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DEPARTMENT OF ECOLOGY

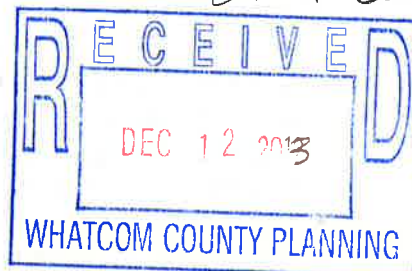
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Ellen Baker

December 5, 2013

Henry Bierlink, Administrator
Bertrand Watershed Improvement District
1796 Front Street
Lynden, WA 98264



RE: Petition to Amend WAC 173-501 – Instream Resources Protection Program – Nooksack Water Resource Inventory Area (WRIA) 1

Dear Mr. Bierlink:

This letter is in response to your October 1, 2013, letter and formal petition for amendment of WAC 173-501, which the Washington State Department of Ecology (Ecology) received from the Bertrand Watershed Improvement District (WID) on October 8, 2013.

In large part due to the increased understanding of ground and surface water since the rule's adoption in 1986, WID is requesting that the rule be amended to change year-round stream closures to seasonal closures throughout the lowland basins of the Nooksack watershed. You maintain that year-round closures limit the implementation of stream flow enhancement projects.

Ecology has carefully considered the concerns raised by your petition. We share your interest in developing innovative water management solutions that could benefit water users, provided there is assurance that protection of instream resources can be maintained. Ecology also understands that since the adoption of the rule there has been an evolution in the understanding of the relationship of the interaction between ground and surface waters.

Although your proposal has merit, Ecology is denying your request to initiate a rule amendment at this time pursuant to RCW 34.05.330. Ecology reviewed data from the gages on Fishtrap, Bertrand, and Dakota Creeks and we have concluded that while instream flows are often met in the winter months, instream flows are not met 100 percent of the time. Therefore, additional technical review is needed before Ecology can initiate any rule amendments to WAC 173-501.

In addition to needing further technical justification for a rule amendment, there are two more factors that contribute to the denial of your petition:

- Ecology's resources for rulemaking are very limited at this time. Our limited staff is currently fully committed to rule development proposals for the Lewis, Grays-Elochoman, and Spokane watersheds, which Ecology has identified as the agency's highest priorities for rulemaking at this time. Additionally, a number of other watershed planning groups have



approached Ecology about starting rulemaking to adopt instream flows in many of the basins in the state where flows are not yet set (flows remain unset in over half of Washington's watersheds). It is an unfortunate reality that Ecology must prioritize its limited staffing and budgetary resources to focus the existing planned high priority rulemaking efforts.

- A key measure to implement the adopted WRIA 1 watershed plan is the Instream Flow Action Plan that directed the planning unit to determine instream flows necessary to meet the needs of local tribes under treaty obligations for fish production. Negotiations to establish a revised instream flow protection program to meet this obligation were put on hold in 2010 for various reasons. More recently, the Lummi Nation and Nooksack Indian Tribe have requested the U.S. government quantify their treaty-reserved water rights in the basin and on their respective reservations. The status of the Tribes' request is not clear at this time.

While Ecology cannot undertake rulemaking at this time, we want to continue working with you to address your concerns. Thus, Ecology commits to working with the Bertrand WID to conduct further surface and ground water analysis. Ecology will use this data to evaluate whether seasonal rather than year-round closures would allow more water management flexibility while maintaining the same level of protection instream. Ecology recommends evaluating a limited number of priority streams for possible seasonal rather than year-round closure, or choosing one stream as a pilot. The existing capital funds grant held by the WID may be used to conduct this analysis. Ecology is also willing to seek additional funds to support these studies. Ecology commits to scheduling a meeting with representatives from the WID by the end of the year to discuss our ideas.

Ecology appreciates the Bertrand WID's active interest in improving water management in the Nooksack Watershed, and while we cannot grant your petition at this time, we are sincere in our commitment to work with you to assess the feasibility of your proposal. Please contact Doug Allen, Bellingham Field Office Manager at (360) 715-5200 to start developing the next steps to take in this matter.

Sincerely,



Maia D. Bellon
Director

cc: Members of the WRIA 1 planning unit
Merle Jefferson, Lummi Nation
Robert Kelly, Nooksack Indian Tribe
Tom Loranger, Water Resources Program Manager
Jacque Klug, Water Resources NWRO Section Manager
Doug Allen, Bellingham Field Office Manager