



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for
Environmental Law & Policy

March 18, 2005

Steve Hirschey
Department of Ecology
3190 160th Ave S.E.
Bellevue, WA 98008

BY EMAIL AND U.S. MAIL

RE: CELP comments to draft new rule, Ch. 173-505 WAC, Stillaguamish River Basin, Water Resources Inventory Area (WRIA 5)

Dear Steve:

The Center for Environmental Law and Policy (CELP) provides the following comments to the proposed draft rule, Ch. 173-505 WAC for WRIA 5.

WAC 173-505-030 Definitions.

“Permit-exempt withdrawals” or **“permit exemption”**: should include language that acknowledges these withdrawals are subject to all applicable law, not just the ground water code.

“Public water system” is defined at RCW 70.119.020(8) and 90.03.015, not RCW 43.20.260.

“Timely and reasonable manner”: We question whether Ecology has authority to define timely and reasonable. In any event, we believe the State Department of Health and/or local jurisdictions are better positioned to define timely and reasonable.

The Legislature has made clear that public water supply is the preferred option for water supply. With the passage of HB 1338, public water suppliers now have a “duty to serve” residential users. Reliance on exempt wells for domestic water supply should be the last option utilized. If Ecology retains this definition, the definition should embody this preference. It should also include encourage satellite management of smaller water supply systems as a preferred alternative to exempt wells, consistent with stated policies and requirements in Ch. 70.119A RCW.

The 120-day and 500-foot definitions appear to be arbitrary and not entirely consistent with other state law (see, e.g., Ch. 70.116 RCW and Ch. 70.119A RCW).

2400 North 45th Street, Suite 101 | Seattle WA 98103 | 206.223.8454 | fax 206.223.8464 | www.celp.org

BOARD OF DIRECTORS: Melissa S. Arias, Dianne D’Alessandro, Barbara Floyd, Joan Foley, Craighton Goepppele, Barry Goldstein, Kyle Kovalik, Nancy Rust, Roger van Gelder, Sims Weymuller, Francis Wood

Additionally, the term “purveyor” is undefined and should be replaced with “public water system” as defined in RCW 90.03.015.

WAC 173-505-080 Future stock watering.

Because it is unclear which specific surface waters are reserved, and in light of the fact that certain surface waters are “closed” to further appropriations under WAC 173-505-070, this proposed reservation is not legally justifiable. Ecology provides no rationale or justification for allowing this reservation for all surface waters in the Stillaguamish Basin.

It is unclear whether the two acre-foot per year reservation is additive, i.e., whether every year an additional two acre-feet per year is reserved, so that in 10 years, a total of 20 acre-feet is determined to be available for use under this reservation.

In the absence of a requirement that users of this reservation meter and report their water use, there is no reasonable means by which Ecology can track this proposed water use and ensure the proposed reservations are not exceeded. Nor will Ecology be able to ensure compliance with this section absent requiring metering and reporting of water use under this reservation. CELP recommends this entire section be stricken and that stock water uses go through the permit system and receive water if Ecology determines it is available pursuant to applicable law.

WAC 173-505-090 Reservation of permit-exempt ground water for future domestic uses.

-Generally, CELP does not believe that Ecology has met its burden of proving future growth overrides the potential for negative impacts to instream resources. Case law has established the “overriding considerations of the public interest” (OCPI) exception found in RCW 90.54.020 should be narrowly construed and applied only when the overriding public interest impinges on a public right. *See, Postema v. PCHB*, 142 Wn.2d 68, 83 (2000); and 23 Washington Practice section 8.91. Future growth is not an emergency situation that warrants application of this limited exception. Future growth should, rather, be addressed by progressive planning that takes into consideration the current status of instream resources in the Stillaguamish Basin.

-The IFIM studies upon which the proposed reservation is based appear to have relied on historical hydrograph data that does not take into account future likely effects of climate change, nor the potential impacts likely from the use of inchoate water rights. In the face of such uncertainty, Ecology should have taken a more conservative approach to addressing future needs, such as requiring future use to be mitigated. Indeed, Ecology’s *Guidance on Setting Instream Flows and Allocating Water for Future Out-of-Stream Uses* (September 2004) acknowledges the extreme nature of relying on OCPI to justify a reservation for future use by recommending avoiding, minimizing and mitigating the harm caused by such withdrawals.

There are several recommendations in this *Guidance* for minimizing impacts that were not included in the proposed amendments to Ch. 173-503 WAC, but that should be added. The most critical among them is **requiring** (rather than reserving the right to require) metering of future withdrawals accessing the reservation. Under state law, new permitted water allocations must be

metered. It is unreasonable and bad public policy not to require metering for new allocations, regardless of whether they are permitted or exempt from permit requirements. It is illogical and inappropriate not to treat the proposed future allocations consistently with statutory metering requirements. It is unjustifiable and indefensible to allow unmetered uses in light of the current status of fish habitat degradation, existing water quality violations, and presence of ESA-listed fish. If Ecology determines not to require metering as part of the proposed amendments, it should assume a higher use per day per household and deduct a greater amount from the reservation per withdrawal.

Other potential opportunities for minimizing impacts, as indicated in the *Guidance*, should be included in the proposed rule amendments. For example, requiring hook-ups to public water supply if it becomes reasonable and timely in the future, and require decommissioning of wells; requiring deeper wells to be drilled when there is evidence using deeper aquifers would minimize impacts to hydraulically connected surface water; and acquiring and transfer water rights for instream purposes to offset effects of other uses.

-CELP supports the requirement in (2)(f) requiring connection to a public water system when water becomes available. However, we recommend the rule require decommissioning of exempt wells upon connection to ensure compliance with this subsection.

-The statement in (6) that Ecology “may limit or restrict the further use of the reservation” if county land use decisions are inconsistent with this chapter appears to conflict with the requirement in (2)(d)(i) that an ordinance or other action is established by a city or county that includes elements in subsection (2). Ecology “**must**” limit or restrict the reservation in the absence of county compliance.

WAC 173-505-110 Future Permitting Actions.

-(1)(b) allows for an undefined mitigation plan. Ecology should instead require mitigation or withdrawals that result in no net loss to the water source. CELP disagrees with the adaptive management approach (if monitoring shows the plan to be ineffective, use is subject to instream flows) to water use. It is unreasonable, bad public policy, and contrary to protecting public health to assume water right holders for domestic supply will interrupt or curtail use after they have become reliant on it.

WAC 173-505-120, and -130

CELP strongly supports these proposed amendments. However, unfortunately, these are hollow policy statements in the face of Ecology’s limited budget resources to support an effective compliance program and the recommended alternatives to mitigate future withdrawals. Ecology should support proposals to decrease reliance on General Funds for its Water Resources Program, and seek a system that makes the Water Resources Program self-financing and provides financial resources necessary to fund effective enforcement and effective mitigation. See CELP’s new report, *Water Is Worth It: Making the case for a water management fee*, which proposes such a system. www.celp.org/waterisworthit.html.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Allston", written over a light gray rectangular background.

Karen Allston
Executive Director