

March 18, 2005

Dan Swenson
Geoff Tallent
Department of Ecology – NWRO
3190 160th Ave. SE
Bellevue, WA 98008

RE: CELP comments to draft rule amendments to Ch. 173-503 WAC, Lower and Upper Skagit Water Resources Inventory Area (WRIA) 3 and 4

Dear Dan and Geoff:

The Center for Environmental Law and Policy (CELP) provides the following comments to the proposed draft rule amendments to Ch. 173-503 WAC for WRIAs 3 and 4.

We commend you for your leadership in moving forward with rule amendments in the Skagit River basins that, to a great extent, close tributaries to the Skagit River because water is not available for appropriation and must be reserved to protect fish and habitat and other instream needs. Our comments are as follows:

WAC 173-503-025 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.

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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).

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

WAC 173-503-060 Future Permitting Actions.

-(2)(c) and (d) allows for a mitigation plan that does not impair senior water rights, and ground water withdrawals that do not impair senior water rights, respectively. Ecology should instead require mitigation or withdrawals that result in no net loss to the water source in order to be consistent with federal law governing fish species listed under the Endangered Species Act, and Washington’s State’s salmon recovery responsibilities. The Skagit River mainstem provides critical habitat for ESA-listed Chinook. However, diversions and withdrawals from tributaries ultimately impact flows in the mainstem and should either be avoided through application of a “no net loss” policy, or accounted for by deduction from the proposed reservation.

-(3) allows permits to be issued subject to avoidance of impairment to established instream flows. 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. Accordingly, permits for domestic supply should not be issued for the subbasins identified in this section. The sentence, “This option is not available for projects requiring a long-term, reliable and predictable water supply” should be strengthened to clarify no permits will be issued for domestic supply.

WAC 173-503-073 Domestic ground water reservation.

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 Skagit basin.

Ecology acknowledges that this reservation will result in a loss of fish habitat, estimated at a maximum of 2% of habitat during low-flow conditions, but concludes this loss will have “little impact on the fish population.” CELP is disappointed and concerned that this reservation and associated impacts to critical fish habitat departs from stated intentions to set and achieve instream flows. Additionally, the associated impacts of this proposed reservation contradict the state’s legal obligations to protect and restore habitat necessary for the recovery of ESA-listed fish species.

The IFIM studies upon which the proposed reservation is based 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. Although Ecology justifies a predicted habitat loss of up to 2%, the reality is the assumptions built into the methodologies relied upon to derive this 2% assumption could be wrong, and the actual impacts from these proposed withdrawals could have been underestimated.¹ 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. Ecology and the Department of Fish and Wildlife have acknowledged in the Draft Skagit Rule Amendment Background document that water is not available in certain Skagit subbasins. The Skagit River basin has been over-appropriated and such over-appropriation has resulted in low flow conditions harmful to fish and other instream needs. 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.

WAC 173-503-075 Stock water reservation.

¹The explanation and justification of the consequences of 2% habitat loss as described in the "Draft Skagit Rule Amendment Background" document, prepared in support of this proposed amendment, is overly generalized and not supported by references to actual studies or literature. For example, the statement that "Ecology biologists have found that a 1% - 2% loss in habitat closely corresponds with a 1% - 2% loss in steam [sic] flow during low-flow conditions..." is not cited, further explained or justified. The assumptions upon which the IFIM/PHABSIM studies referred to in this document are not provided or explained. In fact, it is unclear whether these IFIM studies were done in the Skagit basin, or elsewhere in Washington and extrapolated to the Skagit basin.

In light of the acknowledged low flow conditions in the Skagit basin, and the fact that water is not available for year-round appropriations, this proposed reservation is not legally justifiable. Ecology provides no rationale or justification for allowing 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 150,000 gpd reservation is not exceeded. CELP recommends this reservation be stricken.

WAC 173-503-090, -100 and -110

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

Thank you for your consideration of these comments.

Sincerely,

Karen Allston
Executive Director