic water use." The qualification of "at a minimum" taken with the subsequent language implies that other domestic well use should be included. The following two sentences require "replacing the quantity of consumptive water use" without qualification as to permit exempt status.
3. Paragraph Section 202 (4)(c) and 203 (3)(c) require accounting for "new projected uses of water" without regard to permit exempt status.
4. Section 202 (6)(b) and (c) refer to offsetting consumptive use without any qualifier regarding permit exempt status.
5. Section 203 (3)(d) and (3)(e) require an accounting of "offsetting new domestic water uses..., including withdrawals exempt from permitting..." and "cumulative consumptive water use impacts..., including withdrawals exempt from permitting..." respectively.

6. Section 304 provides direction to "implement a program to restore and enhance stream flows by fulfilling obligations under this act" without reference to whether impacts were from permitted or permit exempt withdrawals.

Replacing the phrase "offset permit exempt domestic well impacts" with "offset domestic well impacts, including withdrawals exempt from permitting" would address these inconsistencies between the text of ESSB 6091 and Rule language. It will also provide more clarity, consistency and will more closely align with the stated goals of the program.

Response: Section 203 (3)(d) and (e) of ESSB 6091 require watershed restoration and enhancement *plans* to include "an evaluation or estimation of the cost of offsetting new domestic water uses over the subsequent twenty years" and "an estimate of cumulative consumptive water uses." This rule does not apply to the planning process under Section 202 (RCW 90.94.020) or Section 203 (RCW 90.94.030) of ESSB 6091. See revision of WAC 173-566-010(2)(d).

Projects not identified in a plan or rulemaking process to meet the requirements of RCW 90.566.020 or 90.94.030, but that meet other goals of the legislation (i.e., to protect and enhance streamflows, improve watershed function that benefit instream fish and wildlife resources, and offset the consumptive use impacts from new domestic permit-exempt wells) are also eligible for funding under the rule.

6. Muckleshoot Indian Tribe Fisheries

WAC 173-566-010 Purpose (2) This chapter contains general rules for project grant eligibility, selection, issuance, and performance, and applies to projects statewide pursuant to and consistent with chapter 90.94 RCW to: (a) Protect and enhance streamflows (b) Improve and/or protect watershed functions that benefit instream fish and wildlife resources. (c) Offset the consumptive use impacts from new domestic permit-exempt wells. (See comment below.) (d) ~~Provide access to new water supplies when identified in a watershed plan adopted under RCW 90.94.020 or 90.94.030.~~ Assess, plan, and develop projects that include acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure, which includes, but is not limited to, projects such as floodplain restoration, off-channel storage, and aquifer recharge, or other actions designed to provide access to new water supplies with priority given to projects in watersheds developing plans as directed by RCW 90.94.020 and 90.94.030 watersheds participating in the pilot project in RCW 90.94.040.

Statement (b) should include the protection of watershed functions that lead to protecting streamflows.

Statement (c). We have believe that WREC committees have the flexibility to do more than offset consumptive impacts from domestic permit-exempt wells with proposed projects.

Statement (d) is taken out of context from the language in 90.94.070 where it is included at the end of a long list of possible projects. Furthermore: by placing it under the Purpose section, Ecology is raising the priority of such projects above others that better meet the

intent of the funding. Such projects could likely not receive funding or score low even though they clearly meet the legislative intent. We strongly recommend that this language be deleted from the Purpose. Accessing new water supplies is not a stand-alone project as (d) implies, but is suggested in context along with other possible projects. If Ecology insists on including "access to new water supplies" as a primary purpose for funding, then include the other projects listed in 90.94.070(2).

Response: The funding rule in no way limits groups planning under RCW 90.94.020 or RCW 90.94.030 from going beyond simply offsetting new permit-exempt domestic uses within their plans. The revision to WAC 173-566-010(2)(d) clarifies that all projects identified within the completed plans are eligible for funding. See also the revision to WAC 173-566-230 regarding the inclusion of watershed functions.

WAC 173-566-020 Relation to other laws and rules.

7. Amy Trainer

The Swinomish Tribe is a party to the Treaty of Point Elliott and, among other rights, has a Treaty-protected right to take fish in its Usual & Accustomed fishing areas (U&A) that includes, but is not limited to, the Skagit River and its many tributaries. The Skagit River is the largest river in Puget Sound, and provides habitat for all six wild salmon species, as well as Cutthroat trout. Since time immemorial the Swinomish Tribe and its predecessors have occupied and stewarded vast areas of land and water in the Puget Sound region to support its fishing lifestyle. These fish and their habitat are part of the Swinomish Tribe's cultural, spiritual, subsistence and commercial way of life, as well as a central pillar of its reserved rights under the Treaty of Point Elliott.

The Swinomish Tribe offers the following comments and proposed revisions on specific subsections of the proposed rule.

Section 173-566-020 (4)(a) - Cultural Resource Review

The proposed rule states that grant recipients must follow steps to work with the Department of Archeology and Historic Preservation and tribes "under Ecology instruction" to determine if a site has the potential of disturbing or impacting cultural or historic resources, and to protect such resources. The Swinomish Tribes finds this language problematic. As part of our review of any proposed project that may affect Treaty protected resources, the Swinomish Tribe reserves the sole right to determine if, when and the extent to which a project has the potential of disturbing or impacting its cultural or historic resources, as well as what steps are taken to address such disturbance or impact.

The language stating that tribes would be required to work under Ecology's instruction in making this determination is not appropriate and should be stricken. We request that subsection -020 (4)(a) be revised as follows:

(a) Grant recipients must follow the appropriate steps to work with DAHP and tribes, ~~under ecology instruction,~~ to determine if a site has the potential of disturbing or

impacting cultural or historic resources as determined by the affected tribe(s), and to protect such resources at the direction of the affected tribe(s).

Response: Ecology regrets the confusion as it was never our intention to direct the tribe(s) during cultural resource review. It is Ecology's responsibility to ensure that consultation with DAHP and the tribes occurs, to resolve with the tribes and DAHP appropriate measures to protect cultural and historic resources, and to ensure that those measures are executed as a condition of funding. See revision to WAC 173-566-020(4)(a).

8. Amy Trainer

Section 173-566-202 (7) - Puget Sound Action Agenda

The proposed rule precludes Ecology from funding a project that is "designed to address the restoration of Puget Sound" if it is "in conflict with the action agenda" developed by the Puget Sound Partnership. The statute that created the Partnership, RCW 90.71, does not include or incorporate by reference any legal standards for water law or instream flow rules in its requirements for the contents of the Action Agenda. Thus, we believe that this provision is a problematic and unnecessary limitation on streamflow restoration projects. We therefore request that this entire sub-section be deleted.

Response: RCW 90.71.340(1)(a) requires consistency with the action agenda by ensuring that projects and activities in conflict with the action agenda are not state-funded. RCW 90.71.340(1) (c) requires state grant and loan programs to be used to encourage consistency with the action agenda.

9. Tulalip Tribes

WAC 173-566-020: Relation to other laws and rules:

This section appropriately recognizes that many other laws and rules are in place to protect streamflows and environmental health. Section (7) of this proposed rule states that "Ecology may not fund projects designed to address the restoration of Puget Sound that are in conflict with the action agenda developed by the Puget Sound partnership under RCW 90.71.310."

This is a confusing statement. Many of the proposed projects in the WRIA's that border the Puget Sound will in some way "impact" the Puget Sound. Does Ecology consider that projects in these WRIAs will "address the restoration of the Puget Sound" by default; as improvements to streamflow and habitat will necessarily aid in restoration of the Puget Sound. Additionally, how will Ecology make a determination if a project is in conflict with the action agenda?

Response: The proposed rule is consistent with state law. Implementation of the rule, will include ensuring the requirements under this section are met. Ecology will communicate with the Puget Sound Partnership to ensure effective implementation of this statutory requirement.

10. Robert Vadas, Jr.

FYI for the modified-Hirst rule, including this quote from the WAC-173-566: "Puget Sound action agenda. Ecology may not fund projects designed to address the restoration of Puget Sound that are in conflict with the action agenda developed by the Puget Sound partnership under RCW 90.71.310." Chinook, being large-bodied, need relatively more flow for reproductive (including adult immigration/spawning/incubation) and rearing (including adult holding in pools) than other Pacific salmonids (Beecher 1990; Caldwell and Atterson 1992; Vadas 2000, 2003; May and Peterson 2003; Kohr 2011), so out-of-kind (non-flow) mitigation might not always adequately counteract human-development projects. This is certainly relevant to Southern Resident orca recovery. But larger streams need relatively less flow to satisfy the spawning needs of Pacific salmonids (Beecher 1990; Vadas 2000), so strong consideration of the optimal (maximum-habitat) flow needs of Chinook will be required for the Hirst-mitigation process.

Response: Thank you. This rule does not apply to the planning processes and the minimum standards identified in RCW 90.94.020 and RCW 90.94.030. This comment is outside the scope of the rule.

11. Amy Trainer

Section 173-566-020 (5) - Water Quality

The rule proposed states that all funded projects "must protect water quality and comply with relevant water quality standards." Washington State's Water Pollution Control Act, RCW 90.48, requires Ecology to "control and prevent pollution" to maintain the "highest quality" of state waters. Washington State's rivers and streams, and particularly salmon streams, have widespread impairment due to pollution from temperature, nutrients and pathogens. We want to ensure that any streamflow restoration projects funded under this program will not merely protect the existing water quality in instances where such water quality is degraded, but will work to contribute to the restoration of water quality as appropriate. We request that sub-section -020 (5) be revised as follows:

(5) Water quality. All funded projects must protect healthy water quality.; Where water quality is degraded funded projects must advance water quality recovery to achieve ~~comply with~~ relevant water quality standards.

Response: This comment is outside the scope of the rule. Although the rule supports water quality protection, the Streamflow Restoration Funding program under chapter 90.94 RCW does not mandate that funded projects address existing water quality degradation.

WAC 173-566-030 Definitions

Consumptive use

12. Squaxin Island Tribe

WAC 173-566-030 ("Definitions"): The rule defines "consumptive use" as that portion of withdrawn groundwater that is lost from the water source, rather than returned through septic system or other means. This definition lacks clarity and should be subject to further review.

13. Tulalip Tribes

WAC 173-566-030 Definitions: Why is Ecology creating a new definition for consumptive use? The definition of "Consumptive Use" is contrary to the definition found in WAC 173-500 (Water Resources Management Program). The definition found in WAC 173-500-050(5) states that "Consumptive Use" is "use of water whereby there is a diminishment of the water source."

While it is true that some groundwater that is withdrawn eventually returns to the system the timing and amount can vary widely and is often based on assumptions that may incorrectly estimate the return flows. If the goal is to fund projects "to restore and enhance streamflows . . . and implement plans to restore streamflows to levels necessary to support robust, healthy, and sustainable salmon populations" it is essential that all consumptive use from exempt well use be offset in amount and in time. By reducing the estimated consumptive use of exempt wells: Ecology may unintentionally reduce the estimated amount of water necessary to restore and enhance streamflows.

14. Muckleshoot Indian Tribe Fisheries

WAC 173-566-030 Definitions "Consumptive use" means that portion of withdrawn groundwater that is lost from the water source, rather than returned through a septic system or other means.

We remain concerned with the definition of consumptive use as it implies that septic effluent is always non-consumptive even if it returns to a different source aquifer, at a much slower rate and a much lower water quality. Also, building site preparation, soil removal, road construction, stormwater and utility infrastructure installation can greatly change hydrologic flow pathways in the soils and subsoils of a site. A simple and clear definition is preferred.

Response for comments 12 through 14: The definition for consumptive use is intended to align with its use in the RCW 90.94.020 and 90.94.030 planning processes and the determination of "net ecological benefits." See our revision to WAC 173-566-030 definition of "consumptive use" to more closely align with the dictionary definition.

Domestic Use

15. Muckleshoot Indian Tribe Fisheries

"Domestic use" should be defined to clarify the status of outdoor watering which is considered to be an "irrigation use" by case law.

Response: We have removed the definition of “domestic use” which included outdoor watering.

WAC 173-566-100 Grant award process

16. Lummi Nation

WAC 173-566-100. Paragraph (1) states that Ecology will develop guidance for implementing the Streamflow Restoration Funding rule. When and how that guidance is developed should be specified in the rule and should not be strictly an internal-to-Ecology process. At a minimum, fisheries co-managers should participate in the development of the guidance, particularly given the Scope of the rule as described in Section 010(1).

Response: Thank you for your comment. Although the rule does not specify the process for developing the grant guidance that we will use, Ecology will commit to providing a draft for public review prior to finalizing.

WAC 173-566-120 Application

17. Seattle Public Utilities

WAC 173-566-120 Application page 4

(3) We support grant funding for feasibility studies.

(6) We support accepting applications for projects not funded in a previous cycle.

Response: Thank you.

18. Squaxin Island Tribe

WAC 173-566-120(2) ("Application"): For reasons described above and in our previous letters, Ecology's application requirements discourage applying for data collection, assessments and feasibility studies that are precursors to shovel-ready projects.

Response: We disagree. The rule clearly authorizes data collection, assessments and feasibility studies that are directly linked to projects which benefit streamflow and instream habitat. We believe strongly that the law requires that capital funding be used only when data collection and studies are directly linked to potential projects. Because of this, the rule favors funding projects that bring about actual streamflow and fish habitat benefits over those that only involve general data collection, assessments, and studies.

We believe this approach aligns with legislative intent to make tangible improvements to stream flows and instream habitat.

WAC 173-566-130 Phasing

19. Seattle Public Utilities

WAC 173-566-130 Phasing page 5

(1) We support funding projects in phases.

Response: Thank you.

20. Squaxin Island Tribe

WAC 173-566-130(1) ("Phasing"): Ecology's requirements discourage applying for data collection, assessments and feasibility studies that are precursors to shovel-ready projects.

Response: See response to comment #18.

21. Tulalip Tribes

WAC 173-566-130 Phasing:

Subsection (3) states that approval of one phase of a project does not guarantee funding for later phases of the project. There is concern that if an initial project meets the criteria for funding it could become orphaned if the subsequent phases are not funded. If an applicant is proposing a phased project it should still be complete enough that Ecology can fund the entire project. It is a waste of time, money, and prolonged impacts to streamflows if a phased project is allowed to die. Ecology should also only fund individual phases if each discrete phase provides benefits to streamflow and has restoration benefits as a stand-alone project.

Response: Thank you for your comment. The purpose of phasing is, in part, to commit some level of funding to assess a project's feasibility and benefits more fully, when that information cannot be determined fully at the outset. We believe it is critical to state clearly in the rule that once more information is known through completion of initial phases, that further funding may not be granted. This ensures that larger sums of money will not be expended on a project that may not be feasible or may not have the benefits initially anticipated. Ecology will continue to strive to make the best possible use of this funding to meet the goals of the allocation.

WAC 173-566-140 Evaluation process

22. Seattle Public Utilities

WAC 173-566-140 Evaluation Process

The evaluation process looks reasonable. (3)(b)(ii) Related to long-term sustainability, add that the applicant should demonstrate the ability to cover any ongoing costs to operate, maintain and monitor projects.

Response: Although Ecology chose not to limit the flexibility of the program by incorporating this language into the rule, long-term sustainability of project proposals is an important element in funding decisions.

23. Squaxin Island Tribe

WAC 173-566-140(3) ("Evaluation Process"):

Ecology's requirements discourage applying for data collection, assessments and feasibility studies that are precursors to shovel-ready projects.

Response: See response to comment #18.

24. Tulalip Tribes

WAC 173-566-140 Evaluation Process:

Will there be an additional explanation as to how Ecology will utilize and define some of the terms found in this section? For example: 3(a) states that Ecology will evaluate the "benefits to streamflow and instream resources". How exactly will this be determined? Will this be solely based on Net Ecological Benefits analysis?

Response: Ecology will use technical experts such as hydrologists, hydrogeologists, and fish biologists to assess the benefits to streamflow and instream resources primarily based on materials submitted with project applications, supplemented with other information, data, field inspections, and so on as available. Where a net ecological benefits analysis as a part of the planning processes in RCW 90.94.020 or RCW 90.94.030 has been done, it can contribute to the assessment.

25. Lummi Nation

Further, the fisheries co-managers need to be involved with the evaluation and assessment of instream resources and the associated streamflows.

Response: Thank you. Ecology intends to consult with the Washington Department of Fish and Wildlife in evaluating project proposals.

WAC 173-566-150 Funding priorities

26. Puget Sound Partnership

Alignment of Programs

Strong alignment exists between Ecology's Streamflow Restoration Funding program and the Partnership's efforts to develop and implement the Action Agenda for Puget Sound. The

2018-2022 Action Agenda recognizes that low flows are a major limiting factor for salmon recovery and includes strategies and priority actions designed to help ensure sufficient instream flow in Puget Sound watersheds to maintain and recover salmon populations.

Suggested Amendment to Proposed Rules

The Partnership offers one suggestion for improvement on the proposed rules. This suggestion relates to section WAC 173-566-020(7), which currently states: Puget Sound Action Agenda. Ecology may not fund projects designed to address the restoration of Puget Sound that are in conflict with the action agenda developed by the Puget Sound Partnership under RCW 90.71.310.

In addition to not funding projects in conflict with the Action Agenda, the Partnership suggests an amendment to the proposed rules that call for Ecology to consider—and potentially give priority to—actions that are included in the Action Agenda for Puget Sound. The consideration is similar to those that Ecology is currently required to provide when making decisions for other funding programs.

The Partnership believes that providing additional consideration for actions that are included in the Action Agenda is justified due to the previously stated alignment of our programs, and to the rigor with which actions are vetted by local and regional experts prior to inclusion in the Action Agenda. For example, each action included in the 2018-2022 Action Agenda was developed through a robust process that required coordination with recovery organizations and alignment with local and regional recovery plans and priorities. Additionally, each action was subsequently reviewed and tiered by local and regional experts based on standard criteria relating to the action's contribution to recovery and their implementation readiness. This collaborative and science-informed work received contributions from hundreds of individuals representing watershed, marine resource, and salmon recovery groups; federal, state, local, and tribal governments; non-profits; businesses; educational organizations; and private citizens. The Partnership also recognizes, however, that the geographic scope of the Streamflow Restoration Funding program extends beyond Puget Sound.

With these considerations in mind, the Partnership offers the following suggested amendment to WAC 173-566-020(7):

Puget Sound Action Agenda. Ecology may not fund projects designed to address the restoration of Puget Sound that are in conflict with the action agenda developed by the Puget Sound Partnership under RCW 90.71.310. Additionally, for projects submitted in WRIAs 1 through 19 (the Puget Sound basin), Ecology shall give priority consideration to projects that are referenced in the action agenda.

The Partnership believes this language provides latitude to Ecology to define how to provide priority consideration in future iterations of the program's funding guidelines.

Response: Funding priorities within the rule reflect Ecology's best determination of legislative intent as evidenced in chapter 90.94 RCW, which establishes a state-wide program with focus on specific WRIAs in both western and eastern Washington.

27. Stevens County

Make sure funding is prioritized so that each WRIA with an updated plan has enough water to offset identified mitigation requirements as detailed in the updated plans.

Response: Projects identified within an updated watershed plan are given priority under the rule. We believe the rule incorporates the legislative priorities under chapter 90.94 RCW.

28. Stevens County

Prioritize water ahead of feasibility studies.

Response: Thank you. We believe the rule incorporates the legislative priorities under chapter 90.94 RCW.

29. Stevens County

Fund water projects (storage, timing, acquisition) ahead of NEB projects

Response: Funding priorities for projects in the RCW 90.94.020 and 030 watersheds follow locally established priorities in the plans or projects identified in the rulemaking process.

30. Seattle Public Utilities

WAC 173-566-150 Funding Priorities page 6 (3)(a) and (b) We support this language. We also want to make sure that projects that are needed for the permit exempt wells get implemented so this issue doesn't linger.

Response: Thank you.

31. RE Sources for Sustainable Communities

RE Sources for Sustainable Communities is a local organization in northwest Washington, founded in 1982. RE Sources works to build sustainable communities and protect the health of northwest Washington's people and ecosystems through the application of science, education, advocacy, and action. Our North Sound Baykeeper program is dedicated to protecting and enhancing the marine and nearshore habitats of northern Puget Sound and the Georgia Strait. Our chief focus is on preventing pollution from entering the North Sound and Strait, while helping our local citizenry better understand the complex connections between prosperity, society, environmental health, and individual wellbeing. Our North Sound Baykeeper is the 43rd member of the Waterkeeper Alliance, with over 300 organizations in 34 countries around the world that promote fishable, swimmable, drinkable water. RE Sources has over 20,000 members in Whatcom, Skagit, and San Juan counties, and we submit these comments on their behalf.

We want to thank the Department of Ecology (Ecology) for including water conservation and efficiency as high priority projects.

Response: Thank you.

32. Lummi Nation

WAC 173-566-150. Broadening the scope for funding priorities beyond that described in "Streamflow Restoration Grants Fiscal Year 2019 Interim Funding Guidance" is good. However, the lower priority assigned to projects that are not part of a watershed plan under RCW 90.94 Sections 020 or 030 is problematic. Given the range of timelines and outcomes:

a. "Planning" under paragraph (1) should be expanded to include rule making. For example, WRIA 1 was "planning" until Feb. 1, 2019, and Ecology is now undertaking a rule making for WRIA 1 to comply with RCW 90.94 with an anticipated completion date of June 2020. In this example, WRIA 1 should not be made a lower priority because it is neither "planning" nor has a watershed plan. Perhaps "planning" could be defined in the Definitions section to include the rule making process.

b. Related, paragraph (3) requires modification as it could end up lowering the priority of high priority projects identified under paragraph (1) for WRIAs where a plan has not been completed, regardless of whether planning or rule making is occurring. Paragraph (3) appears to contradict paragraph (1).

c. Paragraph (2) should be expanded to include projects listed, identified, or otherwise addressed or referenced in a rule adopted by Ecology under RCW 90.94.020(7). The reason for the broad language regarding projects in the last sentence is because it is not yet clear how Ecology will address or identify projects where Ecology adopts a rule, such as will occur in WRIA 1. This issue could also be addressed by expanding the definition of "Watershed Plan" in Section 030 to include rules adopted by Ecology under RCW 90.94020.

Response: Thank you. We have made several changes within the rule to ensure that projects within the "planning WRIAs" (see definition) and identified in either a chapter 90.94 RCW watershed plan or rulemaking process are prioritized.

WAC 173-566-200 Water right acquisitions

33. Muckleshoot Indian Tribe Fisheries

WAC 173-566-200 Water right acquisitions. We assume that no inchoate rights will be transferred into trust. Is that correct?

Response: Ecology recognizes that retiring a water right that is in use provides an actual streamflow benefit at the time the right is retired; eliminating a water right that has not been used does not have the same benefit. Ecology examines acquisition of all water rights very carefully.

WAC 173-566-210 Water storage

34. Tulalip Tribes

WAC 173-566-210 Water Storage: This section should include language that states funding for water storage projects must be used on proposals that will benefit streamflows and instream resources.

Response: Thank you for your suggestion. Water storage projects can meet the intent of chapter 90.94 RCW without enhancing streamflows and or benefitting instream resources. This type of project can meet legislative intent if it offsets consumptive impacts from domestic permit-exempt well water use. The rule language is consistent with the legislative intent.

WAC 173-566-220 Altered water management or infrastructure

35. Seattle Public Utilities

WAC 173-566-220 Altered water management or infrastructure page 6 (1) Please insert in the list of examples "water system consolidations, extension of existing public water systems" between "source switches" and "and other irrigation efficiencies".

Response: No change was made as the list of examples does not need to include every possible project type. Both of these examples would have to be looked at closely for applicability.

36. RE Sources for Sustainable Communities

What are examples of "streamflow retiming projects" as mentioned under 173-566-220 (p. 8, line 31)? This phrase is not defined nor are examples given. We ask that Ecology include clarification somewhere under either 173-566-220 by including examples or creating a definition under 173-566-030.

Response: Retiming projects typically require storage of some type, capturing flow when it is plentiful and releasing it when it is not. Examples may include retimed releases from existing storage, aquifer recharge projects that benefit surface water base flows (sub-surface) or are retrieved by pumping, or new above ground storage. We may include more detail in the grant guidance.

37. Muckleshoot Indian Tribe Fisheries

WAC 173-566-220 Altered water management or infrastructure

(1) Water management and infrastructure improvement projects eligible for funding involve changes in how and when water is diverted, withdrawn, conveyed, or used to benefit streamflows and instream resources and carry out chapter 90.94 RCW. Examples include conservation and efficiency projects such as diversion modifications, ~~lining and piping~~ leakage reduction??, sprinkler conversion, and other irrigation efficiencies, as

well as source ~~switches~~ exchanges?? and streamflow retiming?? We are concerned with the use of this phrase as it is not defined and is not a standard hydrologic term projects. Innovative methods will be considered.

(2) Projects must include sufficient provisions and protections so that completed projects will provide: (a) Permanent streamflow improvement; ~~or??~~ (b) Access to new water supplies when identified in a watershed plan adopted under RCW 90.94.020 or 90.94.030. Again, we are concerned with the emphasis on new water supplies especially when it is implied that projects will improve streamflow OR access new supplies which could be a contradiction. Other projects listed in RCW 90.94.070(2) could also involve altered water management or infrastructure. (3) To meet subsection (2) of this section, conservation and water use efficiency projects must permanently convey the saved water to ecology to be held in the trust water rights program for instream flow purposes.

Response: Yes, lining or piping ditches reduces water loss to infiltration (leakage) and may also reduce evaporation. A “source switch” could also be referred to as a “source change” or “source exchange.” See previous response regarding retiming projects.

“New water supplies” is listed as a fundable project within RCW 90.94.070(2) and 90.94.080(2) but the rule was written to restrict the funding of these types of projects unless they are part of a chapter 90.94 RCW plan for offsetting new permit-exempt uses.

WAC 173-566-230 Riparian and Fish Habitat Improvements

38. Tulalip Tribes

WAC 173-566-230 Riparian and Fish Habitat Improvements: This is a lower priority in the funding criteria and it should be mentioned again here. Also, it appears that some of the examples listed in this section might benefit streamflows, including levee modifications and beaver introduction.

Response: The rule acknowledges that some flow benefits may result from these projects.

39. Muckleshoot Indian Tribe Fisheries

WAC 173-566-230 Watershed, rRiparian and fish habitat improvements

Watershed, rRiparian and fish habitat improvements that might not directly increase streamflow, but do benefit instream resources, may be funded through this chapter. Examples include: but are not limited to: in-channel habitat improvements, riparian restoration, strategic land acquisitions, levee modifications, floodplain modifications, fish passage: and beaver introduction.

This section should have the word "watershed" added to meet legislative intent to protect watershed functions.

Response: See change to WAC 173-566-230.

WAC 173-566-240 Environmental monitoring

40. Seattle Public Utilities

WAC 173-566-240 Environmental monitoring

We support including monitoring equipment and effectiveness monitoring as eligible for funding. This will be very helpful.

Response: Thank you.

41. Tulalip Tribes

WAC 173-566-240 Environmental Monitoring: Ecology should include language in this section that ensures that data gathered as a result of funding provided by the Streamflow Restoration Fund is available to Ecology and the public.

Response: This is a standard in Ecology's general grant and loans terms and conditions.

42. Lummi Nation

Our emphasis is to ensure that streamflow and instream resources are restored, of which monitoring and evaluation are critical components.

WAC 173-566-240(1). This section should be expanded to explicitly include monitoring of instream resources. One cannot know if instream resources are improving, or not, if they are not monitored—it is a fundamental component of any effort to restore, maintain, or enhance instream resources. Existing monitoring of instream resources is too limited to sufficiently address the scope of RCW 90.94.

Limiting monitoring to that which is "directly related to restoring, maintaining, or enhancing streamflows or instream resources and values" is too narrow and will likely lead to monitoring that is only associated with the effectiveness of individual streamflow or instream resources projects. While project effectiveness monitoring is important, that alone will not provide the information necessary to know if there is an overall ecological benefit to the larger system. Baseline monitoring at representative locations that are not associated with a specific streamflow or instream resource project would more accurately indicate if the system—not just the parts—are being degraded, maintained, or enhanced. The language needs to be expanded to address this issue.

WAC 173-566-240(1). Funding should not be limited to "environmental monitoring equipment." Eligible funding should be expanded to include personnel time for study design, deployment and utilization of equipment; and conducting data collection, data analysis; and reporting. Limiting funding to equipment is not sufficient and will likely result in haphazard data collection efforts and archived data that is not effectively utilized.

WAC 173-566-120 and 140. As these two sections are written (application and evaluation), environmental monitoring (i.e., surface water, groundwater, instream resources) will likely not be funded as the "benefits" of monitoring will not be an increase in streamflow or

improvement of instream resources. Language should be added to both sections to address that disconnect, and/or "benefit" could be defined in the definitions section (WAC 173-566-030) including language that explicitly includes monitoring ("benefit" is not currently defined).

In closing, the ability to monitor and evaluate the condition of instream resources, surface water flow and ground water is critical to implementing the goals of RCW 90.94. Offset and enhancement projects are also important, and that importance can only be known through evaluation and monitoring.

Response: The rule clearly authorizes data collection, assessments and feasibility studies that are directly linked to projects which benefit streamflow and instream habitat. We believe strongly that the law requires that capital funding be used only when data collection and studies are directly linked to potential projects. Because of this, the rule favors funding projects that bring about actual streamflow and fish habitat benefits over those that only involve general data collection, assessments, and studies. We believe this approach aligns with legislative intent to make tangible improvements to stream flows and instream habitat.

WAC 173-566-300 Fiscal Controls

43. Seattle Public Utilities

WAC 173-566-300 Fiscal Controls (2) We support the potential need to set aside a percentage of funds for each Ecology region or geographical area.

Response: Thank you.

44. Stevens County

Find a sustainable bucket of money for project o/m costs

Response: The rule does apply to establishing legislative funding priorities. This comment is outside the scope of this rule.

WAC 173-566-310 Ineligible projects and costs

45. Seattle Public Utilities

WAC 173-566-310 Ineligible projects and costs. (4) As currently worded there is a double negative, and it doesn't match the phrasing in the rest of the list. We suggest changing this to: "Staff time not directly related to the project."

Response: See change in WAC 173-566-310(4).

46. RE Sources for Sustainable Communities

Under 173-566-310, Ineligible projects and costs, why does Ecology not include mention of projects that would result in impairment of a senior water right(s)? Under 173-566-210 (2) (a) and 173-566-220 (2) (a) preventing impairment to senior water rights is explicitly called out. Any project that will result in impairment of a senior water right(s) must be immediately disqualified from funding. We ask for it to be included in 173-566-310.

Response: Although consideration of impairment was included in WAC 173-566-210 and -220 sections of the preliminary draft of the rule, those references were moved to the application section and now apply to all project proposals.

47. Washington Water Trust

However, as expressed herein and in WWT's comments on the draft language for Chap. 173-566 WAC, WWT is deeply concerned by the final rule's strategy of largely restricting SRA funds to shovel-ready mitigation projects. Neither the funding strategy in the final rule nor other sources of Ecology funding begin to address the underlying data gaps in many SRA watersheds or support the feasibility studies necessary to develop and assess potential mitigation/restoration projects that will achieve net ecological benefit.

In the absence of other significant funding sources, Ecology is putting the cart before the horse in exclusively devoting SRA funds to shovel-ready projects without first ensuring that the agency and planning units have the basin assessments and other studies necessary to identify where future impacts from permit exempt wells will occur and what projects will best address them. WWT thanks Ecology for endeavoring to provide some technical study funding out of Planning and Participation Grants and other sources in its operating budget. But realistically, whatever funds will be available for technical studies will be relatively small. The Planning and Participation Grants will primarily backfill staff costs incurred by tribes and counties participating in one or more watershed planning process. WWT understands that Ecology has also allocated up to \$300,000 for technical work in the Section 030 watersheds—which is an excellent first step, but without any prospect of further funding, a likely inadequate amount for technical studies. The competition between section 030 watersheds for technical gap funding is guaranteed to be keen—with many significant gaps likely to be denied funding simply because the money ran out.

The Chehalis basin exemplifies this point. As DOE knows well, the Upper and Lower Chehalis are among the section 020 watersheds which engaged in an earlier watershed planning process pursuant to Chap. 90.82 RCW. Many of the section 020 watershed plans identified critical data gaps—data gaps that currently remain unaddressed. The Chehalis Basin Watershed Management Plan of 2006 recommended as a second action item that a groundwater study be conducted to answer questions such as whether "an individual water right application [might] impact stream flows." To date, no such study has occurred—yet the need is even greater now as water resources have become scarcer due to increased population and more unpredictable due to climate change. Other watersheds similarly have unplugged technical gaps that were identified in watershed plans from the mid-2000s.

As deficient as technical information may be for some of the Section 202 watersheds, it is much worse in the section 030 watersheds which did not successfully generate watershed plans during the RCW 90.82 planning process.

Ecology certainly recognizes the importance of basin assessments and other technical assessments like hydrogeologic studies in conjunction with implementing the SRA. In its Preliminary Regulatory Analyses for the Streamflow Restoration Funding Rule, the agency quite rightly points out that such studies are "important precursors to developing effective projects that will result in meaningful environmental benefit." Yet, despite the looming, inevitable shortfall in funds for these important precursor studies, Ecology appears to be plowing ahead without seeking additional funding for them. Moreover, additional funding is needed for feasibility studies that quantitatively assess potential mitigation projects in both the 020 and 030 watersheds. WWT is concerned that this strategy will ultimately put Ecology in the difficult position of choosing which mitigation projects for future permit exempt wells to fund, without sufficient quantitative analysis for those projects, and without the important precursor studies that describe the current scientific and planning landscape and provide the basis for calculating the measures necessary to offset future consumptive uses.

This strategy runs afoul of common sense and quite possibly the SRA itself. WWT strongly encourages Ecology both to revise the final rule to use SRA funds more flexibly.

The language of the SRA is more flexible than how Ecology has defined permissible funding in the final rule...and better grounded in common sense. The SRA states as to section 020 watersheds that updated plans contain "recommendations for projects and actions that will measure, protect, and enhance instream resources and improve watershed functions that support the recovery of threatened and endangered salmonids." RCW 90.94.020(4)(a) (emphasis added). The SRA contains a parallel mandate for section 030 watersheds. RCW 90.94.030(3)(a). These twin directives clearly indicate the Legislature's intent to use SRA funds to measure and assess actions and projects. Those projects and actions could include a wide spectrum of studies from total water supply to hydrogeology to water quality—as long as they serve the statute's purpose of measuring, protecting, enhancing instream resources and improving watershed functions.

This reading of the SRA also squares with RCW 90.94.080 (2), which states that expenditures from the bond account may be used to "assess, plan, and develop projects" that include a wide variety of acquisition and measurement projects. The final rule, accordingly, should be changed to allow bond funds for feasibility and quantitative studies for mitigation and restoration projects proposed by section 020 and 030 watersheds. Moreover, Ecology should modify the final rule to make it clear that bond funds are available not just to assess a particular project, but also to assess the broader watershed to determine which of several potential projects will best project to undertake to mitigate for future consumptive uses. It is illogical to do otherwise. And, as previously noted, the need for assessments is particularly acute in the section 030 basins without previously approved watershed plans.

WWT strongly encourages Ecology to revise the final rule to use SRA funds more flexibly as the statute permits.

Response: See response to comment #42.

48. Washington Water Trust

In addition, WWT respectfully requests Ecology to seek, with the support of WWT and other participants in SRA planning, additional funding from the Legislature, as needed now and in the future, to fill the identified technical gaps. SRA planning will determine watershed management in the SRA watersheds for the next decades. Water management in the SRA watersheds (and throughout the state) is inextricably intertwined with salmon recovery, culvert removal, the plight of the orca, water quality, sustainable water supply for human needs, and climate change. Good water management depends upon good science. WWT urges Ecology to view SRA implementation in the larger ecological, political, and legal context. WWT will fully support Ecology in seeking the resources necessary to ensure that we employ the best available science to guide future water management in the SRA watersheds and the state at large.

Response: Thank you. The rule does apply to establishing legislative funding priorities. This comment is outside the scope of this rule.

49. Squaxin Island Tribe

The Tribe's usual and accustomed fishing area ("U&A") overlaps with most of the Water Resource Inventory Area ("WRIAs") listed in RCW 90.94.030—i.e., WRIAs 12 through 15—all of which lack adopted watershed plans. The Tribe also has U&A in WRIA 11, which has a watershed plan update that Ecology recently adopted under RCW 90.94.020. The Tribe therefore has a significant stake in the Watershed Restoration Act ("Act") planning process that is currently unfolding, including in how Ecology interprets and implements the Act's funding provisions.

II. Funding to ensure that watershed plans and projects are scientifically-based and effective

A key area of concern remains Ecology's discouragement, and apparent prohibition, on funding data-gathering, assessments and feasibility studies (collectively, "studies"). Ecology's Preliminary Regulatory Analysis for the rule says that it will not use the grant money to fund feasibility studies and basin assessments:

Fund feasibility studies and assessments. Feasibility studies and basin assessments are important precursors to developing effective projects that will result in meaningful environmental benefit. However, Ecology chose not to fund these through this grants program. Instead, entities engaged in planning efforts established under RCW 90.94.020 and 90.94.030 are eligible for funding for these purposes through Planning Participation Grants, which are funded using money from the state's operating budget. Projects funded under the proposed rule, on the other hand, are funded using money from the state's capital budget. Funding feasibility studies and assessments with operating funds is consistent with standard budget and accounting principles, and therefore allows us to better meet the goals and objectives of the statute. (Section 6.3.4)

While Ecology's draft rule does not expressly prohibit awarding grants for these purposes, it does so indirectly by requiring submissions that seem only to apply to shovel-ready projects.

See, e.g., WAC 173-566-120(2) ("Application"); -130(1) ("Phasing"); -140(3) ("Evaluation Process").

While we understand the need for practicality and the short timeframes that the Act imposes, the reality is that these kind of studies are critical precursors to funding projects that will restore and enhance South Sound streams with closures and/or unmet instream flows. As described in our earlier letters, we are still missing fundamental information that was identified in the unapproved watershed plans. In many cases, more than guesswork is required before we can propose scientifically-supported shovel ready projects that will actually restore and enhance these streams.

There are several reasons that Ecology should reconsider its approach. First, the components of watershed plans that the Act requires, and the findings that Ecology must make, cannot be accomplished without critical data such as: (1) the amount of water needed to restore depleted streamflows; (2) the amount needed to offset permit-exempt wells; (2) when and where that water is needed; and (3) inventories and assessments of sources of that water, including water rights that may be acquired and reclaimed water.

Second, the Act anticipates that the money will be spent this way. Third, Ecology's Planning and Participation Grants are insufficient for developing studies that are critical in certain subbasins. Participation funds are only \$15,000 per WRIA. In comparison, the Tribe's WRIA 14 grant sought \$240,000 for basic data-gathering and analyses.

The Tribe stands ready to work with the Committees created by the Act to identify and prioritize critical data gaps that need to be filled in order to identify shovel-ready projects. We urge Ecology to fund the necessary studies with the grant money or from other sources, and/or supply the technical assistance with Ecology and other state agency staff such as the Washington Department of Fish Wildlife. Like Ecology, WDFW sits on the watershed committees and has a mandate to protect and restore fisheries. State law requires this kind of inter-agency cooperative effort in watershed planning.

Response: See the responses to comments #18 and #42.

50. Squaxin Island Tribe

By way of background, Squaxin's usual and accustomed fishing area ("U&A") overlaps with most of the Water Resource Inventory Area ("WRIAs") listed in RCW 90.94.030 - i.e., WRIAs 12 through 15 - all of which lack adopted watershed plans (referred to as § 203 WRIAs or watersheds). ESSB 6091 purports to allow development to impair instream flows and impact closed water bodies in these WRIAs through compliance with RCW 90.94.030. For § 203 WRIAs, Ecology must prepare and adopt watershed restoration and enhancement plans ("plans") by June 30, 2021. These plans must contain, among other things, actions and projects needed to offset impacts on instream flows from permit-exempt wells. That deadline is less than three years away.

Ecology's draft rules are deficient for the following reasons, and should be revised accordingly:

1. The draft rules fail to specifically anticipate funding for watershed planning and assessment projects in § 203 watersheds, which are needed as precursors to shovel ready projects. As described below, the draft rules fail to specifically acknowledge the appropriateness of funding planning and assessment actions and projects in § 203 WRIsAs, as a necessary precursor to developing shovel-ready projects. They also improperly implicitly prefer shovel ready projects. Specifically, Ecology should revise the following Sections of the rules: WAC 173-566-010(4) (Purpose), -130 (Phasing), -140(3) (Evaluation process), -150(2) (Funding priorities), -310 (Ineligible projects and costs). Ecology should also revise its grant application forms to ensure that such planning and assessment projects do not receive lower scores than shovel- ready projects.

As noted, there are no adopted watershed plans for § 203 WRIsAs, as compared with § 202 WRIsAs. The unadopted plans in the § 203 WRIsAs identified basic data gaps, many of which remain unfulfilled. The nonexistence of plans for § 203 WRIsAs starkly contrasts with approved watersheds plans for the § 202 WRIsAs, and thus requires different treatment. In the § 203 WRIsAs, the reality is that specific data must be collected and analyzed as a precursor to drafting meaningful watershed plans with scientifically-supported restoration and mitigation projects. Ecology sought to withhold, or at minimum discourage and downwardly score, such funding in its Interim Funding Guidance and the Tribe has objected.

Without meaningful watershed plans, Ecology cannot carry out its overall mandate of implementing a program that restores and enhances streamflows to levels necessary to support healthy salmon populations. See RCW 90.94.030, RCW 90.04.010 (Legislative statement following Definitions). Nor can Ecology attain the mandatory components of and make requisite findings for § 203 watershed plans absent critical data such as: (1) the amount of water needed to restore depleted streamflows; (2) the amount needed to offset permit-exempt wells; (2) when and where that water is needed; and (3) inventories and assessments of sources of that water, including water rights that may be acquired and reclaimed water. See RCW 90.94.030(b).

Finally, the Legislature in the funding provision, RCW 90.94.080, clearly intended that Ecology would fund actions and projects that include data collection, assessments, and planning. It directed Ecology's grant money to the watershed restoration and enhancement bond account created in § 208. Section 208(2) expressly anticipates and authorizes Ecology to fund data collection and assessments in advance of shovel-ready projects:

Expenditures from the watershed restoration and enhancement bond account may be used to assess, plan, and develop projects that include acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure, which includes, but is not limited to, projects such as floodplain restoration, off-channel storage, and aquifer recharge, or other actions designed to provide access to new water supplies with priority given to projects in watersheds developing plans as directed by sections 202 and 203 of this act and watersheds participating in the pilot project in section 204 of this act. (RCW 90.94.080, emphasis added.)

Response: See response to comment #42.

51. Tulalip Tribes

Conclusion: Finally, the Tulalip Tribes would like to reiterate that having the best possible data is essential to Ecology making an informed decision regarding project funding. It does not appear from these rules that funding is available for data collection and management. The speed with which ESSB 6091 requires project application and approval creates a situation where Ecology is trying to determine if projects will adequately offset exempt well use for the next 20 years in perpetuity. Making these decisions with insufficient data could lead to the waste of millions of dollars and ongoing impacts to streamflows and instream resources.

Response: See response to comment #42.

52. Amy Trainer

Sections 173-566-120 (f) - Application and -310 (7) - Ineligible Projects and Costs The proposed rule requires a project applicant to demonstrate the "source of project water, if applicable, and how water will be managed to ensure there will be no impairment to senior water rights." We agree that the project applicant should have to demonstrate that its project would not impair senior water rights. We believe that the rule should be clear that if a project would impair senior water rights it would not be eligible for funding. Accordingly, we believe sub-section -310 (7) should be revised to deem ineligible for grant funding any project that would impair senior water rights as follows: (7) Projects that conflict with other ecology rules, projects or guidance, including any project that would impair senior water rights.

Response: Existing rule language is adequate to address impairment concerns.

53. Lummi Nation

WAC 173-566-310. Paragraph (10) states that operations and maintenance (M&O) costs are not eligible for funding. Ecology should reconsider this position. Projects funded under this rule will require M&O to provide a permanent benefit. Perhaps strictly administrative projects possibly the transfer of water rights to Ecology's trust water rights program where compliance would be covered under an existing program/budget) would not need funding to maintain the benefit, but all others will require funding.

Response: Capital funds cannot be used for ongoing operations and maintenance costs. A 15-year grant program can also not be relied upon for ongoing expenses in perpetuity.

Economic Analysis

54. Lummi Nation

WAC 173-566-120. Paragraph (3) indicates that Ecology may require a feasibility study and that the required feasibility study may be funded by Ecology. Section 6.3.4 of the Preliminary Regulatory Analysis (Ecology Publication 19-11-063) indicates that feasibility studies will not be funded. Clarification is needed: Will Ecology feasibility funding come

from a different funding source? Is there a threshold for when Streamflow Restoration Funds can be used for feasibility studies?

Section 6.3.4 of the preliminary Regulatory Analysis (Ecology publication 19-11-063) states that streamflow restoration funds will not be used to fund feasibility studies and basin assessments. This position should be modified to at least allow funding of basin assessments. While monitoring that is larger than individual projects may not be a basin assessment, the term "basin" is a scalable term and could easily be used restrictively. In addition, basin assessments are excellent tools to evaluate the health of a system and are critical to knowing if instream flows and resources are supporting "robust, healthy, and sustainable salmon populations" [WAC 173-566-010(1)] and if not, why not.

Response: We apologize for the confusion. Project-specific feasibility studies are eligible for funding. The Preliminary Regulatory Analysis contained an error, which is corrected in the Final Regulatory Analysis. Please also see the response to comment #41.

Interim Grant Guidance

55. Squaxin Island Tribe

I am sending this letter because the Squaxin Island Tribe ("Tribe" or "Squaxin") has serious concerns about the legality and effectiveness of Ecology's approach to awarding grants under ESSB 6091 as described in its Streamflow Restoration Grants FY 2019: Interim Funding Guidelines (Pub. No. 18-11-010, June 2018) ("Interim Guidelines"). For reasons described below, Ecology's focus on shovel-ready projects to the virtual exclusion of data collection and analyses during this grant cycle is illogical and inconsistent with ESSB 6091. Its approach unreasonably and significantly prejudices the Tribe and its Treaty fishing rights.

Squaxin's usual and accustomed fishing area ("U&A") overlaps with most of the Water Resource Inventory Area ("WRIAs") in Section 203, all of which lack adopted watershed plans. While this letter focuses on WRIA 14, our concerns extend to the other WRIAs listed in Section 203 that are within Squaxin's U&A -- i.e., WRIAs 12, 13 and 15. We will also be sending comments on Ecology's draft Streamflow Restoration Funding rule, WAC Ch. 173-566. We respectfully urge Ecology to change course when evaluating and scoring upcoming project applications in Section 203 basins during this critical period leading up to watershed plans.

I. Critical Data Gaps Exist in Section 203 WRIAs that must be Filled to Meet ESSB 6091's Requirements.

ESSB 6091 purports to allow development to impair instream flows and impact closed water bodies in WRIA 14 through compliance with Section 203. Section 203, in turn, applies to specific WRIAs that lack adopted watershed plans under RCW Ch. 90.82. These WRIAs (12-15) cover most of Squaxin's U&A. For Section 203 WRIAs, Ecology must prepare and adopt watershed restoration and enhancement plans ("plans") by June 30, 2021. These plans must contain, among other things, actions and projects needed to offset impacts on instream flows from permit-exempt wells. That deadline is less than three years away.

As noted, there is no adopted watershed plan for WRIA 14, that effort having failed in 2006. The unadopted plans identify basic data gaps that include:

- "Much more data must be collected before we can really quantify water availability and understand how pumping from WRIA 14's aquifers will affect streamflows and habitat." (p. 5)
- "However, no single database currently exists where planners can access monitoring data from a variety of sources. . . . The Planning Unit recommends that Mason County, Thurston County, and the State of Washington (Departments of Health and Ecology) support a comprehensive water-resource monitoring program for WRIA 14. This program will address data gaps in the areas of water quality and water quantity To facilitate the first task, the program should be organized by subbasin -- that is, the drainage areas for major creeks and for Pickering Passage/Case Inlet and Chapman Cove Creeks should include, but not be limited to, Sherwood, Malaney, Deer, Cranberry, Johns, Goldsborough, Mill, Skookum, Kennedy, Schneider, and Perry." (p. 9 & n. 1)
- "Specific data-gathering and analysis should include: . . .
 - Developing science-based sub-basin plans that specify management strategies for protecting and restoring natural flow regimes.
 - Developing a detailed current and historical water budget that accounts for precipitation, evapotranspiration, groundwater recharge, aquifer storage, creek flows, nearshore discharge, pumping, and surface water diversions. In addition, historic trends should be identified in these parameters. Note that streamflow analyses should account for both the runoff component, which originates from precipitation, and the baseflow, which is fed by groundwater.
 - Assessing the impact of changes in streamflow on physical habitat and channel geomorphology; use information on historical climate trends, hydrostratigraphy, fish production, land use, and forestry practices to expand the analysis." (p. 11)
- "The Planning Unit recommends that Mason County, Thurston County, and the City of Shelton coordinate closely with the Planning Unit to develop and implement comprehensive water conservation plans for all water users These plans should also specify conservation measures that should be implemented before a municipality can exercise inchoate rights in closed basins." (p. 15)
- "The Planning Unit recommends that Mason and Thurston Counties and the City of Shelton estimate the anticipated demand for water and then reconcile discrepancies between water demand and availability, using a process consistent with GMA. The water-demand estimates should be based on land use designations, as well as on population projections and allocations in the comprehensive plans." (p. 20)

Again, the nonexistence of Section 203 plans starkly contrasts with approved watersheds plans for the Section 202 WRIAs, and requires different treatment for Section 203 WRIAs. In WRIA 14 and the other Section 203 WRIAs, the reality is that specific data must be collected and analyzed as a precursor to drafting meaningful watershed plans with scientifically-supported restoration and mitigation projects. The first funding cycle in a short three-year turnaround is certainly not the time to withhold funding to fill critical gaps in data and analyses in these watersheds.

II. Ecology's Interim Funding Guidelines Inappropriately Favor Shovel-Ready Projects.

As shown in the bullets below, Ecology's Interim Guidelines improperly favor shovel-ready projects to the near or complete exclusion of funding for data gathering and analysis that leads to shovel-ready projects:

- "Water right studies, assessments, and valuations, will not be eligible for funding in the 2018-2019 grant cycle." (p. 7, emphasis in original)
- The definitions exclude data collection and analyses. "Eligible projects" are defined as: (1) "Water projects category", which includes water acquisition, water storage and altered water management or infrastructure; and (2) "non-water projects category", which is riparian and fish habitat improvement. (p. 6)
- Applicants must "illustrate that the project is ready to go", and document that it has completed environmental review, obtained or applied for permits, and completed easements, property owner agreements or land acquisition. (pp. 12-13)
- While Ecology's guidance acknowledges that projects can be phased, it improperly limits phased projects to "large, expensive, or complex projects" particularly when "each phase can be shown to provide streamflow/fish benefits." (p. 13)
- Ecology's ranking process improperly weights shovel-ready projects by, among other things, granting higher scores to projects that are "permanen[t]", have a "clear linkage" between flow conditions and negative impacts on instream resources, and have designs and permits. (pp. 14-16).

Finally, the Tribe cautions Ecology against heavily weighting projects in and near waters that contain ESA-listed fish. (pp. 14-15) ESSB 6091 does not provide authority for such preference.

III. Ecology's Interim Guidelines are Inconsistent with ESSB 6091.

For the following reasons, the Interim Guidelines' preference for shovel-ready projects conflicts with the language and intent of ESSB 6091. ESSB 6091 directs Ecology to implement a program that restores and enhances streamflows. Section 304. First, as described above, in many cases data collection and analyses are needed to develop the scientifically-supported mitigation actions and projects that are required in the plans. Section 203(3). Without these plans, Ecology cannot carry out its overall mandate of implementing a

program that restores and enhances streamflows to levels necessary to support healthy salmon populations. See Section 203, Section 304.

Second, the Legislature in ESSB 6091's bond funding provision clearly intended that Ecology would fund actions and projects that include data collection, assessments, and planning. It directed Ecology's grant money to the watershed restoration and enhancement bond account created in Section 208. Section 208(2) expressly anticipates and authorizes Ecology to fund data collection and assessments in advance of shovel-ready projects:

Expenditures from the watershed restoration and enhancement bond account may be used to assess, plan, and develop projects that include acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure, which includes, but is not limited to, projects such as floodplain restoration, off-channel storage, and aquifer recharge, or other actions designed to provide access to new water supplies with priority given to projects in watersheds developing plans as directed by sections 202 and 203 of this act and watersheds participating in the pilot project in section 204 of this act. (Emphasis added.)

Third, the mandatory components of and requisite Ecology findings for Section 203 watershed plans are unattainable without critical data such as: (1) the amount of water needed to restore depleted streamflows; (2) the amount needed to offset permit-exempt wells; (2) when and where that water is needed; and (3) inventories and assessments of sources of that water, including water rights that may be acquired and reclaimed water. See Section 203(b).

To the extent that the interim funding guidance is a rule, it exceeds Ecology's statutory authority, was adopted without compliance with statutory rule-making procedures, and is arbitrary and capricious. See RCW 34.05.570(2)(c).

To conclude, the law does not support Ecology in this first, critical funding cycle discriminating against projects involving data collection, assessment and/or analyses that will inform as to shovel-ready projects. This information is in many, if not most cases, a prerequisite to obtaining meaningful, scientifically supported watershed restoration and enhancement plans for Section 203 watersheds and thus to carrying out the Legislature's mandates in ESSB 6091.

Response: This comment is regarding the first round of grants (Fiscal Year 2019) issued based on interim guidance. This is outside the scope of this rule, which cannot apply retroactively to funding decisions already made.

Suggested Considerations for Future Funding Guidelines

56. Puget Sound Partnership

ECY could encourage or require that applicants coordinate with the relevant Local Integrating Organization (Puget Sound only) and/or Lead Entity to ensure consistency with local priorities.

ECY could encourage or require that applicants include in their project submittal a discussion of how the project is consistent with the relevant Local Integrating Organization ecosystem recovery plan (Puget Sound only) and/or regional and watershed salmon recovery plan.

Response: Thank you.

Other

57. Squaxin Island Tribe

For the above reasons, Squaxin asks Ecology to redraft its rules to correct these deficiencies. The Tribe stands willing to assist. As currently drafted, however, the rule exceeds Ecology's statutory authority and is arbitrary and capricious. See RCW 34.05.570(2)(c).

Response: Thank you for your comment. Ecology has made changes to the rule in response to the comments received. We believe the rule does not exceed our statutory authority and is neither arbitrary nor capricious.

Appendix A: Comment Index

Amy Trainer	8, 9, 10, 28	Squaxin Island Tribe	4, 5, 6, 11, 13, 14, 25, 26, 29, 33
Lummi Nation	12, 15, 17, 21, 28	Stevens County	16, 22
Muckleshoot Indian Tribe Fisheries	7, 11, 12, 18, 19, 20	Sumner, City of	6
Puget Sound Partnership	15, 33	Tulalip Tribes ..	9, 11, 13, 14, 18, 20, 21, 28
RE Sources for Sustainable Communities	17, 19, 22	Vadas, Robert Jr.	10
Seattle Public Utilities	12, 13, 14, 17, 18, 20, 22	Washington Water Trust	4, 23, 24