

CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for  
**Environmental Law & Policy**

## **CELP Rural Water Supply Guidance Document Comments March 31, 2015**

### **Introduction**

As a member of the Rural Water Supply Workgroup, the Center for Environmental Law & Policy actively participated in the committee meetings and provided robust comments throughout the process.<sup>1</sup> CELP's seat on this committee was to represent the environmental community, which comprises a significant number of Washington residents, and whose voice is critical in this process to ensure Ecology fulfills its role to properly manage the waters of the state. As Washington's water resource manager, Ecology must respect and enforce existing laws and regulations that create and protect instream flows. However, after reading the February 2015 report entitled "Finding Rural Domestic Water Solutions While Protecting Instream Resources," (hereafter Rural Water Supply or RWS report) it is clear that these duties have become subordinate to the agency's near obsession to allocate water for out-of-stream uses.

This letter summarizes the problems found in the RWS report, but the details of the report only serve to mask the greater foundational problem. The report, and by extension Ecology's Water Resources Program, create and formalize a mandate that is false. That is, that Ecology's mission is to "meet the present and future needs of people and the natural environment."

The Department of Ecology is not tasked with meeting the future water needs of people. Indeed, Ecology Director Maia Bellon expressed this very principle in her January 2015 response to a petition to repeal the Skagit River rule, which asserted that Ecology has a mandate to provide water for out-of-stream uses. Director Bellon responded:

Ecology does not agree that RCW 90.54.050(1) **requires** Ecology to reserve water for future out-of-stream uses. The statute provides Ecology with discretion as to whether reservations of water should be created through rulemaking in basins where water is available for future appropriations. Further, we also disagree with the petition's interpretation of RCW 90.54.020(5). This provision of the Water Resources Act directs Ecology to manage water resources in a way

---

<sup>1</sup> CELP's participation included distribution of the attached Center for Environmental Law & Policy's "Proposed Water Management Strategies to Protect Instream Flows and Provide Water for Rural Development (June 2014), and submittal of a redline edit of the November 2014 version of the Rural Water Supply report. CELP sent multiple staff and volunteers to every meeting of the Rural Water Supply work group.

that will ensure the water is preserved and protected in potable condition, but does not require that water be allocated for domestic use.<sup>2</sup>

Ecology is tasked with managing water resources, including issuing water right permits that adhere to Water Code requirements and enforcing the Water Code to ensure the integrity of existing water rights. If a farmer applies for a new water right to irrigate crops and Ecology determines water is not available to meet this proposed use, Ecology must deny the permit. Similarly, if a municipality applies for a new right, it is not Ecology's mandate to fulfill this need. Instead, it is up to the farmer or municipality to find a way to either reduce their proposed use or mitigate for its impact on existing water rights in order to not violate the Water Code.

Ecology's mandate is not to find loopholes or broaden narrow exceptions to the Water Code in order to meet the projected water needs of cities, industries, or individuals. Ecology's historically inconsistent management of water resources is not an excuse to now remove protections for certain existing rights in order to find an easy fix to the problem. This mentality will inevitably lead to further conflict in the future and fails to address the underlying problem: there is not now, and never will be, enough water to meet every demand in every watershed. The solution is not found in taking ever more water from instream flows, but from meaningful conservation, real in-kind mitigation and, when necessary, simply saying that no water is available. Unfortunately this report fails to recommend any of these real-life solutions. CELP's comments address each section of the report.

### **Executive Summary**

Ecology's statement that "since the Water Resources Act of 1971...Ecology has attempted to development water management frameworks that provide reliable future water supplies for community needs while protecting instream flows" misstates what Ecology has actually done during that time and provides a false foundation for this document. In fact, Ecology has not met the mandate of the Water Resources Act, which is to ensure that "instream resources and values must be preserved and protected so that future generations can continue to enjoy them."<sup>3</sup> The proof found for this statement is contained the Supreme Court's Opinion in *Swinomish Indian Tribal Community v. Ecology*. This opinion does much more than tell Ecology that its "balancing" of out-of-stream and instream uses is inconsistent with the law. One of the holdings of *Swinomish* is that Ecology **cannot** balance water for future population growth against keeping water instream, because doing so will always lead to Ecology favoring out-of-stream uses.<sup>4</sup> The

---

<sup>2</sup> Letter, Maia Bellon, Director of Department of Ecology, to Bill Clarke, Attorney at Law, at page 4 (Jan. 15, 2015) (emphasis in original).

<sup>3</sup> RCW 90.54.010(1)(a).

<sup>4</sup> "There is no question that continuing population growth is a certainty and limited water availability is a certainty. Under the balancing test, the need for potable water for rural homes is virtually assured of prevailing over environmental values. But the Water Resources Act of 1971, discussed below, explicitly contemplates the value of instream resources for future populations:

purpose of the Water Resources Act is not to validate that out-of-stream uses are necessary, for which many other statutes exist, but to instead create protections, meaningful protections, for **instream uses**. Therefore, Ecology's premise in the first sentence of this report skews the results to justify methods to take water from instream flows for future out-of-stream uses. This is contrary to *Swinomish* and the Water Resources Act.

As a result of this foundational problem, there are discussions of possible solutions that will not meet the requirements of the Water Resources Act. Most notably is the inclusion of out-of-kind mitigation, or as the report calls it; "Broaden mitigation options to consider the full hydrologic cycle and benefits to instream resources (i.e., use of low impact development; habitat improvement projects)."<sup>5</sup>

## Background

Ecology takes the position that recent case law protecting instream flows "has increased the difficulty in creating rules that balance the needs of competing uses and users."<sup>6</sup> Again, Ecology improperly frames the problem. "Recent case law" has done nothing more than uphold existing laws and regulations; laws and regulations Ecology is required to implement and enforce. It is not "recent case law" that has made water management more difficult; it is Ecology's lack of proper water management and adherence to the Water Resources Act that created the difficulty. It is this foundational misconception to which CELP again objects. This systemic problem infects the process and therefore the document produced by it. A real solution to the rural water supply problem cannot be attained if Ecology views the problem as one created by courts and not one of its own failure to implement and enforce the Water Code.

## Overview of Stakeholder Feedback Process

This section claims that Ecology drafted the document with the feedback given it by the members of the committee. However, several of the ideas and assertions in the document were not the result of a group consensus. The document presents the illusion of unanimity of the

---

Adequate water supplies are essential to meet the needs of the state's growing population and economy. At the same time *instream resources and values must be preserved and protected so that future generations can continue to enjoy them.*"

*Swinomish*, 178 Wn.2d at 587 (emphasis original).

<sup>5</sup> Rural Water Supply report, p. iii. Low impact development is undefined, but if it means decreased consumptive use of water, then it is not a broadened mitigation option. Rather, it is an existing option to allow new users to obtain a water right that does not impair an existing right. Habitat improvements on the other hand serve only to take water out-of-stream and do not "preserve and protect instream values" and therefore should not be included in this report.

<sup>6</sup> Id. at 1.

group. This is improper. CELP objects to several of the proposals in this document as detailed below.

### **Options Possible Under Existing Statutory Authority**

This section once again fails to consider the option that Ecology must protect existing instream flows from subsequent water users, including permit exempt wells. Ecology is not under a mandate to make sure every rural lot may use groundwater. Ecology is required to protect and preserve instream flows. Ecology cannot interpret or implement existing statutes that contravene legislative intent or court decision. Therefore, existing statutory authority allows Ecology to deny water use if water is not legally available. The next step is then to find in-kind mitigation to offset the impact, or use other available water supply options, including cisterns, trucking water to the site, or hooking up to a public water system. If these options do not exist, it is not Ecology's mandate to ensure that a permit exempt well is the answer.

#### **Continue to establish reserves in instream flow rules**

The document finally admits to the real problem in this section when it concludes that water in certain basins is not sufficient to protect and preserve instream flows and allow unmitigated, unmonitored exempt well use. Establishing reserves, which even if available are very limited, does not solve the foundational problem of inadequate water supply. Reserves do nothing more than delay resolution of the matter to future generations (or even this same committee in twenty years).

#### **Invoke OCPI and establish reserves for water**

This option is not available under existing statutory authority. That this option is on the table reflects Ecology's misplaced conception that existing instream flows may be impaired at Ecology's discretion. However, the *Swinomish* decision unequivocally put this option to rest. On this issue there was consensus among the work group participants: utilizing OCPI is not a legal or preferred option.

#### **Using maximum net benefits analysis**

This is not a possible option under existing statutory authority. This section correctly notes that the maximum net benefits analysis is only available when water is available. Therefore, this approach will not solve the problem.

#### **Establish mitigation (water) banks associated with new instream flow rules**

Allowing for the creation of water banks only via rulemaking limits their reach and effectiveness. Ecology should promote water banks throughout the state and not just in the increasingly rare rulemaking setting.

Additionally, the document takes a defeatist and pessimistic attitude toward water banks. The document makes an unsubstantiated assertion that lack of available senior water rights for

deposit in water banks leaves “significant portions” of watersheds without mitigation options. If this is a problem then the document should provide the data showing examples of it.

Further, Ecology injects its own opinion into this section, setting a tone that water banks are untenable and that “flexible mitigation” options, i.e. out-of-kind mitigation options, are better. Next Ecology opines, “Creating a watershed-wide requirement for all new uses to be mitigated with water-for-water mitigation, in-time and in-place, as a condition in all new instream flow rules, would cause significant challenges.”<sup>7</sup> Ecology states this as the problem to allowing for unfettered rural development. However, this statement merely describes the facts and law as they now exist. Ensuring that instream flows are not impaired by new permit exempt wells is not a significant challenge; it is the law. It is new rural development that must adapt to the existing water availability, not instream flows.

The creation and implementation of water banks cannot be dismissed simply because doing so would be a challenge. Ecology must not make general negative assumptions regarding the effectiveness of water banks without sufficient data. Otherwise this section reads as an Ecology opinion that creating water banks is too hard and therefore not a viable option. In fact, water transfers and water banks will be the largest source of mitigation for new development.

#### **Require the use of cisterns or other storage devices to satisfy closure periods**

Yet again the RWS report appears to give up on a viable and important mitigation option before it is even analyzed. The use of cisterns during low-flow periods, or year-round using trucked in water to fill the cistern, are options that fit within existing statutory and case law regarding instream flow protection. As such, this is an option that should be fully explored before discarding it as too difficult to determine the hydrologic variability or enforcement options. Once again Ecology taints a mitigation option that it disfavors with its own unsubstantiated opinion, thereby making it seem impossible.

The potential problems listed for cisterns also exist for permit exempt wells. Both cisterns and exempt wells create enforcement problems for Ecology and both would require the Department of Health to play a role in determining safe potable water supplies. Just because enforcement is a challenge and Health needs to be involved are not necessarily “cons”. No solution will be perfect, yet Ecology continues to promote taking water from instream flows rather than finding viable mitigation options.

#### **Use conservation to make water available for new users**

Water conservation plans are necessary not only for finding “new” sources of water, but also for the efficient management of Washington’s water resources, which is mandated by law. Ecology should promote water conservation at every opportunity. The inefficient and unsupervised use of much of Washington’s water results in waste, which is illegal. It is completely unknown how much water might be freed up as a result of water conservation methods. However, even if the amount is relatively modest, this is a viable option for Ecology to pursue and one for which it

---

<sup>7</sup> Id. at 6.

does have a clear mandate (unlike its self-appointed directive to find water for rural development).

**Consider the full hydrologic cycle and benefits to instream resources to broaden mitigation options**

The proposal to adopt out-of-kind mitigation regimes violates instream flow doctrine. There is no existing authority that authorizes Ecology to exchange water for land use activities or habitat restoration projects. Instream flows must be preserved and protected.<sup>8</sup> Trading water set for instream flows for a variety of “low impact” land use actions does not preserve or protect instream flows. Instream flows are water rights and as such are given the basic protections afforded under the prior appropriation doctrine; namely that subsequent water use must be conditioned to protect existing rights.

Some of the examples of land uses cited in the document are measures that rightfully should already be happening and would provide illusory protection for flows. These “include land development practices (specific zoning densities, forest practices), Low Impact Development (LID), habitat restoration, and stormwater Best Management Practices tailored to a specific watershed.”<sup>9</sup> These types of actions are exactly what are needed to “preserve and protect” instream flows. To suggest these types of land uses should be used to justify taking water from an instream flow right turns Ecology’s duty on its head. Yet, because Ecology improperly framed the foundational issue (it must get water supply to rural development) this out-of-kind mitigation appears in the document as an option. Out-of-kind mitigation is not an option.

**Rely on local governments through better integration of land use planning**

This section seems an odd inclusion to this document. Local governments have a duty to ensure new building permit or subdivision applications have adequate legal and physical water supply prior to approval, but local governments are not authorized to find or create “new” water supplies. This issue is under discussion in the Water Availability for Counties workgroup.

However, this section does highlight an area in which Ecology can improve its water management capability and therefore determine where water is or may be available. Ecology should develop hydrologic data and disseminate it to local governments and the public. Ecology must increase its groundwater mapping, hydrogeologic data, and GIS capability in order to facilitate physical water availability determinations and improve and coordinate its water resource database system to facilitate legal water availability determinations.

---

<sup>8</sup> Several statutes and regulations require Ecology to protect instream flows and condition subsequent uses on them. These include the Water Resources Act, RCW 90.54.020(3)(a), the Minimum Water Flows and Levels Act, RCW Ch. 90.22, and RCW 90.03.247 and 90.03.345.

<sup>9</sup> Id. at 10.

### **Summary of options relying on existing authorities**

The summary of the above options fails to consider that watersheds could utilize several of the options in order to find “new” water for rural development while still protecting instream flows. No single option is a magic bullet that will solve this issue. A combination of water banking, cisterns, and conservation would create sustainable long-term water supply while protecting instream flows. Amending rules or establishing more OCPI reserves are illusory solutions because they do not protect and preserve instream flows. Ecology must stop thinking that it can “balance” instream flows versus new rural water use. This is a fictional premise. Ecology cannot balance these interests. What Ecology must do is protect instream flows. If a source of water for rural development that does protect flows is available, then Ecology may work within its authority to facilitate development of that water.

### **Options Possible Under New Statutory Authority**

#### **Provide clear authority for Ecology to use OCPI or similar tool**

CELP cannot support this option. First, the Supreme Court ruled on this issue in *Swinomish* and legislative action to overturn that decision raises separation of powers issues. Second, changing the use of OCPI from a narrow exception to a broad water reallocation tool will negatively impact instream flows throughout the state. It would create an unrestricted pool of water for all future domestic uses at the expense of ever dwindling instream flows. The likely result will be future legislation attempting to undo this in order to protect instream flows. It must be remembered that laws protecting instream flows were enacted because the public realized that water was not sufficient for fish passage and habitat. These problems still exist. Instream flows rules have attempted to halt the decline of flows and habitat, but not restored rivers. Any new legislation that takes water from instream flows will only create a greater problem.

#### **Broaden Mitigation Options**

This presentation in this section is flawed because it groups two options that should be treated separately. Mitigation banks are developing throughout the state and are a viable option in most watersheds. CELP agrees that legislative direction regarding structure and function of water banks would be helpful. The report is deficient for failing to explore specific recommendations.

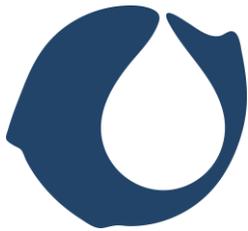
However, as stated above, CELP will not agree to any use of out-of-kind mitigation. Likewise it is not viable to establish an out-of-kind mitigation system whereby credits for “ecosystem benefits” are exchanged for water. One problem raised by this approach inheres in the prior appropriation system. Instream flows are not the only water right at issue. How would a new water right, granted in exchange for land use conditions, fit within the prior appropriation doctrine? Would the new water right be conditioned on existing senior rights? Out-of-kind mitigation would only result in less water for instream flows. No amount of large woody debris can replace water necessary for fish.

### **Assign domestic water use a statutory priority**

This option would solve only one part of Ecology's dilemma. If domestic uses were given priority over instream flows, rural development would occur unabated. Instream flows would certainly decline as a result. Once again, instream flows are not the only water right at issue should Ecology pursue this option. Additionally, this could spur an increase in the use of permit exempt wells, as having the priority is an incentive. Accelerated proliferation of exempt wells, which are mostly unmonitored, unmetered, and generally unknown to Ecology, is not a desirable outcome.

### **Conclusion**

CELP appreciates our inclusion in this process. However, it is clear that CELP's concerns were not acknowledged in the Rural Water Supply report. The improper framing of the issue led to a series of false assumptions about the problem, which in turn, generated a document focused more on obtaining water for rural development than for protecting instream flows. Ecology has an existing statutory duty to preserve and protect instream flows. This is Ecology's first priority in this instance. It is not for Ecology to balance instream flows versus new out of stream uses. It is only through in-kind mitigation that Ecology can hope to achieve both goals. However, Ecology cannot sacrifice its duty to protect instream flows in order to do so. Any option that does so must be rejected.



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for  
**Environmental Law & Policy**

**Proposed Water Management Strategies  
To Protect Instream Flows and Provide Water for Rural Development  
June 2014**

Water scarcity in Washington is not a new story. As population and economy expand, the problems of declining instream flows, depleted aquifers, and increased use of unregulated wells have become more urgent. To a large extent, the state has either ignored these problems, or refused to address them in a sustainable manner. As a result, recent court decisions have placed limitations on state and local land use and water resource management decisions, and required governments to directly address resource issues. (See CELP Paper, “No Quick Fixes to Competing Demands for Water Resources” (June 2014)).

The following suggestions set forth a framework for sustainable water management, and are proposed for the Department of Ecology’s “Rural Water Supply Strategies” process.

**A. Instream Flow Strategies.**

**1. Adopt Instream Flows for All Basins.**

Washington’s rivers and streams must be protected to preserve public values and ecological needs. Ecology should move to adopt instream flow regulations for all watersheds in the state, a goal first established in 1969.

**2. Provide for Interim Instream Flow and Aquifer Protection Through Closures**

In basins where instream flow rules have not yet been adopted, and where threatened species that rely on water resources are located, water quality is impaired, groundwater systems are in decline, the basin is fully appropriated, tribal water rights are unfulfilled, or other management issues exist, Ecology should issue blanket closures to all new water withdrawals until an instream flow rule can be adopted.

**3. Amend Invalid Rules.**

The Supreme Court’s Swinomish decision establishes that several recently adopted rules are inconsistent with that and other court precedents. Ecology should take action to amend these rules to conform to the court’s rulings.

**B. Permit Exempt Well Revisions.**

**1. Require Water Budget Neutrality.**

In any basin where water is inadequate to satisfy all demands, new exempt wells must be fully mitigated to ensure no impacts to surface and ground waters or other water users.

**2. Require Notice to Neighbors and Stakeholders.**

Require public notice of new permit exempt wells, as well as direct notice to individual senior right holders and to nearby tribes. New permit exempt wells effectively jump ahead of senior users,

including individuals, nearby tribes, and the public's interest in water quality and ecologically balanced flows. Property rights and fundamental interests are at stake and require due process protection.

### **3. Regulate permit exempt wells.**

Permit exempt wells are "off the grid," and thus subject to abuse through overpumping or unauthorized uses. Amend RCW 90.44.050 to allow Ecology greater regulatory authority over new and existing permit exempt wells to protect senior water rights, including tribal water rights, and environmental flows in rivers and streams. Regulatory options include reduced pumping limits (for example, limiting exempt withdrawals to less than 5000 gpd ("dimmer switch")), metering requirements, and targeted limits on approved uses (for example, prohibit use of stockwater for industrial uses or dust control; prohibit outdoor irrigation of lawns/gardens).

### **4. Prohibit exempt wells in public water system service areas.**

New permit exempt wells should not be allowed in the service area of a public water system as established by its approved water system plan. Exempt wells that meet water budget neutral standards may be permitted as an interim source of supply, provided that they are required to connect to the public water system once service becomes available.

## **C. Demand Management Strategies.**

### **1. Require Efficient Use of Water.**

State law prohibits the waste of water, but there is no mechanism to implement this policy. Ecology should, as part of its county guidance development, include specific conservation-oriented requirements for use of permit-exempt wells.

### **2. Promote Reclaimed Water and Greywater.**

Where reclaimed water is currently or potentially available to a public water system, require that its use for all authorized non-potable water purposes (e.g., landscape watering, irrigation) be included within the water system plan of a public water system, with a schedule and timeline for development and use. Require subdivision approvals to consider of reclaimed water and greywater as alternative water supplies, and incorporate those alternatives when available. Prioritize state funding for water supply projects that incorporate the use of reclaimed water and greywater.

### **3. Promote Water Reallocation.**

Adopt policies and rules to promote the transfer of existing, valid water rights to new uses. Promote water markets. Ensure that neither basic domestic needs, nor the natural environment, are priced out of water. Proactively evaluate operating water banks in Walla Walla, Kittitas and the Dungeness watersheds and apply lessons learned. To handle demand, prevent fraud, and ensure balanced use of our water resources, establish standards for public and private entities that operate banks.

## **D. Manage Water Resources**

### **1. Require In-Kind Water Mitigation.**

Amend Ecology's policy governing appropriate mitigation for water rights. POL-2035 establishes a preference for the "state's water resources [to] be mitigated in-kind, in-time, and in-place." In practice, that stated preference is insufficient. Ecology has relied on "out of kind mitigation" in several

circumstances, for example, funding habitat restoration projects to compensate for environmental flow depletion caused by new water uses. This type of mitigation lacks a basis in science, making it prone to abuse, and fails to protect the unique values of instream flows.

#### **4. Encourage Public Water Systems.**

The GMA classifies domestic water systems as both urban and rural governmental services. So as long as the domestic water is "delivered at an intensity usually found in rural areas" then piped water can be extended into rural area and resource lands. Expansion of public domestic water systems should be explored to make water use more efficient, while remaining mindful of comprehensive planning goals, preventing sprawl, and preserving rural character.

#### **5. Map and Monitor Groundwater.**

Ecology lacks full understanding of physical water availability around the state. A program should be dedicated to complete assessment and monitoring of the status of groundwater resources. Climate change impacts make this assessment imperative.

#### **6. Connect Local Planning and Water Resources.**

Natural water storage systems, glaciers and snowpack, are diminishing. Engineered solutions (e.g., new dams) are infeasible. We must improve local planning to protect water resources. Counties must revise comprehensive plans and development regulations so that projected growth matches available water supplies—and is planned where that water is located.

#### **7. Require Metering and Reporting.**

Demand management strategies, including conservation and markets, cannot work without water usage data. Nor can enforcement against overuse be implemented without usage data. New technologies have made household-level metering affordable and efficient. All water users in Washington should be required to meter their use and report it. State and local governments should require state of the art automated metering.

#### **8. Fund Water Resources Management.**

Washington lacks the financial ability to manage water resources out of the general fund. Water users should foot a substantial portion of the cost of water resource management. Impose fees on the development of new wells, and license fees for existing rights, and apply those funds to pay for appropriate water management.

For More Information, Please Contact Us:

Center for Environmental Law & Policy  
911 Western Ave., Suite 305, Seattle, WA 98104  
206.829.8366 | [contact@celp.org](mailto:contact@celp.org) | [www.celp.org](http://www.celp.org)