



CLEAN, FLOWING WATERS FOR THE WEST

The Center for
Environmental Law & Policy

July 10, 2009

Ann Wessel
Department of Ecology
P.O. Box 47600
Olympia, WA 98504

Via e-mail to awes461@ecy.wa.gov

Re: WAC Chapter 173-517

Dear Ms. Wessel,

Thank you for the opportunity to provide comments on draft WAC Ch. 173-517, the Qulicene-Snow WRIA rule. These comments are submitted on behalf of the Center for Environmental Law & Policy, a public interest organization dedicated to protecting the freshwater resources of western Washington and the Columbia River basin.

Our comments on the draft rule are set forth below. Each paragraph represents a separate comment on the identified section.

Section 173-517-030 (definitions)

After reviewing several new and amended rules across the state over the past few years, we conclude that it is bad policy and potentially bad from legal standpoint to adopt difference definitions of the same term. We encourage Ecology to adopt definitions for terms used in more than one rule into WAC Ch. 173-500 and define only those terms in individual rules that are pertinent and appear only those rules.

Section 173-517-090 (instream flows)

Ecology and predecessors have already over-appropriated (ie, issued more water rights than water available to satisfy, taking into account environmental and instream needs) several of the streams listed for closure. Human use of the streams listed here clearly takes precedence by virtue of the priority system endorsed in the rule. It therefore seems inappropriate to assert or imply that the flows established in the rule are sufficient to protect and preserve the listed values (e.g., wildlife, fish, scenic, water quality, etc.).

CELP believes it is appropriate, necessary and in the public interest to prioritize instream flows over existing rights. (Didn't the director say six years ago or so that the agency was going to set and meet instream flows adequate to protect instream values around the state?) Further, the rule should include specific provisions to identify streams with problem instream flows and include provisions to restore flows.

If Ecology cannot muster the will and creativity to prioritize instream flows, we suggest the agency at least explicitly acknowledge in the rule that the effort is a failure in meeting instream flow values and goals set forth in statute.

Section 173-517-100 (closures)

As in the comment above, closures do not reverse or address the harm caused by over-allocation of stream systems. The rule should include specific provisions to identify streams with problem instream flows and include provisions to restore flows. The rule should explicitly acknowledge that this provision is a failure in meeting instream flow values and goals set forth in statute.

Water is not available from the Big Quilcene River and Chimacum Creek and these two watersheds should be closed.

Section 173-517-110 (future water use)

This section is confusing. In particular, it appears that exempt groundwater withdrawals may be used in basins with instream flows.

This section sets up several vague and exploitable provisions. Details are lacking. Ecology's water right processing division was deliberately cut by the 2009 Legislature and is losing staff. It is not at all clear that the agency has resources to assess whether a proponent's scientific studies are sufficient, review mitigation plans, determine whether an environmental restoration project is sufficient, and generally enforce the terms of these conditions.

Privately funded and conducted impairment analyses do not protect the public interest or other users. Ecology is essentially forfeiting its statutory duties by transferring this authority to private parties.

Ecology is not authorized to create new exemptions to the water code, particularly concerning rainwater collection systems. Reservation of authority to regulate in the future does not cure this problem.

Section 173-517-120 (exempt well limits)

As noted above, it appears that exempt groundwater withdrawals will be allowed in basins with instream flows, thereby depleting stream flows in the future.

We hate to say it, but it seems possible that Kittitas County is correct in asserting that Ecology lacks authority to limit the quantities of exempt well use. On what basis does the agency believe it has such authority?

Assuming the agency does have authority to limit exempt well use, 500 gpd is not reasonably efficient, based on water usage statistics from municipal water suppliers.

The rule should address reasonable efficiency for all water users in the basin.

How will the agency enforce these provisions, particularly in a difficult budget climate?

Reliance on Jefferson County Code is improperly vague. It is also imprudent, given that local codes may be easily amended and could potentially subvert the intent or application of the rule.

Section 173-517-130 (coastal reserves)

Authorizing exempt wells in coastal areas is not protective of the public interest in preventing sea-water intrusion into aquifers.

How will Ecology enforce these provisions?

Reliance on Jefferson County Code is improperly vague. It is also imprudent, given that local codes may be easily amended and could potentially subvert the intent or application of the rule.

Subsection (d) appears, improperly, to be intended to provide special provisions for specific users.

Section 173-517-140 (Chimacum & Big Quilcene reserves)

Ecology should not create reservations of water for the two subbasins listed here due to endangered species concerns. Reservation of authority to reduce the reserve quantity in the future does not cure this problem.

Section 173-517-150 (reserves)

It is not in the public interest to further deplete already over-appropriated stream systems.

It is potentially a violation of the Endangered Species Act to allow further depletion of some of these streams.

If and when tribal water use increases in the future, how will Ecology regulate to prevent harm to instream resources.

How do these reserves account for future impacts associated with climate change?

The rule should explicitly discuss the extent to which these streams already fail to meet the established flows.

This subsection is complicated, and will be difficult if not impossible to enforce.

The requirement that the local jurisdiction must agree to comply in writing with the rule bodes ill for implementation. Isn't the county required to comply with state law?

Section 173-517-160 (accounting)

Setting aside the problem that reserves should not be allowed in all of the basins, Ecology should deduct the full amount authorized for exempt wells. We surmise this is a "return flow" calculation. Absent modeling and monitoring, there is no basis to assume that septic systems will return uncontaminated water to the system in the assumed quantities.

Section 173-517-180 (metering)

Water use measuring applies to virtually all water users in the basin pursuant to RCW 90.03.360. The rule should so reflect and direct all users to commence metering and reporting data.

Section 173-517-190 (stockwater)

Ecology is not authorized to create a new exemption to the water code requirement that all water diversions require a permit.

This provision is vague. What is a "small amount of water"? Is that not a contextual issue (i.e., related to how much water flows in the source stream?) How is it known how many head of livestock were located on a parcel pursuant to "historic practice"?

This provision is also unenforceable. Who will determine the above questions and whether a water user is in compliance?

Thank you for the opportunity to provide comments.

Yours very truly,



Rachael Paschal Osborn
Executive Director, CELP