



WASHINGTON STATE  
DEPARTMENT OF  
ECOLOGY

**Responsiveness Summary  
and  
Concise Explanatory Statement**

**For the adoption of:**

**Chapter 173-503 WAC  
Water Resources Management & Instream Flow Program  
Skagit River Basin Water Resource Inventory Area (WRIA) 3  
and 4**

**Administrative Order # 05-15**

**May 2006**

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As required by the Washington State Administrative Act, Chapter 34.05 RCW.

**RESPONSIVENESS SUMMARY  
AND  
CONCISE EXPLANATORY STATEMENT  
FOR THE ADOPTION OF**

**CHAPTER 173-503 WAC, Water Resources Management Program –  
Skagit River Basin Water Resource Inventory Area (WRIA) 3 and 4**

Administrative Order # 05-15

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May 15, 2006

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## **I. Introduction and Background**

The Water Resources Act of 1971 provides that the quality of the natural environment shall be protected and, where possible enhanced. In addition, perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. (See chapter 90.54 Revised Code of Washington (RCW))

The Washington State Department of Ecology's (Ecology) Water Resources Program (Program) determined that it was necessary to develop an Instream Resource Protection Program (IRPP) setting instream flows for certain streams and tributaries and setting reserved withdrawal amounts from these streams and tributaries for water users within the Skagit River Basin. The Skagit River Basin is named Water Resource Inventory Area (WRIA) 3 and 4 pursuant to chapter 173-500 Washington Administrative Code (WAC).

The purpose of the instream flow rule amendment for WRIA 3 and 4 is to establish a water right for instream flows to satisfy the statutory directive to protect the instream resources of fish, wildlife, water quality, navigation, recreation, scenic, aesthetic and other environmental values. Instream flow and reservation requirements will be conditioned by permit proviso on new water right applications, or applications to change existing water rights that affect sources of water covered by the proposed rule.

The rule-making process has increased awareness that water allocation decisions and the retention of flows instream must be made in the context of a more holistic watershed approach to water management than has historically been the case. Skagit Memoranda of Agreement (MOA) signatories (Skagit Co, Swinomish, Sauk-Suiattle, Upper Skagit tribes, City of Anacortes, Skagit PUD), Ecology and the Washington Department of Fish and Wildlife worked on developing the existing Skagit Instream Flow rule and Ecology has continued to work with these parties on the amendment proposal. Public participation in the rule amendment development process is critical to the successful adoption and implementation of an instream flow rule.

### ***Purpose of this rule***

The purpose of the instream flow rule for WRIA 3 and 4 is to establish a water right for instream flows to satisfy the statutory directive to protect the instream resources of fish, wildlife, water quality, navigation, and recreation, scenic, aesthetic and other environmental values.

### ***Key elements of this rule***

The rule:

- Establishes instream flows to protect aquatic resources, including habitat for threatened and endangered salmonids;
- Establishes a reserve of water to meet new rural domestic and business potable needs;
- Establishes a reserve of ground water to meet new stock watering needs;
- Establishes a reserve to meet agricultural irrigation, commercial and industrial needs;
- Establishes a maximum allocation of water during peak runoff that will provide some water for storage while protecting stream ecological functions; and
- Establishes procedures for future water use permitting, reservation implementation.

### ***Statutory authority for this rule amendment***

Authority for promulgation of the rule amendment resides in a number of statutes as follows:

RCW 43.21A.064(9)  
RCW 43.27A.090(11)  
Chapter 90.22 RCW  
Chapter 90.54 RCW

Department of Ecology  
Water Resources  
Minimum Water Flows & Levels  
Water Resources Act of 1971

The Water Resources Act of 1971 provides that the quality of the natural environment shall be protected and, where possible enhanced. In addition, perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, and aesthetic and other environmental values, and navigational values. The Statute provides that these objectives will be satisfied through rule making. The code also provides the only way to create a water right for instream resource protection is through rule making. (See chapter 90.54 (RCW))

### ***Rule schedule***

The **adoption date** of this rule amendment will be **May 15, 2006**. The effective date will be 31 days after the rule amendment is filed with the code reviser. Therefore, the **effective date** will be **June 16, 2006**.

## **II. Concise Explanatory Statement: Differences between the proposed and final rule**

There are numerous changes from the rule amendment published with the CR 102, and this rule amendment adopted and published with the CR 103. The changes were made in response to comments as well as upon Ecology's initiative. All changes made are for rule amendment clarity to more precisely identify the rule amendment or requirement. The changes made do not change the substance or the intent of the rule.

**173-503-020 Purpose.** The words "as defined in chapter 173-503-040 WAC," were added after "Cultus Mt. Tributaries" as an editorial change for clarity. "Requirements as" after "stock watering" was replaced with "objectives" consistent with RCW 90.22.040.

**173-503-025 Definitions.** In the definition of "commercial/Industrial" water use, a sentence was added that includes irrigation of agricultural products as a purpose per the PCHB Kim decision. The sentence added is "For permit exempt commercial/industrial water ground water uses, it also means irrigation of agricultural products." In addition, "within the business property" was added for clarification of where the commercial/industrial water use will take place.

In the definition of "domestic water use", "only" was added before potable water for clarification. The words "or business" were removed from the definition because business has already been included in the definition for commercial/industrial. The words "maintenance and vegetation" and "incidental livestock" were added to the list of examples of domestic water uses to further clarify the definition.

The definition of "incidental stock water use" was added to allow small scale domestic stock (i.e. family horses) to be counted as domestic water use. This concept was developed so that we can allow small scale stock in tributaries while limiting larger operations to the mainstem areas only. Large stock water uses can now access a specific stock water reservation.

The words "any applicable" were added to the definition of "maximum average consumptive daily use" in front of "return flow recharge credit" and the word "the" was removed from the same location for clarification.

In the definition for "mitigation plan" the words "must be" were added before "approved by the department" to stress that Ecology approval must be gained prior to commencing a mitigation project in accordance with this rule. The remainder of this definition was removed to allow Ecology to approve scientifically sound plans as submitted by a proponent.

The definition of “public water system” replaced “established by RCW 43.20.260” with “defined by RCW 70.119.020(8)” in order to clear up confusion regarding the intended definition of public water as written in the rule amendment. Further, “excluding” was added before “a system with four or fewer” systems clarify that farms with four or fewer connection and single family residences are not considered to be public water systems.

The definition for “retail service area” was added in keeping with the meaning of the rule amendment and in accordance with public comments seeking clarification of sections of the rule amendment in which this term appears.

The definition for “stock water” was added in accordance with comments seeking clarification of relevant areas of the rule amendment as they pertain to current case law and the recent Attorney General Opinion.

In the definition of “withdrawal,” “appropriation or” was replaced with “extraction and” and later “or” regarding surface water diversion was replaced with “and” in order to comport with the definition for consumptive water use.

**173-503-051 Future Stream Closures.** The title was changed to “future stream closures” from “stream closures” in order to clarify that streams will not be immediately closed if they will be closed at all.

In subsection (1) “uses, ...other than the water reserved under WAC 173-503-073, ... from the tributary subbasin management units of ... identified as subject to closure in WAC 173-503-074. Therefore,” was changed to, “existing ... uses, ... is not available for year-round consumptive appropriation in ... basin. However, in order to provide for some limited future uses,” as an editorial change for clarity and readability. “These basins” was replaced with “the subbasin management units of the Skagit River identified in WAC 173-503-074” because the language was merely implicit in its meaning. “And used by permitted or exempt use ... in WAC 173-503-074” was added as an editorial change for clarity and in order to specify that the rule amendment applies to permitted and permit exempt users alike, as is specifically stated in other sections of the rule. Finally, “which will remain open to out-of-stream uses subject to instream flows. If subsequent water use information indicates that the basin can be reopened, the department shall notify the public and local governments of the change in the status of the basin as provided for below.” was added for clarity on the future of the streams if or when a stream is closed.

In subsection (2) “for the region” was replaced with “in each affected county in WRIA 3 and 4.” Was added to clarify that all those affected by a change in the reservation will be notified as to the status of the reservations.

**173-503-052 Future out of stream uses in the Upper Skagit River subbasin management units.** The title was changed to “Future out of stream uses in the Upper Skagit Rive subbasin management units” in order to more clearly state the subject of the section.

In subsection (1) “The department determines that, based on historical and current low flows and uses, there remains limited water available for year-round appropriation from certain tributary subbasins within the Water Resource Inventory Area 4, Upper Skagit Basin. Therefore... these basins that can be used under certain criteria described in WAC 173-503-073. The subbasin management units within the upper Skagit River have been delineated” was replaced by, “In order to allow for some limited future out-of-stream uses while protecting instream resources in the Upper Skagit River subbasin management unit... the Upper Skagit subbasin management unit and important tributaries in this subbasin management unit identified.” This was done in order to make this section more succinct.

Subsection (2) was changed from a separate subsection to a continuation of subsection (1). The words “are cumulatively” were added before “limited to a maximum average consumptive daily use”. “.04 CFS or” was removed before the gpd number in keeping with section 074, which lists the tributary reservation amounts in gpd. “[I]n each tributary identified in Figure 5 of WAC 173-503-120. These uses must comply with the criteria described in WAC 173-503-073 and” was added before “will be debited” as editorial changes to clarify Ecology’s intent with regards to the limits of withdrawals in tributary areas.

**173-503-060 Future Water Rights.** The title was changed to “Future Water Rights” in order to corroborate with the rule amendment that exempt and non-exempt water rights alike are covered under the rule.

In subsection (1) “rights, including permit exempt uses under 90.44.050 RCW, may be obtained” was added after “surface and ground water” in consideration of public comments, and as an editorial change to clarify the applicability of these provisions to permitted and permit exempt users alike.

In subsection (1)(b), “173-503-075” was added after “173-503-074” to reflect the change in which a separate reservation was created for stockwatering. “In an application for ... a reservation is approved, the department shall deduct its permitted amount from” was removed and “The department shall deduct the” was added as an editorial change for succinctness and clarity. Further, “as described in WAC 173-503-073” was added as an editorial change for specificity. “173-503-075 was added to the end of this subsection for the above reason.

In subsection (1)(c) “applicant” was changed to “proponent” and “to the department’s satisfaction” was added after “demonstrate to” and “adversely impact instream resources,” was added before “or diminish water quality” in accordance with several comments made, which felt that the standards listed that a mitigation plan must meet were set too low or left too vague. The sentence “The source of water for a mitigation plan shall not be from a legally closed source.” since Ecology retains approval authority for the mitigation plans and it will make a determination on the legal availability of the source water when it reviews the proposed mitigation plan.

In subsection (1)(d) “or withdraw water from a legally closed basin” was added after “will not impair senior water rights” to clarify what was only implied in the rule. “A ground water permit” was replaced by “a ground water right” in keeping with the intent of the rule amendment to include both permit and permit exempt water uses. “Sufficiently” was added in the sentence allowing for changes in rule amendment application in the event of new scientific information to give clarity as to the standard by which the scientific information will be judged. A final sentence was added to the rule amendment stating “and will account for uses under the reservations in WAC 173-503-073, 173-503-074 and 173-503-075 in accordance with these findings” in order to explicate which parts of the rule amendment will be applied differently in light of new scientific information, which was merely implied in the rule amendment proposal.

Two editorial changes were made in subsection (2) to be consistent with other areas of the rule. In the first one, “public water supply” was changed to “public water system” in order to be consistent with section 073, the definitions section and the purpose of the rule. The words “municipal or” were removed before both references to “public water system” because municipal water systems are subset of public water systems and thus covered by this term. Additionally “that can provide timely and reasonable water service as defined in WAC 173-503-025” was added to be consistent with public water connection requirements in section 073.

In subsection (3) “permits” was changed to “appropriations” to be consistent with the fact that permitted and permit exempt users alike will be subject to the reservations. “If the water source is located in a closed subbasin, a water right can only be obtained under conditions 1(a),(c) or (d) of

this section” was added to clarify the water rights of water users located within the various tributaries and streams and is consistent with the rule amendment.

In subsection, (4) the word “right” was replaced by “appropriation” as an editorial change and for clarification. The statement “serve overriding considerations of the public interest” was replaced by “meet the standards set forth by RCW 90.54.020”, on the request of commenters.

In subsection (5), the words “permit holders” were removed and “appropriations” was put in their place as an editorial change and for clarification. Further, the language “in accordance with specifications provided by the department, and report the data to the department in accordance with the permit requirements. In addition, the department may require the permit holder to monitor stream flows and ground water levels” was removed. The language was replaced by “measured through installation and maintenance of appropriate measuring device(s) (water source meters), except for permit exempt uses serving a single residence. Water users required to measure water use must provide a reasonable right of inspection, allow access for the meter to be read, and report the data to the department or a local entity the department designates. The department may require additional users to measure water use, if the department determines that water supplies warrant further monitoring.” and an editorial change to clarify metering requirements, as several commenters showed confusion as to what would be expected of them. Ecology has retained the authority to require single residence permit exempt users to meter in the future, and believes that the data from metering of group B water systems will provide Ecology with an idea of actual water usage on single residence water uses.

**173-503-061 Baker River project settlement agreement flows.** The language “will provide a significant benefit to salmonids and instream resources. Therefore, the department will as part of its public interest review of new water right applications ensure that no reduction in the mitigation benefits associated with the flow release provisions of the hydropower license for the Baker project will result from approval of such applications; however, this provision shall not apply to new water right applications or permit exempt water rights under RCW 90.44.050 that are processed and approved” was removed. The language was replaced by “are a necessary component to adequately mitigate for the ongoing impacts of Baker River project operations. Therefore, in order to prevent detriment to the public interest, new permits for withdrawals or diversions that would impact the portion of the Skagit River Basin between Sedro Woolley up to and including the Baker River, will only be issued if the applicant can demonstrate that there will be no measurable reduction in the mitigation benefits associated with the flow release provisions associated with the Baker River relicense. However, this provision shall not apply to new appropriations that are obtained” and “173-503-074, and 173-503-075” was added to the end as an editorial change to clarify the department’s intent based on public comments received and in accordance with the removal of Stockwater from section 073 reservations.

**173-503-073 Water Reservations.** In subsection (1) a new sentence was added stating, “The department reserves its authority to review an application for new water use under the reservation in light of new information that may reflect upon or alter its current findings of availability, beneficial use, impairment, and/or public interest.” This sentence was added as an editorial change to clarify Ecology’s permitting authority. This sentence does not change or expand Ecology’s authority.

In subsection (1)(a) the words “10 cubic feet per second (cfs)” before “is available for agricultural irrigation purposes” was removed. This clarifies the amount of water reserved under agricultural irrigation reservation as 3,564 acre feet annually (equivalent to 10 cfs diverted continuously through the irrigation season) and Ecology would not be limiting all withdrawals under this reservation to an instantaneous withdrawal rate of 10 cfs. Similarly, “of water” was added after “3,564 acre feet” as an editorial change for clarification.

In subsection (1)(b), “stockwatering” was removed from the section which still covers the “domestic, municipal, and commercial/industrial” reservation. The stockwatering reservation has

been moved to section 075 in response to several public comments to make stockwatering a separate reservation, and does not raise the overall reservation values. "Fifteen cubic feet per second (15 cfs) or 10,840 acre-feet annually" was also removed and replaced with "a maximum average consumptive daily use of 9,370,208 gallons per day" to account for the removal of stockwatering from the domestic, municipal, and commercial/industrial reservation, and the change in the reservation number is reflected in the stockwatering reservation in section 075. Similarly, the new language clarifies that the reservation will be accounted for using the maximum average consumptive daily use (withdrawal amount minus any applicable septic recharge). The change from cubic feet per second and acre-feet annually to gallons per day is for clarification and because more people understand the concept of gallons per day.

In subsection (2)(a), "a source in" was removed before "the Lower, Middle or Upper Skagit" as an editorial change for clarification.

In subsection (2)(c) "The department will condition uses under the reservation to minimize the instantaneous impact of withdrawals on instream flows. Such conditions may include requiring efficient conveyance and irrigation methods or irrigation scheduling" was added at the end of the subsection to clarify Ecology's permitting requirement.

In subsection (2)(e), "water user must install and maintain a water" was added before "a measuring device" and replaced "must be installed and maintained on the water source" as an editorial change for clarification. "The user or other designated local entity must" was added before "report the data to the department" for clarification of the reporting requirement, which was requested by several commenters.

In subsection (2)(g), the words "has been relinquished" have been added after "has been abandoned" to give agricultural irrigators the ability to add the unused portion of their water right to the reservation prior to when abandonment conditions have been met. In keeping with this change, "upon notification of abandonment" has been changed to "once the department is notified of the discontinuation."

In subsections (3) and (3)(a) "stock watering" was removed as a purpose of use. Ecology is proposing to allow incidental stock water use (small scale livestock operations) as part of domestic water use. A small quantity of domestic reservation (0.5 cfs/340,000 gpd) will be set aside for a separate stock water reservation.

In subsection (3)(b) "based on the subbasin management units established in" was replaced with "and used consistent with" for clarity and succinctness. In the next sentence, "and" was removed and replaced with "Such use of the reservation," which is the start of a new sentence, and the update was an editing change for clarity. A new sentence was added, stating "For water sources located in identified tributaries in the Upper Skagit subbasin management unit in Figure 5 of WAC 173-503-120, water withdrawals must meet the restrictions described in WAC 173-503-052." This sentence does not change or add a requirement, but clarifies that the requirements in this section are consistent with other sections of the rule. The words, "the following conditions are met" were added after "if" as an editorial change for clarity. The conditions "or the applicant demonstrates to the department that surface water is the only physically available source of water that can be obtained in the tributary subbasin; (2) the appropriation complies with the conditions of the reservation, and (3) the appropriation" were added as an editorial change for clarity and do not change the requirements created by the rule. "Use of the source" was removed before the new language "(3) the appropriation" was added for clarity. Finally, "For sources located in identified tributaries in the Upper Skagit subbasin management unit in Figure 5 of WAC 173-503-120, water use is limited to only ground water sources, and is limited to a maximum daily use of 0.4 cfs or 25,851 gallons per day, debited from the total Upper Skagit subbasin management unit reservation." was removed because it would be redundant in meaning to the language added in this subsection and detailed above.

In subsection (3)(c), “Domestic” was removed before the word “water” to clarify that subsection (3) does not only pertain to domestic water uses, but also municipal and commercial/industrial water uses.

In subsection (3)(d), “of this reservation, except for permit exempt appropriations serving a single residence,” was added and “including permit exempt users, under the reservation” was removed, effectively removing single residence exempt well users from the metering requirement in order that Ecology can focus on enforcement of metering compliance of larger water users and single residence exempt wells will be deducted from the reservation at 350 gpd or 175 if they are served by a septic system. “The water user” was replaced by “Water users required to measure their water use” was replaced in keeping with the above change. “The department may require additional users to measure their water use, if the department determines that water supplies require further monitoring” was added as a final sentence to allow for Ecology to require single residence exempt well users to meter their wells if there is reason to believe that the gallons per day use exceeds or is less than 350 gpd.

In subsection (3)(f), “ for a potable water supply” was added after “a new withdrawal” for clarity and consistency with other sections of the rule amendment and in response to several comments from non-potable water users stating confusion over whether they would be required to seek public water system connection. “Municipal” water system was replaced with “public” water system in two locations because municipal water systems are a subset of public water systems. “Obtain a letter from a” was replaced with “present written evidence to the department that water service cannot be provided in a timely and reasonable manner by a” in keeping with several commenters who stated that public water suppliers do not often deny potential water connections through a letter and in keeping with standard practices of Skagit County. Similarly, “was denied. Such a denial” was replaced with “cannot be provided in this manner. This determination” in keeping with comments stating that a public water connection is not always denied as such, and the language was updated in keeping with the rule’s intent.

In subsection (3)(g) “users” was replaced by “appropriations under this reservation” as an editorial change for clarification.

Subsection 3(h) was added, stating “All users of this reservation, including permit exempt users, must inform Ecology, at the time of the appropriation of water, the type of wastewater disposal system for the property or properties that the appropriation serves. If the initial wastewater disposal system is a septic system, and the property or properties subsequently connect(s) to a sewer system, the users of the appropriation must report to Ecology the change in the wastewater disposal system in a timely manner.” This provision allows Ecology to request information to assist us in administering the rule, specifically applicability of septic recharge credit.

In subsection (4) “or a subsequent owner” was added before “seeking water” to emphasize that following the conditions of the reservation is the responsibility of subsequent owners in addition to the user which established the appropriation. This does not change or add a requirement and is consistent with the law of prior appropriation.

In subsection (5) “identified as subject to closure in WAC 173-503-074” was added after “subbasin management units” as an editorial change for clarity. “New water sources” was replaced by “Upon closure, new appropriations” as an editorial change for clarity. A final sentence was added to the first paragraph of this subsection stating “If subsequent water use information indicates that the basin can be reopened, the department shall notify the public and local governments of the change in the status of the basin as described below.” For clarity and in response to several comments requesting information on how the public will be notified when basins are closed or if or when they could be reopened.

In subsection (6), “a water use authorized from the reservations” was changed to “an appropriation from a reservation” as an editorial change and in keeping with the rest of the rule, which includes permit exempt wells.

In subsection (7)(a) the words “stock watering” were removed in keeping with subsection (1) in which the reservation for stock watering was removed.

In subsection (7)(b) the words “regardless of whether the use is an interruptible or uninterruptible water right” was removed because the previous phrase “ All uses of this reservation shall be debited against the reservation” gives Ecology the authority to account for the water use under the reservation based upon the type of proposed use. The word “source” was changed to “use” in the first sentence as an editorial change for clarification. In the next sentence “or a standard amount” was added after “actual measured data” in order to make this section consistent with other sections of the rule. “Account for water use using 800” was replaced with “deduct the authorized quantities under water right permits or certificates from the reservation. For permit exempt appropriations, the department will initially deduct a standard amount of 350” to comport with several comments challenging the 800 gallons per day amount as far exceeding that which is actually used by residents of the Skagit River Basin. “Municipal” was changed to “residential service” for clarity. “Or” after “connection” was replaced with “in a group domestic water system. The standard amount will be adjusted periodically to reflect the maximum average daily use before any recharge credit. The department will deduct” to clarify Ecology’s reservation accounting. In the same sentence, “a” was replaced with “each” and “until” was changed to “unless” as editorial changes and for clarity as to Ecology’s intent. “Availability certificates issued by the counties” was change to “approvals issued by local jurisdictions” after it came to Ecology’s attention that not all counties in the Skagit River Basin issue availability certificates.

In subsection (7)(c) “individual and community” was added in response to several comments requesting clarification on the sort of septic systems covered under the recharge credit. “On-site” was removed before “septic system credit” as an editorial change, and “of the reservation” was added to the same sentence as an editorial change and for clarity. After “converted to sewer systems” “whose discharge is located outside the basin of origin” was added because sewer systems with a discharge within the basin or origin would add to the basin similarly to septic systems. New language was added to the end of the subsection stating, “If water users are subsequently converted to sewer from septic systems, total water uses under the reservation in the applicable subbasin shall remain below the maximum average consumptive daily use limits in the newly sewerd basin. Actions to remain in compliance with maximum average consumptive daily use limits could include: reducing the number of withdrawals under the appropriate subbasin reservation, reducing actual water use, providing an equal quantity of imported water to the subbasin as has been provided through septic recharge return flow allowance, implementing an Ecology approved mitigation plan, or by connecting to water sources from outside of the subbasin.” This language was added to present water users subject to the reservation with options for continuing to use only a portion of the reservation after a sewer connection and does not add a new requirement.

In subsection (7)(d) “or relinquishes” was added to provide water users an alternative to abandoning a water right in order to add water to the reservation and allows the water right to vest more immediately. “/or debited from the reservation, upon demonstration to the department that the well or surface water source has been decommissioned through written certification.” was added to replace “debited from the reservation, upon demonstration to the department that the well or surface water source has been decommissioned through written notification of the abandonment.” as an editorial change for clarification that the writing does not have to be in the form of a certification.

**173-503-074 Establishment of subbasin management units and reservation quantities by subbasin management unit.** A sentence was added stating, "Appropriations established after April 14, 2001 will be debited from the reserved quantities in accordance with the provisions contained in WAC 173-503-060 and WAC 173-503-073." This sentence was added as an editorial change for clarification and does not add or change a requirement under the rule. The column in the chart showing the maximum average consumptive daily use in cubic feet per second was removed because it was redundant in its content to the column showing the maximum average consumptive daily use in gallons per day. Carpenter and Fisher Creek basins were combined based on further hydrological review.

**173-503-075 Future Stock Watering.** Language was added stating: "Consistent with RCW 90.22.240, the department retains sufficient minimum flows or levels in streams, lakes or other public waters to provide adequate waters in such water sources to satisfy stock watering requirements for stock on riparian grazing lands. Future permit exempt stock water uses and future stock water uses requiring a water right can be obtained as outlined below.

(1) A reservation of 324,000 gallons per day of water is reserved for new stock water uses not subject to instream flows. It is available to users exempt from the permitting process and to users requiring a water right. Users of this reservation would be limited to a source within the Lower, Middle and Upper Skagit subbasins and must use the source only for stock watering purposes. Future permit exempt stock water users would not have to measure and report their water use, although the department encourages water withdrawal measuring. The department would measure and account for permit exempt stock water appropriations using stock inventory reports or actual measuring data, if such data exist. New stock water sources using surface water can be authorized under this reservation if authorized under an approved water right from the department. Measurement requirements for these appropriations would be outlined in the water right permit." A separate reservation for stockwatering was created because of the difficulty of accounting for stockwatering usage. The reservations were not raised or lowered due to this change. The language was also added to clarify that permit exempt stock water users will not have to measure water use, Ecology will account for their use using stock inventory reports.

**173-503-116 Incorporating new hydrologic investigations and information in rule.** The word "scientific" was added before "findings" to clarify that Ecology would only update its accounting of the reservations given scientific findings, which is also consistent with section 060. A sentence was added stating "will account for uses under the reservations in WAC 173-503-073, 173-503-074 and 173-503-075 in accordance with these findings. If necessary, the department will" to clarify that the section applies only to the accounting of the reservations. Finally, "this rule in the bulletin" was replaced with "maps described in WAC 173-503-120" to clarify the process for updating the maps.

**173-503-120 Maps.** The words "and will be updated as information becomes available as provided under WAC 173-503-116" to comport with the change to section 116. The maps in figures 4 and 5 were updated to reflect the combining of Fisher and Carpenter Creeks in section 074 and to make the maps more readable.

**173-503-150 Water rights subject to instream flows predating the reservations.** The words, "including permit exempt commercial/industrial irrigation users," were added to conform to the rest of the rule amendment which treats permit and permit exempt uses alike. "household water use for the Skagit River basin for domestic water uses" was removed and replaced with "of 350 gpd," as an editorial change for clarity. "Water use records are available" was replaced by "the department determines that other information demonstrate an alternative water use quantity should be deducted. Mitigation credits, including but not limited to, the recharge credit described in section 173-503-073(7), apply to these water uses, if appropriate." This change was made for clarity and to comport with sections 060 and 073 allowing water users of the reservation recharge credit for septic systems and to mitigate reservation withdrawal with approved mitigation plans.

### **III. Summary of Public Involvement Opportunities for the Skagit Instream Resources Protection and Water Resources Program, Chapter 173-505 WAC.**

The rule amendment was developed by the Department of Ecology in conjunction with regional salmon recovery groups, with feedback from the Tribes, local government and utilities and other interested groups and citizens.

A focus sheet was prepared and mailed out when the CR-102 was published on November 16, 2005. It was mailed to over 400 interested parties. A news release was sent out on November 7, 2005. A message was also sent to Ecology's Water Resources "listserv," which contains over 600 names and email addresses on November 9, 2005.

Newspaper ads announcing the open comment period and public hearings were published on December 28, 2005 and January 4, 2006 in the following newspapers:

- Bellingham Herald
- Everett Herald
- Skagit Valley Herald

A public hearing was held in Bellingham on January 11, 2006 at the Bellingham Public Library, Fairhaven Branch. A total of five people were in attendance at the Bellingham hearing and one person gave public comments. Another public hearing was held in Mount Vernon, also on January 11, 2006 at the Skagit Station Community Room. Forty-nine people were present at the hearing in Mount Vernon and ten of them gave public comments. A third public hearing was held in Darrington on January 12, 2006 at the Darrington Community Center. A total of four people were at the Darrington meeting and no one gave public comments.

The Water Resources Program solicited written comments on the rule amendment until January 20, 2006. The comment period was then extended to allow more time for additional comments. The extension was from January 20, 2006 to January 31, 2006. The comment period extension was published in the same newspapers as above.

#### IV. Responsiveness Summary

##### Section - 173-503-010

###### Comment 467

**Commenter:** Tom Anderson representing Public Utility District, Whatcom County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I'm the general manager for the Public Utility District in Whatcom County, and in that position I'm very involved in the watershed management efforts on the Nooksack and have significant concerns about Ecology's approach in the Skagit for the reservation. Rules are pretty rigid once they are adopted, and they're hard to change and can cause a lot of problems. Instream flow rules were established in the Nooksack basin in 1986, and the unintended consequences of those rules have been significant and have created significant problems. I think the approach of the reservation is different than what was used in the Nooksack, and may have some merits, but I have some concerns about the quantity that's being reserved.

**Response:** Thank you for your comment.

Comment 468

**Commenter:** Tom Anderson representing Public Utility District, Whatcom County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I'm not aware of any studies that show that in the Nooksack -- in the Skagit itself, in the lower Skagit, that flow issues are a problem for fish at the current time, and if my memory is right, the original study that was used to set the flows in April 2001 indicated that there was on the order of 800 CFS available in the lower Skagit before there had been a measurable impact to fisheries or fish habitat in the estuary.

**Response:** Flow is always an issue for fish. Flow provides fish their space for living, eating, and surviving. As flow decreases, then depth decreases and predation on fish increases as birds and other predators can seize and eat fish. As flow decreases then velocity decreases and the main food supply for fish, (aquatic insects that drift downstream) is stopped and they have to rely on the terrestrial insects that fall into the stream. But this fish food decreases as flow continues to drop because the terrestrial insects no longer fall into the stream as the stream pulls away from the bank and the insects fall onto dry rock and do not become prey for the fish. As flow decreases and depth decreases the fish are compressed into a smaller space and competition between fish increases as the food supply decreases. So as flow decreases, all of the factors listed above increase the mortality of the fish in the stream.

The 836 cfs made available in the Skagit was not a zero impact. The biologists agreed that the 836 cfs made available was a 10% loss of frequency of flooding the over-bank estuary habitat for Chinook fry. This Chinook habitat is used for feeding by fry. The final technical report from June, 1999 stated, "...it is evident that any reduction in [Skagit River] flow would cause some reduction of inundation for the estuary habitat. The Committee discussed the issue of impacts and decided that significant impacts to the over-bank inundation should be avoided. Based on the professional judgment of the group, the Committee further determined that a 10% maximum threshold was a reasonable level to set for significant impacts." So the Committee decided if 836 cfs is diverted from the Skagit River this would be a 10% loss of over-bank habitat and this would be a significant loss of fish habitat for Chinook fry and no more diversions could be allowed.

Comment 469

**Commenter:** Tom Anderson representing Public Utility District, Whatcom County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Agriculture in Skagit County is a very important part of the economy. History has clearly shown that irrigation is a very critical aspect of agriculture as local ag competes in the world market and needs to go to higher value crops. And at least for me personally it's important in Whatcom and Skagit County that we keep agriculture viable. I don't like living in an urban environment. I prefer an ag environment.

Based on the numbers I've been able to come up with it seems to me that there is on the order of 40,000 acres of ag land in the lower valley in Skagit County that's currently ag land that's not irrigated. If this ag land is going to remain viable it seems that the reservation of 10 CFS of water, which by Ecology's estimate is enough for 2,000 acres -- it's not really adequate for the future of agriculture in the lower valley.

**Response:** Ecology agrees that the agricultural irrigation reservation may not be adequate to meet all future water demands for irrigated agriculture in the Skagit River Basin. However, the agricultural irrigation reservation is one of many tools to meet future water demands, interruptible water rights, transfers to existing water rights, water rights leases or purchasing water from water utilities may be available to meet future water needs in those areas. Ecology is working with the agricultural community through efforts like the Skagit Conservation and Irrigation District Management Plan to identify existing and future water rights needs to meet agricultural uses.

Comment 235

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** My family and I have property in the sub basin being referred to as the Main Stem of the Nookachamps. My family and I have owned and paid taxes on this property for over fifty years. We feel this amendment is unjust and ultimately our land will become valueless as a result of such an amendment. Below is a list of questions I would like to have answered:

**Response:** A very common misunderstanding is that instream flow levels set by Ecology create a water right that is senior to those previously appropriated. Instead, the instream flow level created in WAC 173-503 have a priority date of April 14, 2001 and is therefore junior to all water rights that were established before that date. Therefore, land with an existing water right, including with a permit exempt well, will not be made valueless as existing water rights with a priority date earlier than April 14, 2001 will not be affected. Ecology's intention in developing this rule amendment was to provide for legally certain water supplies for out-of-stream uses, while continuing to protect instream resources within the prior appropriation water law framework. Under the existing instream flow rule, all uses developed after April 14, 2001 are subject to regulation when the senior instream flow is not being met and could be forced to shut down their use during those time periods. Ecology's rule amendment would allow wells developed after April 14, 2001 a legally secure water supply by including their uses under the reservation. Ecology believes this will be a benefit to property owners in the Skagit River basin.

Comment 236

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** What Happened to Department of Ecology's commitment to Watershed Assessments?

**Response:** This amendment is not a product of the watershed planning process. Ecology's commitment to watershed assessments has not wavered.

Comment 237

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Why do you believe your Data is correct when professionals in the field of groundwater hydrology in Skagit County believe otherwise?

**Response:** Although it is unclear what data you reference it is not unusual for scientists to reach different interpretations based on the same information.

Comment 239

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** If my well provides water from a depth lower than that of a nearby water body and I have a drainfield, aren't I in fact, providing additional water for nearby waterbody?

**Response:** Use of a well withdrawing water from a depth lower than a nearby water body combined with a septic drain field does not guarantee that there will be additional water for a nearby water body. There are many other factors that would affect what the actual affect is on the nearby water body.

Comment 240

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Why is it, the Salmon are able to make it upstream to Lake McMurray during the worst low flow months and wouldn't the (464 parcels to be built out) provide additional water instream via drainfields as long as continuity didn't exist between new wells and waterbodies?

**Response:** There are many factors that affect salmon migration, one of which is the amount of flow that occurs in a stream and there is a good correlation between the amount of flow and the number of salmon that are able to return as adults. If there is a situation where wells tapped into aquifers that are not in continuity with surface water bodies and some of that water is returned to the shallow aquifer via septic drain fields, there might be more water available for the near-by surface water bodies although there could be water quality concerns associated with the septic discharges. In addition, land use changes associated with development generally result in increased surface water runoff and decreased ground water recharge relative to pre-development conditions, which contributes to lower summer flows. Thus, there is no guarantee that the situation described in the comment would be a benefit to stream flow and salmon.

Comment 242

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Who will compensate rural landowners for having property that's worthless because you took the ability to obtain water away from them?

**Response:** Ecology has not taken away the ability of a property owner to develop their land. Please see answer to comment 235.

Comment 243

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Will you pay rural landowners taxes?

**Response:** Ecology will not pay rural landowner's taxes. Please see Ecology's response to comment 235.

Comment 244

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Does this proposed amendment make rural landowners 2nd Class citizens? (Ex. non-rural property owners can use all the water they want).

**Response:** It is not Ecology's intent to make rural landowners second class citizens. The rule reservations apply to urban and rural residents alike.

Comment 246

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Why shouldn't the Department of Ecology have the burden to show Hydraulic Continuity?

**Response:** Ground water scientists have studied the relationship between ground and surface water for several decades and there is no question that streams in western Washington, as well as throughout the world, are hydraulically connected to ground water.

Comment 250

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Does there exist additional models and/or studies that call out what amount of water the Skagit needs to maintain the ecology other than the one you present? Why have you chosen the most conservative model?

**Response:** We are not aware of any additional studies but there may be some as new studies are done in Washington state every year on our streams and rivers.

Ecology is directed by the legislature to protect instream resources and provide water for people and farms. Ecology has used the best scientific information available to the agency in developing the original Skagit Instream Flow rule and the rule amendment.

Comment 251

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Does there exist additional models and/or studies that provide what amount of water fish need to make it up streams?

**Response:** There are many studies over the decades on how flow relates to fish migration as both upstream and downstream migration are important for the fish population and its survival. However, even years of studying a fish population in detail can still lead to results that people will not agree upon. The Columbia River has been intensively studied and people will cite the same study as conclusively saying fish do and don't need water for migration.

Fish passage flows are difficult to define exactly. A flow that provides passage one year can be inadequate the next year. Fish migration needs change as the channel shape changes as it can every time there is a large rainfall. Fish migration needs can change depending on the species and size of the fish as well as the water temperature and time of year. Sometimes migration needs may be a percent change in flow instead of a specific number.

Comment 252

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Isn't it true that drainfields provide water to areas of low flow, and more importantly in those months that you claim low flow is the worst, whereas no extra water would exist during this time if drainfields weren't allowed?

**Response:** Ecology respectfully disagrees with a portion of the comment. Ecology does agree that septic drain fields do return some water to the shallow ground water system and that the majority of the water discharged through the drain field likely contributes to ground water recharge in most cases. However, land use changes associated with development generally result in increased surface water runoff and decreased ground water recharge relative to pre-development conditions. This generally results in higher flows during the wet season and lower flows during the dry season relative to pre-development conditions. So although there may be specific instances where discharges through septic drain fields result in an overall increase in ground water recharge, it is not true that septic discharge would compensate for the decreased recharge resulting from development combined with the capture of surface water resulting from the associated ground water withdrawal in all cases.

Comment 254

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** My family and I would like to encourage Department of Ecology to review closely the concerns, along with information provided by The Washington State Ground Water Association, Upper Skagit Indian Tribe, Skagit County Gov., and undoubtedly, the rural landowners of Skagit County. Also - I strongly request that comments you received last comment period regarding this amendment be answered (as promised), along with these.

**Response:** Ecology is not required under the law to respond to comments made on the March 2005 version of the proposed rule amendments, which was not adopted by Ecology. That rule making effort is closed, but Ecology reviewed all of the comments submitted as it prepared the current proposal. The comments received on that proposal did influence the current rule amendment proposal. Ecology has chosen to respond to comments made in the previous amendment, but only to those comments where the commenter documented that his or her previous comment represents a concern relevant to the new proposal. Because the two rule amendment proposals differ substantially, Ecology does not know if the previous commenter's concerns are relevant to this proposal and therefore represent a valid concern.

Comment 516

**Commenter:** Bill Clotye representing D&C Well Drilling

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** The other concern I have, I'm running a business with employees, and as this thing winds along my ability to provide a gainful employment for those individuals and an income for myself is going to be reduced. So I have some parochial interest in this, but I think the real issue, the real true issue that people copyrights, and rights to their use of the land is being adversely affected here. So that's where I'm at on it. And I think it needs to be looking at very hard, the reservation system. I don't think it's a good way to go. Thank you.

**Response:** Ecology's economists calculated the financial impacts to businesses as a result of this rule in both the Economic Impact Statement and the Small Business Economic Impact Statement and concluded that the financial impacts to businesses were minimal and that the benefits from the rule outweighed the costs. Further, Ecology determined that this rule will support the projected water demands in WRIA 3 and 4 for at least 20 years.

Comment 277

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** I would require that the DOE answer all of the comments people made on the original 2001 rule plus comments on the amended rule.

**Response:** Please see Ecology's response to comment 254. Prior to adoption of the 2001 rule, Ecology responded to the comments to the rule, and our responses can be found on the Ecology website at: <http://www.ecy.wa.gov/biblio/0111004.html>.

Comment 282

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** A study in Arizona on the Gila River system showed that when trees and brush were removed from around the river, instream flows increased. A Douglas Fir or similar type of tree uses 250 gallons a day. When a building site is made and a house is installed, usually there are 2 to 50 of these trees removed. The water that was used for those trees is now getting to the shallow aquifer . It is a proven fact that a grass lot puts more water into recharge than a treed lot. With that being said, how does DOE justify denying people access to water when their development may use less water than what nature uses?

**Response:** Ecology respectfully disagrees that it is a fact that replacing a forest with grass would result in increased ground water recharge. Contrary to what is stated in the comment, studies suggest that removal of a forest substantially increases surface water runoff compared to what occurred prior to the trees being cut and much of the water running off a de-forested site contributed to ground water recharge prior to de-forestation. Several other studies conducted in western Washington suggest that conversion of land from forest to residential land use results in higher peak flows during the winter and decreased low flows in the summer and early fall. Therefore, although large trees can capture and transpire more water than what might be consumed by a domestic use, the overall affect of de-forestation is generally less water in streams during the low flow time of the year compared to what occurred prior to removal of the trees.

Comment 283

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** In a recent Supreme Court case in Ohio, the court stated that a property owner has a right to access water on their property for domestic need. And if they are denied that right, they should be compensated. This is a DOE rule and they, not the counties, would be held accountable. Does the DOE have a fund set aside to compensate property owners for the loss of value to their property and loss to the county for property taxes plus legal fees?

**Response:** Under Washington water law, all waters of the state are publicly owned by the citizens of Washington. When an individual establishes a water right, they are given an authorization to use the water of the state so long as they meet certain conditions of use set forth by law. A water right is a special kind of right legally termed a usufructuary right, which means that it is a legal right to enjoy the benefits of something that does not belong to the individual. Given this legal framework, Ecology does not believe the court case cited in your comment is relevant to the rule. Ecology is charged by the Washington State Legislature to manage water resources of the state. In this capacity the agency is also legally obligated to protect surface water quantity and quality and has the authority to set conditions of use water to meet these objectives. Ecology established the existing Skagit Instream Flow rule to protect instream resources. Ecology is now amending it to provide for future water users to be able to develop a reliable water supply that can be used without interruption by the instream flow rule. Ecology believes the reservations in our amendment benefit property owners.

Comment 287

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** In the original 1996 MOA the exempt well was exempt. In the 2001 rule that ruling was left out. The amended ruling did an economic impact study on the amendment but not on the 1996 MOA or the 2001 rule. The ones that were printed in the ruling fell short and vary generically in their design. I would like a factual report done.

**Response:** Ecology has prepared several economic assessments in conjunction with this rule making effort. Ecology prepared a Small Business Economic Impact Statement on the rule amendment proposal which includes an analysis of costs associated with the existing rule (2001 rule) as well as the proposed amendments to that rule. This document was published at the same time of the rule amendment proposal. Ecology also prepared a Preliminary Cost Benefit Analysis, Preliminary Maximum Net Benefits Analysis and Preliminary Least Burdensome Analysis that were published at the same time of the rule amendment proposal. Final versions of these reports are also published at the same time as rule adoption.

Comment 288

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** If instream flow was really the true issue, then wouldn't it make sense to stop all outside use of water exempt for commercial crops where instream flow levels fell below the limits instead of just the new users?

**Response:** An instream flow according to statute is a water right that is junior to all water rights obtained prior to the adoption of an instream flow rule, which in this case was 2001. Ecology, therefore, does not have the authority to cease water use from senior water rights.

Comment 289

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** When we look at the vast amounts of water available in the ground (90% of the liquid freshwater is underground), only 3% is in river and streams. It seems that the DOE is way off the mark. When I explain what the DOE is proposing, my peers in the ground water profession are appalled.

**Response:** Ecology agrees that the vast majority of liquid fresh water is underground. However, Ecology respectfully disagrees that the proposed rule is way off the mark. Many existing laws require the protection of surface water quantity and quality. Because of the inter-relationship of ground and surface water and the fact that this relationship generally occurs at the upper-most surface of the saturated zone dictates that the vast majority of the ground water resource can not be removed without significant and illegal impacts to surface water bodies. The limiting factor regarding how much ground water can be withdrawn is primarily related to the consequences and impacts of that withdrawal and is not directly related to the quantity of water in the ground.

Comment 290

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** It is my opinion that this is not an environmental issue. It is strictly a political issue. The PUD, City of Anacortes, and the Tribes got their water and now they can dictate what property owners in Skagit County can do. This is not what this country was formed on.

**Response:** Thank you for your comment.

Comment 291

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** Thank you for taking time to respond to my questions and comments. I am in agreement that watersheds should be managed at a local level; however, I do have some concerns towards your proposal and how you arrived at your conclusions.

**Response:** Thank you for your comment.

Comment 292

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** Nowhere has the Department of Ecology (DOE) been able to prove through fact-finding science that the exempt well or group of exempt wells has had a negative impact on instream flow.

**Response:** You are correct that Ecology has not conducted a fact finding scientific investigation specifically designed to prove or disprove that use of exempt wells has a negative impact on stream flows. Ecology has however funded the development of a ground water model of the Dungeness River basin which in part, evaluated the impacts of increased development of exempt wells. Although this has not yet been developed for the Skagit River basin it is widely accepted by licensed hydrogeologists that consumptively using ground water results in changes to the ground water system relative to pre-pumping conditions. Possible changes include loss of storage in the aquifer (with associated declines in ground water levels), increased recharge to the aquifer, decreased discharge from the aquifer, or some combination of these three. Over the long term, the dominant change to the system is thought to be decreased discharge from the aquifer.

This conclusion is repeated in Appendix H in Skagit County's Coordinated Water System Plan (CWSP, 1993). Skagit County's plan includes the statements "The Skagit River is the discharge point for most groundwater in the county. Almost all groundwater eventually discharges to the river (except for a small amount that discharges to the sea or to Snohomish or Whatcom County). Development of groundwater in the Skagit Valley removes groundwater before it reaches the river... Over the long term (after pumping has removed water from storage and an equilibrium situation is established), the reduction in flow to the river may approximately equal the volume of water pumped." Thus, Ecology's conclusion that pumping wells results in less water in streams is identical to the conclusion documented in Skagit County CWSP in 1991.

Comment 293

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** After talking with your staff at the public meeting, it appears that the DOE did not look at wells in a subbasin to determine where domestic wells are completed. The reason I mention this is most drilled wells are completed into a confined aquifer which in most instances is not in direct continuity of instream flow.

**Response:** You are correct that Ecology did not look at all the well logs in each sub basin to determine where the wells are completed. Ecology also agrees that many wells are completed in aquifers that are overlain by confining geologic materials that exhibit lower permeability than the aquifers in which most wells are screened. Existing information contained in several USGS reports suggests that the unconsolidated glacial deposits in the Puget Sound lowland (including the Skagit River basin), which make up the majority of the aquifers in which wells are screened, are spatially heterogeneous. As such, these deposits do not form spatially extensive aquifers and confining units but rather act as an integrated aquifer system of higher permeable deposits interspersed with lower permeable materials. Because of this, the aquifer system is characterized as being "leaky" and the effects of pumping a confined unit can propagate through the entire system, ultimately affecting surface water bodies.

Comment 297

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** The DOE has stated "First in time, first in line" when it comes to water rights. When does the permit exempt well right come into effect: when the startcard is filed, when the well is drilled or when the water is put to beneficial use?

**Response:** Currently, this is an unsettled concept under the law. Ecology presently views the priority date as relating back to the date the start card is filed, when a right is perfected within a reasonable time.

Comment 298

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** Should the name of the startcard notification fee be changed to a water right permit fee?

**Response:** The majority of the start cards (also called notice of intent to drill a well) are for wells that are exempt from the water right permitting process. As such, it would be inappropriate to rename the fee associated with start cards to a water right permit fee which is defined as elsewhere in statute.

Comment 301

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** If DOE does not allow a person the ability to access water on his property for the good of the public, under current state and federal case law wouldn't the state be required to compensate that landowner?

**Response:** Under Washington water law, all waters of the state are publicly owned by the citizens of Washington. When an individual establishes a water right, they are given an authorization to use the water of the state so long as they meet certain conditions of use set forth by law. A water right is a special kind of right legally termed a usufructuary right, which means that it is a legal right to enjoy the benefits of something that does not belong to the individual. Ecology is charged by the Washington State Legislature to manage water resources of the state. In this capacity the agency is also legally obligated to protect surface water quantity and quality and has the authority to set conditions of use water to meet these objectives. Ecology established the existing Skagit Instream Flow rule to protect instream resources. Ecology is now amending it to provide for future water users to be able to develop a reliable water supply that can be used without interruption by the instream flow rule. Ecology believes the reservations in our amendment benefits property owners.

Comment 306

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** Did the DOE look at current and future logging practices and their effect on instream flow?

**Response:** Ecology did not look at the effects of current and future logging practices on instream flow. However, studies suggest that removal of a forest substantially increases surface water runoff compared to what occurred prior to the trees being cut and much of the runoff contributed to ground water recharge prior to de-forestation. Several other studies conducted in western Washington suggest that conversion of land from forest to residential land use results in higher peak flows during the winter and decreased low flows in the summer and early fall.

Comment 307

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** You do not have deeper aquifers listed as an alternative. Does the DOE not recognize that there may be more than one aquifer under one's feet? And if they don't then why does the drilling regulation state we are not allowed to intermingle aquifers?

**Response:** Ecology does recognize that there could be and frequently are multiple aquifers that are vertically separated by lower-permeable units that act as confining layers. Although the confining units are frequently leaky (meaning water can pass through them), the purpose of the requirement in WAC 173-160-241 to install seals between aquifers during well construction is to prevent construction of an artificial conduit that would allow water and contaminants to flow between two aquifers at a rate much higher than would occur naturally.

Comment 308

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** New users are under the restrictive regulations. However, rural water users already use less water than urban residents. If we are truly trying to project instream flow, wouldn't it be better to restrict all domestic users groups?

**Response:** All users of water that access the reservations set forth in the rule amendment will have to follow the same provisions, whether the users are rural or urban. Existing users and individuals and businesses that connect to water supplies with water rights that predate the rule are not subject to the instream flow rule.

Comment 309

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** Under Growth Management 80% of the building is urban, 20% rural. Under your plan rural does not set their 20%.

**Response:** This rule does not address rural and urban building proportions. Ecology used Skagit county's data on projected growth and location of buildable lots.

Comment 311

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** In conclusion it appears that this proposed rule was developed by policy makers and the large water purveyors.

**Response:** Ecology developed this rule amendment proposal under our rule-making authority. The public comments received from stakeholders in the Skagit River basin influenced the proposal.

Comment 312

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** This plan was not developed by the best available science.

**Response:** Ecology developed this rule in accordance with our policy and guidance on instream flows.

Comment 313

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** It takes people's personal property rights away. It devalues their property.

**Response:** Please see responses to comments 283 and 301.

Comment 314

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** It gives a monopoly to the PUD.

**Response:** Senior water right holders will not be affected by this rule. Future water users needing a potable water supply are required to seek a public water supply hook up where it can be provided in a timely and reasonable manner. If it cannot be provided in a timely and reasonable manner, a private water supply could be developed under the provisions set forth in the rule amendment. Moreover, there are many other public water suppliers in the Skagit River Basin besides the Skagit PUD, so Ecology does not believe that the PUD will have a monopoly on providing water.

Comment 315

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** It puts the DOE into land management.

**Response:** Land management authority remains with the counties, and is not bypassed by this rule as this is not a land management rule.

Comment 316

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** It is using direct withdrawals from surface water as the answer to all urban problems.

**Response:** This rule only regulates future users and does not affect water users whose water right predates 2001.

Comment 317

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** SB2514 had the basic premise that watersheds should be controlled at the local level. However, it allowed the foxes to guard the hen house.

**Response:** ESHB 2514 (RCW 90.82) does give watershed planning authority to county and local governments, but it also allows county and local governments to seek assistance in their planning and funding from state governments. It recognizes and emphasizes the authority of state government to adopt instream flow regulations.

Comment 319

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** The amount of water the exempt well uses is the smallest of all of the user groups, less than 1 %; yet the Department uses it as a scapegoat. The DOE should leave the exempt well alone and spend its time working on true high users of water.

**Response:** Ecology's intention in developing this rule was to provide for legally certain water supplies for out-of-stream uses, while continuing to protect instream amenities within the prior appropriation water law framework. Under the existing instream flow rule, all uses developed after April 14, 2001 are subject to regulation when the senior instream flow is not being met and could be forced to shut off their use during those time periods. Our rule amendment would allow wells developed after April 14, 2001 a legally secure water supply by including their uses under the reservation.

Comment 320

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** Now for the first time, DOE is saying that it is a water right and is junior to all. Unfortunately, all your current plan is going to do is make the people trust government less and make a bunch of attorneys wealthy. This policy has a large negative impact on the economy of Skagit County and its residents.

**Response:** Thank you for your comment.

Comment 456

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** The exempt well and the small use domestic well has been mainly billed for many years now from the Department of Health, the Department of Ecology and some of the tribes. The fact of the matter is in the State of Washington there is not any scientific proof where the exempt wells have had a negative impact. As a matter of fact on the Washougal drainage, I believe, and the hydrologist there said the exempt well has no impact on the stream flow, and if anything, has a beneficial benefit on the stream flow.

**Response:** In regard to the scientific proof that exempt wells can impact streams please refer to the response to comment number 292. In regard to the comment on the Washougal report (PGG, 2003) Ecology respectfully disagrees and points you to the following statement from page 3 of this report. "However, the total volume of [surface] water capture eventually equals the total volume of groundwater withdrawn." Thus, the authors of the Washougal report do not conclude that exempt wells have no impact or a beneficial impact on steam flow.

Comment 459

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I do want to state for the record that I wish all the comments from previous public hearings be addressed in this new hearing, because it looks like there are some people that haven't shown up here and I want those people's questions to be answered. Thank you.

**Response:** Please see response to comment 254.

Comment 596

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Oral, Mt. Vernon on 3/9/2005

**Comment:** My brother, Bruce, and I defer to comments earlier by Bill Neal, Washington State Ground Water Association, and you will be receiving our comments in written form.

**Response:** Please see Ecology's response to comment 254.

Comment 264

**Commenter:** Dorothy Freethy, SCARP representing (Skagit Citizens Alliance for Rural Preservation)

**Type:** Letter, 1/17/2006

**Comment:** While the recent changes to Ecology's rule amendments include some minor improvements, it's clear to the SCARP membership that the theory behind this "resources protection program" has little basis in science and even less in common sense.

**Response:** Ecology respectfully disagrees with your comment. Ecology based the original Skagit Instream Flow Rule and the rule amendment on best scientific information available.

Comment 263

**Commenter:** Randy Good representing Skagit County Cattlemen

**Type:** Letter, 1/10/2004

**Comment:** This proposed rule amendment will cause economic hardship and ultimately the death of agriculture here in Skagit County.

**Response:** Please see Ecology's response to comment 319.

Comment 460

**Commenter:** Randy Good representing Skagit County Cattlemen

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** First I think it is important to note here what was said here tonight compared to what was written in the proposed rules. Everybody should take a look at that. I'm speaking on behalf of Skagit County cattlemen. I'm also a member of the Skagit County Farm Land Legacy Program, and also a member of our Skagit County Ag advisory board.

**Response:** Ecology believes that information communicated at the public hearing was consistent with the rule amendment language.

Comment 497

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** My named is David Hawkins. I'm an attorney with the Upper Skagit Tribe. I want to thank the Department of Ecology for coming up here. Just a little background on the tribe. We're in the Hansen basin, our reservation. That's where the majority of our people currently reside. We have another reservation on Bow Hill. So we are the tribe that lives in the basin and will be from a population perspective most impacted by the proposal here.

It's also important to note that we historically have been a tribe that has had a fishery on the Skagit River, and so our interest is not solely for our membership in terms of being able to provide for future development, but also to ensure that our fishery is maintained for our future generations.

As a result of those two concerns at a minimum we look at this rule with a perspective of balance that needs to be brought to the table. And there are some things that were said today and in the presentation that are in direct contrast with our understanding of what the proposal had been after, our understanding of negotiations.

**Response:** Ecology apologizes for any confusion on the elements of the rule amendment proposal experienced by the Upper Skagit Tribe. Ecology has worked with the Upper Skagit Tribe rule as we developed the rule amendment and like the tribe, strives for a balanced final rule.

Comment 499

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** There is language throughout the amendment that relates to -- doesn't relate to, but in essence is legal conclusions, and particularly in section 173-503-051 Stream Closures.

**Response:** Ecology respectfully disagrees that the language in section 173-503-051 states legal conclusions, rather the language states scientific conclusions, which were obtained using the best available information.

Comment 500

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** There are a couple of sentences that are detrimental to the settlement process in the sense that they draw a legal conclusion which one of the parties either currently or a future party may rely upon in an adverse way to prolong either the current litigation to set forth the specific language in our written comments that we'll provide.

**Response:** Ecology's goal in establishing this rule is to protect stream flows for fish, habitat, and future water users. Ecology does not intend to prolong or induce litigation. Without an indication of which language concerns you, Ecology is unable to consider addressing your concern through changes to the rule nor is Ecology in a position to control the actions of third parties in present or future litigation.

Comment 502

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Again, there is language in the water reservation section which reaches legal conclusions which we believe is very detrimental and should not be included.

**Response:** Ecology respectfully disagrees that the language in section 173-503-073 states legal conclusions, rather the language states scientific conclusions, which were obtained using the best available information.

Comment 35

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** How did the average stream flows vary over shorter time spans, say for example 6-years (that would yield 7 + time periods) and how do these averages correlate with historic East Pacific ocean temperatures and upper atmosphere (Jet Stream) conditions which can partly determine the frequency and extent (light or heavy) of rainstorms and snow accumulations?

**Response:** Ecology does not have a climatologist so we are unable to answer your question on Jet Stream conditions.

Comment 36

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** How might global warming characteristics now suspected and potentially being observed and corresponding modeled predictions affect snow pack levels and glacial retreating that will determine Summer period stream flows (rainy winters and less total snow storage and reduced glacial accretion is one current long-term prediction that I've heard about in the North Cascades)?

**Response:** Your comment points out an important issue, one which we all will learn to address, and that the rule provides limited response to. The response to global warming and significant change to the water management framework would be to initiate a new rule making. We currently have no predictive capability on changes to stream flow in response to climate changes that is useful for administrative rule making. Even if known, climate change effects on the flow of water in streams and rivers in the Skagit basin would not change the predicted flows of water needed for fish habitat. However, if the changes in flow pattern changed channel morphology, the habitat information used would not be as applicable. Section 140 of the rule provides that Ecology will review this chapter whenever significant new information is available, a significant change in conditions occurs, or statutory changes are enacted that are determined by the department to require review.

Comment 42

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** Does the DOE have concerns and are there now working solutions to minimize sprawl contributions to fisheries damage for fish species either on or off the ESA List?

**Response:** NOAA Fisheries and or U.S. Fish & Wildlife act as administrators of the ESA and are the agencies better equipped to respond to this comment.

Note that Ecology determines instream flows to protect all fish species whereas NOAA and USFWS only are allowed by law to protect listed species.

The instream flow as a water right can be used to curtail (interrupt) future diversions when the instream flow is below an established instream flow level. In that respect, the rule will keep streams and rivers at higher flow levels in the future than they otherwise would be without an instream flow rule.

Comment 49

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** First of all let me congratulate you and your team (Contributing Authors) on the readily understandable "Skagit Rule Amendment-Background on the Reservations, Closures, and Hydraulic Continuity" handout you provided to the attending public at your January 11, 2006 evening meeting in Mount Vernon. I would logically suspect that the Best Available Science exemplified in your proposal "In-Stream Flow Rule, re Chapter 173-503 WAC-IRPP for the Upper and Lower Skagit WRIAs" has exceeded any "horse trading process" accuracy (that could have divided up the water resources in Skagit County) had needed levels of cooperation between all the human principals and fish representatives/supporters (starting back in 2000 I believe) been achieved.

**Response:** Ecology appreciates the importance of connecting with the community on instream flow issues and welcomes your comments and support.

Comment 50

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** HOWEVER; your background paper honestly alludes to the problems associated with the lack of potentially better and/or more rigorously convincing data that you may or may not collect in the future due to a lack of investigation funding specificity. As a retired engineer who has spent years looking at various non-ideal data sets to derive the best possible sense out of same, I still detect the following perceived and categorized problem areas which your no doubt also aware of.

**Response:** Ecology is able to issue this rule only with the best data available at the time of adoption. However, as stated in WAC 173-503-116, amended, "If further scientific investigations produce results that indicate the findings and conditions of this chapter should be updated, the department will publish... the findings in a 'Skagit River Water Resources Supply Bulletin' and outline a process for updating this rule in the bulletin."

Comment 57

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** How much shallow (<200 feet) and deeper (>300-500 feet) aquifer water abounds in Skagit County or does bedrock conditions preclude substantive recharge and ultimate contributions to needed or expected base flow conditions in the late Summer through Fall time periods?

**Response:** Ecology has assumed based on the information available that essentially all of the ground water in the Skagit River basin is derived from precipitation within the topographic basin. Although there is likely some ground water flow into the basin from adjacent areas, this is not considered to be significant. The majority of the ground water that can be extracted at a rate high enough to be used by wells is assumed to occur in the unconsolidated glacial and alluvial sediments overlying bedrock. Ground water in the unconsolidated sediments is thought to discharge primarily to the Skagit River and other smaller streams as well as to marine waters. Although there are lower-permeability confining units that can restrict the vertical movement of ground water, these layers are thought to be leaky and saturated conditions are assumed to exist throughout all of the unconsolidated deposits below the water table. Because of this, the affects of pumping a deeper aquifer can propagate through the system and result in less discharge to streams. Therefore the limiting factor regarding how much ground water can be withdrawn is primarily related to the consequences and impacts of that withdrawal and is not directly related to the quantity of water in the ground.

Comment 51

**Commenter:** Carolyn Kelly representing Skagit Conservation District

**Type:** Letter, 1/31/2006

**Comment:** Thank you for the opportunity to comment on the proposed amendments. We view this latest effort by the Department of Ecology as a positive step forward to resolving the in-stream flow issue in Skagit County in a cooperative and collaborative fashion.

**Response:** Ecology appreciates the importance of connecting with the agricultural community on instream flow issues and welcomes your comments and support.

Comment 475

**Commenter:** Janet McRae representing Skagit County Cattlemen

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I know farmers who have pumped water for irrigation, and they have done chemical analysis to the wells and it is not connected with the river water. It is different water. Most of the farms in the lower Skagit are right close to sea level, and I think most of the wells are probably down there where it's not going to make a difference. I think you could pull out of those wells forever and ever and not get down to sea level.

**Response:** Ecology recognizes that it is normal to have differences between the chemistry of ground water and surface water and that differences can be detected over relatively short distances even where there is a hydraulic connection. As ground water moves through the subsurface between recharge and discharge areas, its chemistry is altered by the affects of a variety of geochemical processes. The chemical differences between ground and surface water can certainly be used to help characterize the relationship between the two. However, the fact that there are differences does not preclude a hydraulic connection between the two or that consumption of ground water could result in less ground water discharge to streams. Ecology also recognizes that there could be areas where ground water withdrawals could have very little impacts to stream flows in the Skagit River. Ecology anticipates that areas such as this can be better delineated by the proposed ground water study to be conducted by the USGS.

Comment 477

**Commenter:** Janet McRae representing Skagit County Cattlemen

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** And you talk about a low turnout. We have given up. We are wearing out. Government people get paid to come to these meetings, and us private citizens, it's on our dime and there is a point where you just want to stay home. Thank you.

**Response:** Thank you for your comment and for taking the time to attend the public hearing. Ecology also accepts written comments to our rules, which are given as much weight as oral testimony.

Comment 154

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 2/1/2006

**Comment:** I am writing this email to clarify Skagit County's comments, provided to you yesterday. After reviewing our submittal, I realized that two minor corrections to the letter would help to clarify the County's position. For that reason, I have attached a revised version of the letter, which we'd like you to substitute for the version sent yesterday. First, I modified footnote 3 to correctly cite a memorandum from Steward Associates.

**Response:** Thank you for making us aware of your clarifications, we have updated our responses accordingly.

Comment 156

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 2/1/2006

**Comment:** Our comments about the how the recharge credit is calculated, and about attempts to make the rule amendment retroactive, remain as previously expressed.

**Response:** Please see Ecology's response to comment 154.

Comment 157

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 2/1/2006

**Comment:** Second, I'd like to clarify the County's expectations regarding Ecology's response to our comment submittal. The purpose for submitting the appendices was to provide a proper background in the record for the rulemaking. Unlike the attachments to my letter, we are not expecting Ecology to respond formally to the appendices.

**Response:** Please see Ecology's response to comment 154.

Comment 158

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 2/1/2006

**Comment:** I hope this clarifies Skagit County's position on the proposed rule amendment. We look forward to working with you to develop a final version of the amended rule.

**Response:** Please see Ecology's response to comment 154.

Comment 159

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** These comments are submitted on behalf of Skagit County on the Washington Department of Ecology's ("Ecology") proposed amendment to the Skagit Instream Flow Rule. This letter includes several attachments, which are hereby incorporated by reference. We also are submitting with the letter a number of technical reports that are relevant to your deliberation. These technical reports are included as appendices to this letter, and are identified in the attached index. The appendices also are incorporated by reference.

**Response:** Thank you for your comments and for your submittal of accompanying materials. You also sent a follow up clarification email regarding the accompanying documents, stating "Second, I'd like to clarify the County's expectations regarding Ecology's response to our comment submittal. The purpose for submitting the appendices was to provide a proper background in the record for the rulemaking. Unlike the attachments to my letter, we are not expecting Ecology to respond formally to the appendices." Ecology acknowledges your comments and will respond accordingly.

Comment 162

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** The Skagit Instream Flow Rule applies to all areas in WRIAs 3 and 4 except the Samish Basin and islands surrounded by salt water. The area under the rule thus includes Fir Island, Samish Island, Bayview Ridge, Pleasant Ridge, and saltwater drainages such as Joe Leary Slough, which are not in hydraulic continuity with the Skagit River.

**Response:** Ecology is choosing not to amend the rule area and will address the Samish Basin in a subsequent rule.

Comment 163

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Similarly, the rule applies regardless of whether water withdrawals adversely affect stream flows.

**Response:** The rule expressly outlines conditions where water rights can be obtained outside of the reservations established in the rule amendment. Please see section 173-503-060.

Comment 164

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Skagit County recognizes that precise delineation of the Skagit Basin would be difficult given currently-available information. For this reason, Skagit County proposes to initiate a groundwater study by the U.S. Geological Survey (USGS) for the lower Skagit River Basin and its tributaries. The County wants plain language in the rule amendment indicating that the rule applies only in the Skagit River Basin, leaving delineation of the Basin until after the groundwater study is completed.

**Response:** Ecology agrees that a USGS study would be a benefit to the Basin and to the effective implementation of these rules and is supportive of conducting this investigation. Ecology recognizes that additional scientific information may be relevant to the administration of this rule and has made provisions in the rule amendment that would allow the agency to administer the rule according to the new information. See section 173-503-060(d) and 173-503-116.

Comment 166

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Specifically, the USGS groundwater study will have three objectives:  
1) Identify areas that are outside the physical boundaries of the Skagit River Basin that should be excluded from application of the Skagit Instream Flow Rule;  
2) Identify areas and aquifer zones, primarily in the Skagit River delta and lower Skagit Basin tributaries, where groundwater withdrawals would not adversely affect mainstem and/or tributary flows; and  
3) Identify areas in lower Skagit tributary basins where, based on the degree of hydraulic continuity, groundwater can be extracted with less than full hydraulic effect on tributary streams, and subsequently where groundwater use should result in a lower debit against tributary water budgets established under the instream flow rule amendment.

**Response:** Please see Ecology's response to comment 164.

Comment 169

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** USGS has indicated a willingness to help fund the groundwater study, subject to the availability of non-federal matching funds. Skagit County is prepared to help fund the groundwater study and is requesting Ecology provide matching funds.

**Response:** Ecology agrees that a USGS study would be a benefit to the Basin and to the effective implementation of these rules and we are pursuing a means to assist in funding such a study.

Comment 194

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Skagit County respectfully requests that Ecology's final rule amendment be revised as explained in this letter and its attachments. We look forward to working with you and other interested parties to develop effective, responsible regulations to protect Skagit County's aquatic resources.

**Response:** Ecology appreciates the importance of connecting with the County on instream flow issues and welcomes your comments and support.

Comment 195

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Skagit County appreciates the opportunity to comment on the Department of Ecology's Environmental Checklist and October 24, 2005 Determination of Nonsignificance (DNS) for the proposed amended Skagit River Instream Flow Rule, WAC Chapter 173-503. We are disappointed to note that our prior comments regarding State Environmental Policy Act (SEPA) issues based on the February 2005 version of the rule were not addressed, and many of our concerns remain.

**Response:** Thank you for your comment.

Comment 196

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** To summarize, our concerns are that. the proposed rule conflicts with Skagit County's land use authority, fails to provide water supply for planned growth, and could impact land use patterns in Skagit County. Failure to consider impacts. to the both the natural and built environment through an EIS, and the absence of considering alternatives to proposed rule are contrary to the purpose of SEPA review.

**Response:** Please see Ecology's responses to comments 200, 209 and 215.

Comment 197

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** As we noted in our comments on Ecology's initial amendment proposal, Ecology failed to take the requisite hard look at potential effects of the proposed amended rule. Because of its incomplete review, Ecology wrongly ignored significant impacts, concluding the impacts of the proposed amended rule are insignificant.

**Response:** Please see Ecology's response to comment 213.

Comment 209

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Clearly, the proposed rule amendments include insufficient water to satisfy residential demands, yet Ecology fails to disclose or discuss the rule amendment's potential effects on growth in rural and urban areas. Skagit County recognizes that it will experience growth regardless of the rule amendment and must plan for it pursuant to the Growth Management Act. The proposed rule will have a profound effect on how and where that growth will take place. The County's efforts to assure, that sufficient suitable land availability to accommodate anticipated housing and employment growth, as adopted by countywide planning policies, are severely undermined by the proposed amendments.

**Response:** The environmental checklist did acknowledge where the reservations were adequate to meet projected need and where they were not. Table 1 provided estimates of the number of households that could be served by the reservation in each subbasin under two scenarios. Section B.8 acknowledged that 1) some development could be redirected away from sub-basins closed to further consumptive uses once reservations are fully allocated, to areas where water is available unless alternative water sources are identified and 2) to the extent that other allowed uses consume water from the reservation, less water will be available for residential development.

This rule amendment does not create a water shortage, but does set some limits to water available for future users. Skagit County faces a finite quantity of water for any use. If residential demands exceed the remaining available water then the demand will go unmet or changes to the existing system will be required. This may mean conservation efforts, construction of desalination facilities, or transfers of existing water rights for example. This amendment should help Skagit County with future planning efforts.

New water uses that began in rural areas after the effective date of the existing rule could face interruption during low flow events. The amendment creates a pathway for these users to acquire reliable sources of water for development in these areas through the creation of reservations.

Ecology acknowledges that the reservations in some subbasins are not sufficient to meet the needs of projected growth in those areas. It is important to remember that this is projected growth; actual growth may not occur as quickly in the future as it has in the recent past. Still, all areas benefit from the rule amendment by gaining some quantity of reliable water not previously available. Sufficient water is available basin-wide to serve the level of growth expected for at least 20 years, although some redistribution is likely to occur in comparison to what could occur if nature provided plentiful and reliable water sources throughout the basin.

Comment 210

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Limiting water supplies may also create an incentive for landowners to accelerate development. The proposed rule's "first in, first served" or "use it or lose it" approach encourages rural land owners to build before the reservation is depleted. The rural growth inducing effect of the proposed amended rule is in direct conflict with the Skagit County Comprehensive Plan and the goal of directing growth towards urban areas where services can be provided. The rule could also induce higher growth outside of the Skagit River Basin. Either scenario will disturb current utility service planning. Increased density could also result in environmental impacts such as loss of open space, increased urban runoff and other development pressures on critical areas.

**Response:** Ecology cannot change the priority system of the water code nor the natural limits of water availability. Consequently, Ecology acknowledges that growth could be accelerated temporarily in areas where the reservations are insufficient to serve full build-out. With the size of the reservation being limited in these cases, the maximum potential for accelerated growth in these subbasins is negligible viewed basin-wide.

Ecology acknowledges that increased development outside the basin may occur to a limited extent. Several factors significantly reduce this risk. 1) The reservations created through this rule amendment are sufficient when viewed basin-wide to serve projected levels of rural development, although growth may be restricted in some individual subbasins. 2) Options exist for providing alternate sources of water supply inside the basin. 3) Instream flow rules have been or will be adopted in neighboring river basins.

Neither the small likelihood of increased growth outside the basin nor the minimal and temporary potential for accelerated development in subbasins with reservations that are not projected to meet the needs of full build-out should result in significant increases in density, urban runoff, or other pressures on critical areas. Ecology fails to see how either scenario will disturb current utility service planning, particularly as the realization of either scenario is likely to be nominal and the reservations are not available in areas where public water can be provided in a timely and reasonable manner.

Comment 219

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Ecology also previously acknowledged that “[i]f water supply becomes limited, people may make different decisions on where to work, live, and farm than they would make where the water supply is not limited.” Despite this impact, Ecology failed to adequately consider how the proposed rule will impact development’ throughout the Skagit River Basin or whether changes in growth patterns will be consistent with GMA planning. The importance of such considerations is apparent in light of projections that Skagit County’s population may more than triple between 2000 and 2050.

**Response:** Ecology disagrees. This rule amendment does not limit water supplies, but rather provides reliable water sources where previously none existed. Additionally, an assessment was made of the level of residential development supported by each reservation created in this rule amendment. Ecology has acknowledged that the reservations in some subbasins are inadequate to serve the projected growth in these areas. Further Ecology has acknowledged that growth may be delayed in these areas and potentially redirected to areas with sufficient water supplies until alternative sources are made available. The reservations were not intended to provide water for unlimited growth. The reservations establish a limited amount of water for future development while still maintaining protection of instream resources established in the existing rule. Water is a finite resource. Where stream flows are naturally low and/or where significant quantities of water have already been allocated to other existing out of stream uses, there is little new water available for additional development.

Comment 478

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** For the record, my name is Joe Mentor. I'm a water rights attorney for Skagit County, and these comments are on behalf of the county.

Skagit County has an interest in balancing instream and out of stream needs, being parties to the litigation that you've been hearing about. We've also been working hard out of court to find solutions to the competing interest that Ecology is trying valiantly to reconcile with this instream flow rule. The county will continue to provide supporting analysis to Ecology and other parties in an effort to find good solutions. We've been in negotiations with a number of parties interested in this matter, but I think it is important to point out that we have not been in negotiations with Ecology or other parties since the draft rule was published for public comment.

There are a number of county staff here today besides myself, and we came here to listen to what other people had to say about the rule and to learn more about Ecology about their rationale for it. The changes from the February 2005 draft are in our view a positive step, but we have six suggestions about how to make improvements and make it a better rule. We're going to be submitting written comments in which we'll describe the suggested changes in more detail, but I would like to summarize them briefly tonight.

**Response:** Ecology appreciates the importance of connecting with the County on instream flow issues and welcomes your comments and support.

Comment 480

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Furthermore, there are areas particularly in the lower basin where we believe that ground water withdrawals would not affect stream flows in the Skagit River at all. For that reason Skagit County has proposed to initiate a ground water study. I'm very interested in discussion tonight about USGS and ground water studies that USGS has undertaken in many places.

We have contacted USGS. They have been supportive and have offered a cost share to the parties here to try to develop an appropriate ground water study which we think is a very key part of trying to work out some of the issues that have been raised in the litigation and in this rule making.

**Response:** Please see Ecology's response to comment 164.

Comment 496

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Now, as I said, we will be submitting written comments. Also we did provide extensive comments to Ecology in connection with the previous rule draft, and I'm going to ask now that those comments be included in the record in this proceeding as if they were presented here tonight. And our questions will be submitted also for the record, and we'll ask that those be addressed in the responsiveness comments. That's all I have. Thank you very much.

**Response:** Please see Ecology's response to comment 254. Further, it is Ecology's understanding that this commenter's request that his previous comments receive response was revoked and there is a letter to this affect in the rule file.

Comment 523

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** The county has the obligation to accommodate the population direction that is provided by the State of Washington.

**Response:** Ecology respectfully disagrees with this statement. Under the Growth Management Act (GMA-RCW 36.70A) it is the obligation of counties of a certain size to plan for their population direction and size increase in a comprehensive plan, and State agencies must comply with the comprehensive plans. This rule does not affect Skagit County's authority to create and implement the GMA because the rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for at least twenty years. The purpose of the reserve is to provide water for development approved by the counties consistent with the counties land use plans and zoning. The rule also does not change the local jurisdictions obligation under the GMA.

Comment 527

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Both groundwater and surface water in large areas of western Skagit County discharge directly into Puget Sound; neither groundwater nor surface water runoff contribute to Skagit River stream flows in these areas. Notably, these include Pleasant Ridge, Bayview Ridge, and the Joe Leary Slough area. Similarly, groundwater withdrawals in areas of Skagit County that are diked or drained likely will not affect streamflows. Most of the Skagit River delta falls into this category. Nevertheless, the proposed rule amendment applies the Skagit instream flow rule to all of WRIs 3 and 4, except the Samish River subbasin and saltwater islands. This means that areas of land in independent saltwater drainages are included under the rule, despite the lack of hydraulic continuity between these areas and the Skagit River.

**Response:** Ecology respectfully disagrees with the assumption that ground water in the Skagit River delta area is hydraulically isolated from the Skagit River. However, Ecology acknowledges that additional future scientific investigations of the hydrogeology of the Skagit River basin may identify areas where water may be used without impairing the instream flows set in this chapter. If an applicant can demonstrate, through additional studies and technical analysis, and to the satisfaction of the department, that the proposed use will not cause impairment to existing water rights, including the instream flows, a ground water permit may be approved. If future scientifically sound investigations identify such areas, the department will notify the public of these findings through publication of a Skagit River Water Supply Bulletin. Given the existing high legal standard for impairment, Ecology must be very conservative in reviewing water rights for potential impairment issues.

Comment 528

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Furthermore, there is no justification for making surface water diversions or groundwater withdrawals in the tidally-influenced portion of the lower Skagit River, particularly in the vicinity of Fir Island and in tributaries that drain to this portion of the Skagit River, subject to interruption based on water level measurements taken several miles upstream at the Mount Vernon gauge. According to the information provided in the Supplemental Environmental Assessment for the original rule (which is also summarized in WAC 173-503-030), the fisheries concern in this segment of the Skagit River is the available estuary habitat. To protect this habitat, a total maximum allowable out-of-stream withdrawal amount was set in the rule at 836 cfs for the entire river basin for the months of February through August. There is nothing in the documents supporting the rule that justifies the application of minimum instream flows measured at the Mount Vernon gauge to the tidally-influenced section of the Skagit River. Consequently, we recommend that the proposed rule include a provision that water rights in this area and in tributaries that drain to this area not be subject to interruption based on the instream flow measured at the Mount Vernon gauge, but remain subject to the total maximum allowable out-of-stream withdrawal amounts that continue to protect the estuary habitat.

**Response:** The purpose of the estuary study done for the original rule was to specifically determine the effect on Chinook of diverting surface flow from the Skagit River in the estuary.

There is extensive documentation about this rule and the original rule on the Skagit River (i.e. Final Technical Report Lower Skagit River Instream Flow Studies dated June, 1999 by Duke Engineering & Services Inc.) . The original instream flow rule did an extensive study of the estuary habitat to determine the streamflows needed to protect Chinook fry feeding habitat. The study was complex because of the difficulty in measuring a tidal habitat where water levels were constantly changing from the tides and then determining how the tidal water levels are influenced by specific streamflows coming downstream from the Mount Vernon gage. The Instream Flow Committee determined that a loss of 836 cfs of flow in the river combined with the effect of tides would cause a 10% loss of over-bank inundation which is when conditions would be right for Chinook fry to feed. The Committee decided a loss of 10% of this feeding habitat would be significant and that 10% loss should be a limit on the loss of feeding habitat from the Skagit River in the estuary.

Diverting water from the Skagit River in the estuary would directly lower the water levels needed in the estuary to provide feeding habitat for Chinook fry.

Comment 530

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology asserts that precise delineation of the Skagit Basin is difficult given currently-available information. Skagit County recognizes this difficulty and proposes to initiate a groundwater study by the U.S. Geological Survey. To this end, Skagit County has offered to contribute non-federal matching funds. Delineation would follow after adoption of the rule amendment. The rule should also allow for modifications to assumed reservation debits based on new scientific investigations, such as the USGS study. The groundwater study would have three objectives:

- Identify areas that are outside the physical boundaries of the Skagit River Basin that should be excluded from application of the Skagit Instream Flow Rule;
- Identify areas and aquifer zones, primarily in the Skagit River delta and lower Skagit Basin tributaries, where groundwater withdrawals would not adversely affect mainstem or tributary flows; and
- Identify areas in lower Skagit Basin tributaries where groundwater can be extracted with less than full hydraulic effect on tributary streams, based on the degree of hydraulic continuity, and subsequently, where groundwater use should result in a lower debit against tributary water budgets established under the instream flow rule amendment.

**Response:** Ecology welcomes additional groundwater studies, as they can aid stakeholders in better understanding how groundwater and surface water interact. The current rule language already allows for Ecology to update the public of new findings via the Skagit River Water Supply Bulletin. Ecology respectfully disagrees with your suggestion that a new study could identify where groundwater use should result in a lower debit against tributary water budgets established under the instream flow rule amendment. As was specifically noted in the rule, impairment is not a matter of degree, nor is hydraulic continuity. Further, it is not likely that the proposed study could identify the actual amount of surface water captured by any individual ground water withdrawal. In scientific matters, regardless of the goals, number or complexity of studies, results unfortunately have to be given in approximations or ranges, as there is simply not enough data to get more specificity. Hydraulic conductivity epitomizes this scientific paradigm. More studies could theoretically improve the understanding of ground water - surface water interactions. However, arriving at an actual number that could be used to correlate to a scaled debit against tributary water budget is very likely beyond the scope of even the most optimistic and well funded study.

Comment 576

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** The recent draft rule is an improvement over the previous draft. Nevertheless, there are significant issues that need to be resolved before the rule amendment becomes final. These include:

- 1) Proper delineation of the Skagit Basin, including a clear process for excluding water use that does not affect Skagit instream flow resources, and for adjusting tributary debits from the reservation based on a more detailed analysis of hydraulic effects. A clear commitment to help fund the proposed USGS groundwater study is necessary to support a better understanding of hydrologic processes in the basin.
- 2) Increased water budgets in Skagit tributaries, particularly in the Carpenter, Fisher Creek and Nookachamps Creek subbasins.
- 3) Clarification of ambiguities that create unintended consequences for implementation of the instream flow rule and other state and local land use and public health and safety laws.
- 4) Application of the instream flow rule prospectively.
- 5) Adequate funding to provide for implementation of the instream flow rule.

**Response:** Ecology is working with the county and tribal governments to ensure that these issues are addressed in the final rule.

Comment 43

**Commenter:** Michael Mayer, Ross Freeman representing Washington Environmental Council/  
American Rivers

**Type:** Letter, 1/31/2006

**Comment:** While recent steps are encouraging, we do however have concerns with some of the policies embodied in the emerging proposals. Our concerns are heightened in this instance given the key role that the Skagit River system plays in recovery of threatened Puget Sound Chinook. The Skagit contains some of the largest and healthiest wild Chinook salmon runs in Puget Sound and is a critical building block to recovery. As Ecology recognizes, flow minimums for the Skagit River are not met in virtually every month of the year. Establishing protections and improving instream flow are vital if the region is to achieve its goal of healthy salmon stocks.

**Response:** Ecology agrees that adequate instream flow is an important building block for recovery of these species. The rule supports fish recovery by limiting the depletion of stream flows in the future from more diversions of water during low flow times. The rule does not add water back to the stream nor guarantee a certain flow will be in the river. An achieving flow program needs to be coupled with the established flow to more fully ensure stream flow is not limiting salmonid production. The reserves will help fish recovery in the future, by limiting depletion during low flow times. Ecology and WDFW biologists have determined that the biological impact of the withdrawals from the reservations in the rule amendment will not impair fish species.

Comment 53

**Commenter:** Michael Mayer, Ross Freeman representing Washington Environmental Council/  
American Rivers

**Type:** Letter, 1/31/2006

**Comment:** Second, we strongly support Ecology's efforts to establish instream flows and appreciate the recent progress that has been made. As has been frequently observed, the instream flow protections now in place for approximately one-third of Washington's watersheds largely occurred over a ten-year period from the mid 70s to mid 80s. The lull that followed was a setback to watershed conservation, and we cannot allow a similar delay to recur before the remainder of the state is addressed.

**Response:** Thank you for your comment

Comment 524

**Commenter:** Michael Mayer, Ross Freeman representing Washington Environmental Council/  
American Rivers

**Type:** Letter, 1/31/2006

**Comment:** First, we appreciate the briefing to the conservation community in November of last year. We hope that such dialogues can continue as this – as well as similar planning processes – moves forward. Ecology presently has ambitious targets for setting instream flows in 2006, and we hope to assist in achieving those benchmarks.

**Response:** Ecology appreciates the importance of connecting with the environmental community on instream flow issues and welcomes your comments and support.

Comment 445

**Commenter:** Chad Savage

**Type:** Letter, 1/25/2006

**Comment:** I am faxing you two letters, both from Department of Fisheries that prove there exists varying opinions having to do with allocation of water in watersheds, in this particular case, it happens to be the Nookachamps Watershed. I would support the 94' letter that gives approval to the applicant as long as he or she can prove no hydraulic continuity with surface water. These two documents in my opinion speaks volumes as to the need for further studies before your Department hands down this amendment.

**Response:** Thank you for your comment and for providing us with this additional information. Ecology agrees that there exist varying opinions in regards to allocation of water in watersheds, and these letters highlight the need for protecting stream flows for fish and future water users. Ecology recognizes that additional scientific information may be relevant to the administration of this rule and has made provisions in the rule amendment that would allow the agency to administer the rule according to the new information. See section 173-503-060(d) and 173-503-116.

Comment 505

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Number one, I take a little bit of issue with the word apathy. I see a roomful of people who have been to these meetings over and over and over, and we've said the same things over and over and over, and this plan keeps coming back to us as if they haven't heard us at all. The comments are -- most important comments haven't been addressed.  
And frankly everyone is tired. Their family is a priority and these meetings don't seem to be making any difference. This proposal doesn't show anything that this room was fuller last time and people were a lot more rowdy, but from here it's as if they didn't hear us so why bother.

**Response:** Ecology understands that people have priorities and extended the public comment period for this rule to allow for commenter's who were not able to be present at the public hearings, ample time to comment.

Comment 508

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** We still don't have any science stating, okay, not only a correlation of hydrologic continuity, but also some kind of correlation -- I know it's a natural thing, but some kind of correlation between these flows and the fish that we're attempting to preserve, in our minds anyway.

**Response:** Ecology has developed the existing instream flow rule and the amendments based upon the best scientific information available. Please see Ecology's response to comment 292.

Comment 511

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** So anyhow, people are tired, and they would really like to see -- I would like to see my tax money spent a little bit better than in lawsuits against people who are supposed to be public servants who are also being paid by my tax money. So it would be really nice to see a better -- a completely different proposal and some evidence of our comments of the past being appropriated as well as these comments today.

**Response:** Ecology chose not to adopt the previous version of the amendment. However, we did review all comments received on that proposal and those comments influenced the current proposal. Additionally, Ecology has worked with local and tribal governments, and water systems to create a more workable solution to water problems facing the Skagit Basin.

Comment 512

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Like the attorney for the county said he would like to have his previous comments included in this proposal. Well, I guess I'll take the same thing, because clearly my comments from the last time either weren't read or were completely dismissed. So I think it's not a matter of some change here, some change there, let's make a deal. It needs to be some really big change in order for this to work.

**Response:** Please see Ecology's response to comment 254.

Comment 522

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Yes, but GMA doesn't force growth into an area where there isn't enough water. So if that is the dichotomy in the law then our Olympians down there haven't figured out yet that there are limits to resources.

**Response:** This rule does not affect Skagit County's authority to create and implement the Growth Management Act (GMA) because the rule or reservations created do not limit or facilitate growth. Please see Ecology's response to comment 523.

Comment 577

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 3/9/2005

**Comment:** I am a resident of Skagit County and a citizen of the State of Washington, and I have a 5,000 gallon stay water right on my land as does everyone else who lives in this county. What you are proposing is to reduce a water right and a land right, a property right of every citizen in the -- in the Skagit watershed, and I believe that would be considered a taking, and it needs to be compensated.

**Response:** Please see Ecology's responses to comments 283 and 301.

Comment 578

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 3/9/2005

**Comment:** There's also some confusion as to the authority of the Department of Ecology in this process. The 2514 process allows landowners and stakeholders in the area to develop a plan to manage the watershed in their area. The only reason that this particular watershed, quote, unquote, plan has gotten this far is because it was railroaded by the powers that be before the people knew and county knew what was going on.  
I am also a member of the unaffiliated caucus in the Samish watershed instream flow process, and that we have known that to be very true, that landowner participation is extremely difficult. It's supposed to be a unanimous vote of all stakeholders in implementing the watershed plan, and based on this Skagit plan, supposed to be something that has been available to the public all along. Myself, Janet McRae, Randy Good, Tom Solburg, and several others were asked to be excused from one of the meetings by the leader of your meeting, so I would believe that also violates your public meeting law.

**Response:** ESHB 2514 (Chapter 90.82 RCW) does provide a framework for local watershed planning. However, this rule is separate from watershed planning.

Comment 579

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 3/9/2005

**Comment:** This plan, as everyone else has said, assumes hydraulic continuity. Hydraulic continuity is not a contest. It's a scientific fact that has to be proven to measurements and measurements and analysis and analysis over and over again in each specific area. That has not been done here.

**Response:** Please refer to the response to comment number 292.

Comment 55

**Commenter:** Mike Shelby representing Western Washington Agricultural Association

**Type:** Letter, 1/25/2006

**Comment:** We commend the Department of Ecology for persevering through a long and arduous process to achieve a rule that preserves water for instream flow needs and also provides a reservation for a more equitable sharing of available water to accommodate future domestic, municipal, commercial and industrial, and agricultural uses. From our perspective, the proposed changes to the rule represent an important and long sought for recognition of the need to address irrigation as well as stock watering for agricultural users.

**Response:** Thank you for your comment.

Comment 450

**Commenter:** Arn Thoreen representing Skagit Fisheries Enhancement Group

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** If we ask questions will we get replies like we were supposed to last time?

**Response:** The previous proposed amendment to WAC 173-503 was not adopted by Ecology. For this reason, Ecology did not respond to public comments that related to the amendment. However, all the comments received on the previous amendment proposal were reviewed and influenced the current amendment proposal.

Comment 451

**Commenter:** Arn Thoreen representing Skagit Fisheries Enhancement Group

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Thank you. I don't have a prepared speech, but I appreciate being able to make some comments. First I think I'll take the minority position and thank the Department of Ecology staff for coming up on a night like tonight out of their area to work with the community on taking care of this. Most of us that are here are here because of the quality of life here, and we know that we could lose that if we get a sprawl like we've seen happen in other watersheds. And so -- and my friend Rod Sacrasom [phon] says to say hello to you folks, and he is about two thirds through his book that covers this topic.

**Response:** Ecology appreciates the importance of connecting with the community on instream flow issues and welcomes your comments and support. We also look forward to reading Rod Sakrison's book.

Comment 452

**Commenter:** Arn Thoreen representing Skagit Fisheries Enhancement Group

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I've volunteered on salmon issues here for close to two years now. So I'm very involved with the salmon issues. I also have acreage on either side of Sorenson Creek which is in the southern Anderson Parker watershed area, and I live there, and my brother has acreage and is planning on building there. So this does affect us.

**Response:** Thank you for your comment. Ecology is sensitive to the fact that landowners may be affected by this rule.

Comment 453

**Commenter:** Arn Thoreen representing Skagit Fisheries Enhancement Group

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** In your chart that shows water flows that you would like to see being in the streams, you have listed 20,000 gallons per day for that group of three streams. Sorenson being the smallest of those goes dry every summer, won't dry down at the mouth. And so -- and in trying to do the salmon enhancement thing, because we see thousands of coho dying in there every year because of this. We've done the studies, and gone to the upper watershed and found that the stream is flowing nicely in the upper areas and the result of logging in the 1900s where they clear cut, took the logs out of the stream to clean it up, and then clear cut the other side of the stream, too, it allowed a lot of gravel when we did have rains to come down and fill in the lower stream so that now it's a giant perk area.

And so, in the summers, the water is still flowing nicely up in the hills and there are fish in there, but in the lower end where it perks through this gravel it goes dry at the mouth first and then it used to dry up for a mile. And so we would lose fish in all that area.

Well, that, of course, impacts the water quality and the number of fish, and that's why you folks are involved. You wonder, well, who did the logging up there? They should have some obligation to help correct this. Well, it's state school board land, and that was the state of the art in the 1950s, to clear cut, pull all of the large debris out of the stream. Well, now we know it is the worst thing that you can do. But what you're doing is penalizing us for something that the state did several years ago, and there has to be some way to pull in state funding to correct those problems before you penalize the people who live there now that are trying to do it, but are having to do it on their own nickel.

**Response:** Your comment highlights the need to create instream flow rules. Ecology agrees that clear cutting affects not only water quantity, but also water quality, and has a dramatic negative affect on the ability of salmon to spawn. However, it is not the purpose of these rules to punish the community, but the fact remains that due to whatever cause, water in WRIA 3 and 4 is scarce and it has become necessary to create a system to protect ground and surface water for future generations.

Comment 454

**Commenter:** Arn Thoreen representing Skagit Fisheries Enhancement Group

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** And so Sorenson Creek has had a 303 D listing for several years because of the Department of Ecology. They're saying it goes dry. Well, we know that. And yet there aren't really funds available to help landowners who are willing to alleviate this problem, who are wanting to do something. There aren't funds available unless they do it out of their own pocket. So there needs to be some way for the state to put money into programs that help alleviate problems that they caused in the past before there is really penalizing of the people that are living there now. And that would be my comments.

**Response:** Thank you for your comment.

Comment 82

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** To begin, the Tribe expresses its extreme disappointment at Ecology's disregard for previous agreements that have been made between a number of parties within the Skagit River Basin, including Ecology. As you know, our 1996 Memorandum of Agreement ("1996 MOA") was an attempt to resolve specific practical concerns, and thereby avoid any necessity for the Tribe to consider assertion of its senior federally reserved water rights, or for any determination or resolution of those rights. We (and it was our understanding the other parties as well) believed this agreement struck an appropriate balance between instream and out of stream uses of water without requiring the parties to consider incurring the very great cost and inevitable disruption of protracted litigation over quantification of Tribal reserved water rights. Although the balance was a limited one, both in terms of time (50 years) and the number of parties involved, it was our belief that this MOA would provide stability among the parties within the Skagit Watershed for decades to come and allow all parties to live harmoniously as good neighbors, and to defer to a later date resolution of this issue. Ecology's proposal will serve only to undermine the agreements in the MOA, disrupt the stability that all of us attempted to achieve, and force the Tribe to reexamine whether to assert its federally reserved senior rights. However, while it is important that you understand the basis for our deep disappointment with Ecology's proposal, the comments we are providing to you at this time reflect our concerns in the context of State law and rule-making alone, and are not submitted with the intent of raising or addressing (and thus do not raise or address) any federal reserved rights issues. We leave that for another time.

**Response:** Ecology shares your frustration with the lack of resolution on instream flow issues since the signing of the 1996 MOA. Ecology has been trying to work with the signatories of the MOA to develop a resolution to Skagit County's legal challenge of the rule and the outstanding water management issues in the basin. However, since we could not come to a consensus resolution of the issues, Ecology has proposed this rule amendment in hopes of developing a compromise solution.

Comment 83

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** While we agree that this rule should not include the Samish River Basin, it is important that maps be provided that clearly delineate where this rule will apply. We believe that such maps should include an overlay that identifies parcels so it will be clear which parcels will or will not be affected by this rule. Please see the attached SRSC maps as an example of what such maps might look like. We ask that the Department definitively identify and clarify the boundaries and parcels to which the Rule will apply, and we would ask that Ecology include in the Rule a statement of how parcels will be dealt with that are partially inside and partially outside applicable boundaries (e.g., based on location of the well or whether half or more of the parcel is inside the boundaries). We have provided a GIS product that overlays Ecology's delineation of the lower Skagit Basin and Skagit County's parcel layer. We would like to know if this is the definitive approach that Ecology will use in determining whether future withdrawals fall within the jurisdiction of this rule. (See SRSC Maps folder on attached CD.)

**Response:** We appreciate the information you provided and we will discuss the issue of basin boundaries in the implementation plan.

Comment 525

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Email, 1/30/2006

**Comment:** In addition to the comments we mailed to you today (Monday), which should arrive on Tuesday, January 31, please also consider, as comments to the current proposed rule, the Tribe's and SRSC's comments on the 2005 proposed rule that were sent in March 2005. These comments consisted of a Swinomish comment letter and appendices, an SRSC comment letter and appendices, and five emails sent from me to Geoff Tallent.

For your convenience, we will mail you a CD containing those comments.

**Response:** Please see Ecology's response to comment 254.

Comment 581

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/21/2005

**Comment:** The Swinomish Tribe is waiting with anticipation the Department of Ecology's latest draft of the proposed amendment to the Skagit River Instream Flow Rule, WAC chapter 173-503. We have some very serious concerns about the amended rule, as laid out below, based on our understanding of prior drafts. Our concerns will likely be refined and added to as we learn more about the proposed rule. We trust that you will take our concerns into account as you continue to revise the draft rule.

**Response:** This comment relates to a previous rule amendment proposal Ecology appreciate the input provided on the entire rule-making effort.

Comment 582

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/21/2005

**Comment:** Temperature Maximum Daily Load Study ("TMDL Study") produced by Ecology, all of the tributaries addressed in that study, especially Nookachamps, East Fork Nookachamps, and Hansen, must be closed to all further appropriations, including exempt well use. No reservation can be established in these streams because of the water quality and flow difficulties they are already experiencing.

**Response:** Small depletions of stream flow resulting from the use of the reservations could potentially cause small impacts to stream temperature in basins that are listed as impaired water bodies for temperature under the Federal Clean Water Act. The temperature issues are currently being addressed under a Water Quality Clean-up Plan, and actions implemented under this plan should improve temperature conditions in the basins. Ecology has sized the reservations such that the maximum impact would be approximately 2% reduction in the 7Q10 flow. For instance, Ecology is requiring that uses in the tributary basins be limited to ground water sources only, which likely will lessen the impact on surface water sources. Ecology has determined that a 2% reduction in a low flow are within the uncertainty of stream temperature modeling. Consequently, it is difficult to determine what the impacts on temperature would be.

Comment 583

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/21/2005

**Comment:** Justification of Amended Rule. The amended rule's justification must not minimize its effect on fisheries. The Department has not studied the potential of the rule to affect fisheries and all documentation suggests that the amended rule will adversely affect fisheries. A contrary "determination" would be arbitrary and capricious.

**Response:** Please see Ecology's response to comment 347.

Comment 586

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/21/2005

**Comment:** Protection of Flows Released by Puget Sound Energy. As you may or may not know, Puget Sound Energy has agreed to release additional flows up-river to protect spawning habitat. These flows, which are over and above the flow levels currently set by rule, must be protected in the up-river portion of the Skagit. This protection should be provided in the amended rule or through some other mechanism.

**Response:** This comment was submitted on a previous rule amendment proposal. We have included a section addressing the flows agreed upon in the Baker River Project settlement agreement in our rule. See section 173-503-061.

Comment 588

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/21/2005

**Comment:** Comment Period. The comment period must be extended to allow the Tribe to submit the flow studies it is conducting on selected tributaries to the Skagit, as well as other relevant information.

**Response:** This comment relates to the previous version of the proposed amended rule, and is not relevant to this amendment.

Comment 597

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** On behalf of the Swinomish Indian Tribal Community, and the Sauk-Suiattle Indian Tribe, the Skagit River System Cooperative (SRSC) would like to provide the following comments to the Department of Ecology regarding amendments to WAC 173-503. We also hereby submit by reference all supporting documents and documents submitted to Ecology utilized in the development of the original Skagit Rule, 173-503 WAC. The Tribes may choose to send other comments in addition to those made herein.

**Response:** Thank you for your comments and for the submittal of additional information.

Comment 613

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** 173-503- n There is no section 072. Is something intended to be inserted here?

**Response:** This comment was submitted on a previous rule amendment proposal and is not relevant to the current proposal.

**Section - 173-503-020**

Comment 259

**Commenter:** Randy Good representing Skagit County Cattlemen

**Type:** Letter, 1/10/2004

**Comment:** Livestock is a beneficial use of water.

**Response:** Ecology agrees that stock watering is a beneficial use of water pursuant to RCW 90.54.020.

Comment 321

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 173-503-020 Purpose. The rule states that these flows are "necessary to satisfy stock watering requirements." It appears to us, based on Department of Ecology (DOE) documentation, that enough stockwater is being reserved to provide for a five fold increase in stock over what is presently utilizing exempt wells. In the face of a declining agricultural land base and a lack of hard data to support this supposition, we believe DOE has been arbitrary in its determination for the need for this quantity of water to support future stock. See Section II for more discussion of this issue.

**Response:** In the proposed rule amendment available for public review, future stock water users could potentially access the 15 cfs of water reserved for domestic, municipal, commercial/industrial and stock watering use. Ecology understands that this arrangement of adding reserved water for people and for livestock is confusing and has created a separate reservation for stock water uses. See section 173-503-075 WAC.

Comment 85

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** In light of the facts that (1) numerous tributaries are currently listed as water quality impaired pursuant to the Clean Water Act Section 303(d), and (2) the purpose of this rule is in part to insure waters of the state shall be of high quality, further reductions of flows in streams that are temperature-impaired appears to be a flagrant misuse of the overriding consideration of public interest test. Ecology's own studies (See Lower Skagit tributary TMDLs on attached CD) have shown that reductions in stream flows will have adverse impacts on water temperatures in streams currently on the 303( d) list. This does not appear to have been considered in the environmental analysis associated with the adoption of this rule.

**Response:** Several Skagit River subbasins are listed as impaired under the Federal Clean Water Act Section 303(d). Ecology has considered the impact of further withdrawals of ground water in these sub-basins when developing the water budgets for these basins. See the Environmental Checklist prepared for SEPA documentation.

Comment 600

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** 173-503-020:  
Cultus Mountain Tributaries should be defined in the definition section  
•It appears that the inclusion of county obligations is essentially meaningless based on the phrase "whenever possible."

**Response:** This comment relates to a previous proposed rule amendment. However, Ecology agrees that Cultus Mountain Tributaries should be defined and included a line stating that the term is defined in WAC 173-503-040. The phrase "whenever necessary" was left out of these rule amendments. See WAC 173-503-020 in the updated amendments.

**Section - 173-503-025**

Comment 37

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** "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.

**Response:** Because Ecology may create rules only within the bounds of the authority delegated by the legislature through statute, it is implied in Ecology rules that the rules are subject to all applicable laws.

Comment 38

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** "Public water system" is defined at RCW 70.119.020(8) and 90.03.015, not RCW 43.20.260.

**Response:** Ecology agrees that "Public water system" is defined in RCW 70.119.020(8) and 90.03.015 and not 43.20.260. The rule proposal available to the public states that a "public water system" is a system as established under RCW 43.20.260, not defined by 43.20.260. Ecology agrees that this could be confusing, and the definition of "Public water system" has been updated to clarify this point. See section 173-503-025 in the updated amendment.

Comment 150

**Commenter:** Joseph Brogan, Foster Pepper, PLLC representing City of Anacortes

**Type:** Letter and Email, 1/31/2006

**Comment:** WAC 173-503-025 Definition: "Timely and Reasonable Manner"  
The definition should be clarified to state that "timely and reasonable water service" shall be defined by the purveyor or public water system reasonably expected to provide water service consistent with the definitions, regulations, water system plans or policies adopted by that purveyor or public water system. The reference to potential interpretation or definition by "local legislative authorities" is somewhat vague and potentially subject to political influences. Please revise this definition accordingly .

**Response:** For the purpose of this section, Ecology will defer to local definitions of timely and reasonable, which can be defined in a coordinated water system plan developed under the Public Water System Coordination Act of 1977 (RCW 70.116). This will be discussed further in the implementation plan.

Comment 531

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Many of the definitions included in the proposed rule amendment have been modified in response to Skagit County's previous comments. The definitions are an improvement over earlier versions. Skagit County remains concerned, however, about the following definitions:

**Response:** Thank you for your comment.

Comment 532

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** "Agricultural irrigation" is too narrowly defined and inconsistent with the beneficial uses presented in RCW 90.54.020(1) or RCW 90.14.031. Ecology's narrow definition is unnecessary, considering future uses from the reservation remain subject to the beneficial use requirement under state water law, and permitted uses will remain subject to Ecology's public interest determination. The current proposal precludes use of irrigation water for noncommercial purposes or where irrigation does not involve growing and harvesting crops, even though these uses are beneficial uses of water under RCW 90.54.020(1). This definition also precludes processing and stock holding facilities, water for which would not constitute stockwater use. We recommend that the term "agricultural irrigation" be removed and replaced with the term "agricultural and irrigation uses."

**Response:** Ecology respectfully disagrees with your assessment. RCW 90.03.345 expressly gives Ecology the authority to establish reservations of water for certain purposes. Other beneficial uses related to the agricultural industry, such as those uses referenced in your comment are not precluded from obtaining a future water right, as those uses are allowed in the other reservations established in this rule. See 173-503-073 and 173-053-075.

Comment 533

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** "Maximum average daily consumptive use" is the primary means of accounting for water use under the proposed amendment. The definition indicates that use will be measured "over the highest period of use" but does not explain how the period of use will be determined, or the period's length. As explained below, Skagit County recommends basing tributary reservation utilization on average water use. The County's recommendations on water measurement render this definition superfluous.

**Response:** The highest period of use means the time period in which water usage is highest and is typically correlates with the period in which stream flows are lowest (late summer months). The frequency of measurement may vary according to the resource needs and measuring device capabilities. Please see the implementation plan for more details on how the metering provisions will be implemented.

Comment 534

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** "Municipal water supply purposes" is a superfluous definition and should be deleted from the rule amendment. There is no relevant distinction under the current version of the proposed rule amendment between municipal water suppliers and other public water systems.

**Response:** The definition for "municipal water supply purposes" was taken from RCW 90.03.015 and governs municipal water systems. This definition would be distinguished from other public water systems by subsection (a) of the definition which states that municipal water suppliers serve residential purposes through 15 or more residential service connections, whereas other public water systems (also known as a "group B" water system by the Department of Health) have less than 15 residential service connections.

Comment 535

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** "Timely and reasonable manner" is ambiguous in that it refers to definitions provided by multiple sources. This could potentially lead to conflicting definitions. For clarity, we recommend that the definition refer to the appropriate section of the local government code.

**Response:** Please see Ecology's response to comment 150.

Comment 86

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Domestic water use. We believe that it is inappropriate that domestic water use is being defined to include water used as part of business operations. This is a perversion of the generally acknowledged definition of domestic water use, that is, water used in for residential purposes. The definition as proposed clearly expands the use of domestic water to any commercial or industrial purposes. We do not believe OCPI can legally be given such a broad application. See dictionary definition of "domestic" on attached CD.

**Response:** Ecology agrees and has removed "or business" from the definition of "domestic water use." See WAC 173-503-025

Comment 87

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Maximum average consumption daily use should not be reduced by the return flow recharge credit. This is because the actual quantity or quality of water that will be returned to the original aquifer is unknown, differs depending on the particular geography of the area around the well, and will vary over time. Further, the cumulative Qi will not be able to be calculated on a daily basis due to the lack of metering technology. Therefore, maximum average consumption underestimates instream impacts. This will only be exacerbated by the credit for recharge. In addition to these systemic problems with providing recharge credit in general, Ecology's approach, as shown in the attached critique by Dr. Joel Massmann, will result in an overestimation of recharge to the detriment of fisheries

**Response:** Ecology believes that the 50% recharge credit is a conservative, yet fair, estimate of recharge from on-site septic systems. Recharge from septic systems varies, according to some of the factors mentioned in this comment, such as septic design, geology and outdoor water use. It is for these reasons that Ecology chose to use the low end of the estimated recharge percentage, to account for the variation in septic system conditions. Ecology's Background Document on Reservations, Closures and Hydraulic Continuity describes more of the information that Ecology used to determine recharge rates from on-site septic systems.

Comment 88

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Consumptive should be defined as "a use of water that causes either a temporary or permanent reduction in flows or water quality" and a non-consumptive use should be defined as "a use of water that does not cause either a temporary or permanent reduction in flows or water quality."

**Response:** The definitions for consumptive and non-consumptive use in the amended rule were taken directly from WAC 173-500-050.

Comment 89

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** "Commercial agriculture" should be defined so that it is clear that only those who are actually selling their products for profit may take advantage of the reservation.

**Response:** Ecology respectfully disagrees with the suggested definition for Commercial Agriculture. A farmer's ability to earn a profit is dependant on a number of factors such as market and climatic conditions. Consequently, Ecology cannot limit water rights only to farmers who make a profit, as a farmer may not consistently make a profit.

Comment 90

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Instream Flow. The phrase "that is needed" should be deleted from this definition as Ecology commonly adopts instream flow rules that provide less than the necessary protection for fish, wildlife, and recreational purposes.

**Response:** Ecology believes, based on the best scientific information available to us, that the instream flows set by this rule will be sufficient to protect fish, wildlife, and recreation.

Comment 91

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Scientifically sound should be defined as best available science as defined by the version of WAC 365-195-905 5(a) and (b) that exists on the date of adoption of this rule. To eliminate confusion, the relevant language of these subsections of 365-195-905 (as modified slightly to make it appropriate for this context), should simply be cut and pasted into this section. Furthermore, Ecology must be the agency with responsibility to determine if BAS has been applied; such determinations should not be relegated to local governments, who often lack the political will and/or scientific prowess to make these crucial decisions, or to critical areas ordinances.

**Response:** Ecology believes that this is a level of specificity that is too detailed for rule language. Ecology does provide some guidance to applicants developing mitigation plans.

Comment 92

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Service Area definition. "Service Area" of a municipal water rights holder must be defined as existing at the time of the Rule and water provided pursuant to service area expansions beyond that in tributary basins must be deducted from the tributary reservations. Otherwise the reservation quantities will be even more uncertain.

**Response:** The Washington Legislature, in creating Public Utilities laws, stated that "The term "service" is used in this title in its broadest and most inclusive sense." (RCW 80.04.010) Ecology, therefore, does not feel that we can limit the term "Service Area" in space to that which currently exists. However, PUD water rights will be limited by time and any future water rights granted to the local PUDs that are greater or above the rights currently held will be junior rights and subject to the same rules and regulations as other junior water rights, and will not affect the reservation.

Comment 601

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** A definition of incidental uses should be provided

**Response:** The words "or business" have been removed from the definition for "domestic water use" which is the section of the rule amendment where "incidental uses" is found, and therefore "incidental uses" relates to uses for potable water that satisfy the human domestic needs of a household. See WAC 173-503-025 in the updated amendment.

Comment 602

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** We believe a more appropriate definition of consumptive use should be "a use of water that causes either a temporary or permanent reduction in flows."

**Response:** The definitions for consumptive and non-consumptive use in the amended rule were taken directly from WAC 173-500-050.

Comment 603

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** The definition of "domestic water use" should not include business use as this is inappropriate under RCW 90.44.050.

**Response:** Ecology agrees that business use should not be included in the definition for "domestic water use" and has updated this definition accordingly. Please see WAC 173-503-025 in the updated amendments.

Comment 604

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** Mitigation plans are described as voluntary; however, if they are a necessary predicate to receiving a new water right, it is misleading to describe them as "voluntary."

**Response:** Ecology cannot require mitigation as part of an application for water right, so all mitigation plans are voluntary. Please see RCW 90.03.255.

Comment 605

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** A definition of "water source" should be provided

**Response:** Ecology respectfully disagrees as to the need for a definition of "water source" as the source of water will be defined in an application and permit and will encompass the water sources identified in the rule amendment.

**Section - 173-503-051**

Comment 431

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/11/2006

**Comment:** WAC 173-503-051 Stream closures. (1) The department determines that, based on historical and current low flows and uses, water other than the water reserved under WAC 173-503-073, is not available for year round appropriation from the tributary subbasin management units of the Skagit River identified as subject to closure in WAC 173-503-074. If the intent of this section is to set forth the basis upon which the various subbasin management units are to be closed there is no need for the department to reach a legal conclusion as to whether there is water available or not for future year round appropriation. This statement by implication may foreclose the opportunity for future adaptive management and mitigation which is a critical element of the amendment as set forth in WAC 173-503-060. The Upper Skagit Tribe suggests that the section be amended to read as follows: The department has set aside a limited amount of water for future out-of-stream uses which may be appropriated in accordance with WAC 173-503-073 and as quantified in WAC 173-503-074. When and if the full amount of the reserved quantities are allocated, those tributary subbasins identified as subject to closure shall thereby be closed without further action of the department, except for the Upper Skagit, Middle Skagit and Lower Skagit subbasin management units.

**Response:** Ecology has amended the language in the rule amendment relating to future stream closures to more accurately reflect our intention. Please see section 173-503-051.

Comment 93

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** The Upper, Middle and Lower Skagit Subbasin Units should be closed when total permits, certificates, applications and claims equal 835 cfs. This is the number that was previously determined to be necessary to maintain the appropriate hydro graph for the Skagit River. In addition, based on the attached IFIM study, the entire Nookachamps basin should be closed to further appropriations. It is unclear how Ecology can justify the reservations on the upper portions and how it can justify providing no protection whatsoever to the lower portion. Finally, upper Skagit tributaries should each be closed upon reaching a use of .04cfs. The same biological considerations for the other tributaries that do automatically close should apply to these tributaries as well. The Rule would provide more certainty if previous language were reinstated such that the streams would be closed except for the reservations.

**Response:** The entire Nookachamps Creek basin is subject to closure once the reserved quantities are fully allocated. Ecology has chosen not to close the upper Skagit tributaries as it is not evident at this time that closure is necessary. Since most of the land in those tributaries is held in public ownership there will be limited demand for out-of-stream water uses in those basins. Closing those basins will not add much in the form of protection for the basins, as the land use designations for the most part prohibits out-of-stream development.

Comment 606

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** While we are supportive of stream closures and believe they are necessary to protect the already severely taxed stream flows, Ecology has provided no documentation to justify why some tributaries remain open. Specifically, it is unclear to us why Nookachamps Creek-East Fork, Salmon/Stevens Creeks, and Gilligan Creeks are open to further appropriation. Leaving these streams open conflicts with sound science including Ecology's own TMDL study. Moreover, Skagit PUD has water rights to several of these tributaries that predate this amendment, and these rights could be impaired by future users.

**Response:** This comment is on a previous rule amendment proposal and the comment is no longer applicable to the current rule amendment. All of the creeks listed in the comment are subject to closure once the reservations are fully allocated.

**Section - 173-503-052**

Comment 536

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** This section delineates the boundaries of the Skagit River Basin and its subbasin management units by referring to WAC 173-503-120, Figure 5. Grandy Creek is shown in both Figures 4, which delineates Lower Skagit River subbasin management units, and in Figure 5, which delineates Upper Skagit River subbasin management units. In both figures, Grandy Creek appears to fall within WRIA 4, the Upper Skagit River. Ecology's Background Statement recognizes that Grandy Creek is the only subbasin within WRIA 4 that has a separate reservation. Ecology should remove Grandy Creek from Figure 5 to avoid confusion over the amount of water available in the Grandy Creek subbasin.

**Response:** Ecology understands that including Grandy Creek in Figure 5 is somewhat confusing, since it also defined in Figure 4. Ecology has removed Grandy Creek from Figure 4.

Comment 542

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** The scope of the studies relied upon to develop the project release flows was limited to the middle segment of the Skagit River roughly from the Baker River confluence to the Skagit PUD pipeline crossing near Sedro-Woolley. Subsequently, the scope of the department's public interest review of future water right applications should be limited to benefits of the proposed project releases in the middle segment of the Skagit River only.

**Response:** Ecology agrees that for the purpose of issuing future water right applications relating to the project release flows for the Baker River Project the department's scope of the public interest review should be limited to the segment of the Skagit River Basin between Sedro Woolley up to and including the Baker River, and has updated the rule amendment accordingly. See WAC 173-503-061 in the updated amendment.

Comment 94

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (2) The word "cumulatively" should be added before the word maximum

**Response:** See WAC 173-503-052(2) in the updated amendment for this change.

Comment 633

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** One final issue that must be addressed within this rule is the protection of streamflows resulting from the relicensing of the Baker Dam. After four years, and many compromises on the part of all parties, Puget Sound Energy (PSE) has agreed to increase minimum instream flows to protect spawning salmon and incubating eggs. In addition, these increased flows will provide for additional habitat do instream of the Baker River. These flows are necessary to protect and restore Skagit basin Chinook salmon, currently listed as threatened under the Endangered Species Act These releases have been agreed to for the express purpose of meeting fisheries needs, not to accommodate future out of stream demands. Reduction of these flows as a result of new diversions or withdrawals will have adverse impacts on fisheries resources, may result in the take of listed species, and will be inconsistent with the purposes for which this water was released. It is therefore imperative that the rule provides measures to insure that the flow regimes established in the settlement agreement, of which Ecology was a participant, are protected.

**Response:** This comment relates to the previous proposed rule amendment. Ecology has included a section on the Baker River Project in this rule.

**Section - 173-503-060**

Comment 44

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** (c) includes a contingency provision if monitoring in a closed basin indicates a mitigation plan is not effective, water use must cease. This is an unlikely consequence for water rights being used for domestic public water supply. Ecology should address this possibility in more detail in this rule.

**Response:** Because all future water right permits will be water rights junior to the instream flow, holders of such permits will be subject to interruptions in water use, and this includes domestic water users. Ecology will warn future users of the risk that they would face if the mitigation plan is not effective. Ecology recognizes that this could be an enforcement issue if monitoring demonstrates that the mitigation is not working and the withdrawal will need to cease or be subject to instream flows. However, the law allows for mitigation and this section provides some guidance on this point. Because Ecology can envision an interruption of domestic water supplies, it can envision enforcing a cessation until and unless a mitigation plan is made effective.

Comment 61

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** (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, including instream flows. On its face, the language in these sections exempt these potential water rights from the instream flows and closures established in Ch. 173-503 WAC, which essentially nullifies, and at least contradicts, the requirement that these rights not impair instream flow rights. Ecology must rectify this.

**Response:** Ecology does not believe that the language in sections 173-503-060(1) (c) and (d) contradicts or nullifies the instream flows and closures established in this rule. For section 173-503-060(1)(c), the law allows for mitigation and the rule provides some guidance on that point. For section 173-503-060(1)(d), there may be areas in the Skagit basin where withdrawals of water would not impair instream flows, and an applicant could demonstrate this condition through scientifically sound investigation. Consequently, Ecology does not want to prevent applicants that can scientifically demonstrate this condition from obtaining a uninterrupted water right.

Comment 62

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** We recommend that Ecology 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.

**Response:** Please see Ecology's response to comment 44.

Comment 63

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** (2)- the term "public water supply" is not defined and therefore could be interpreted to be either water used for a public water system (which is defined) or for municipal water supply purposes. CELP strongly supports the provisions in this section but cautions Ecology to use the terms "public water" and "municipal" carefully to capture the real intent.

**Response:** Ecology agrees that "public water supply" lacks clarity, and so has changed the term to "public water system" to be consistent with the rule's stated intent.

Comment 66

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** (4)- this section seems to allow for water rights to be granted by Ecology in addition to the reservations provided in Section 173-503-073, if Ecology makes a determination that they serve overriding considerations of the public interest. If this is Ecology's intent, CELP strongly disagrees with this provision and recommends it be deleted. If another interpretation is intended, Ecology should clarify the actual intent.

**Response:** Ecology may grant water rights, using the reserved water, or permit-exempt wells may be installed using the reservation. Ecology does not contemplate reviewing and granting applications for water rights based upon a case-by-case evaluation of whether the request meets the overriding considerations of public interest standard. Rather this standard was used in establishing the reservations.

Comment 151

**Commenter:** Joseph Brogan, Foster Pepper, PLLC representing City of Anacortes

**Type:** Letter and Email, 1/31/2006

**Comment:** Subsection (2) pertaining to public water systems should be clarified as follows: "Before the department can approve a water right application for a new public water supply under subsection (1 )(b), (c), or (d) of this section, the applicant must also demonstrate that there are no other municipal or public water systems in the same proposed retail service area that can provide timely and reasonable water service as defined in WAC 173-503-025." This revision is consistent with the language in WAC 173-503-073(3)(f).

**Response:** Ecology agrees that this language is appropriate and has updated the subsection accordingly. See WAC 173-503-060(2) in the updated amendments.

Comment 269

**Commenter:** Dorothy Freethy, SCARP representing (Skagit Citizens Alliance for Rural Preservation)

**Type:** Letter, 1/17/2006

**Comment:** issuance of new water rights that in any way would impair those of rural property owners exercising their rights with respect to exempt wells and established ground-water or surface-water withdrawals;

**Response:** Please see Ecology's response to comment 577.

Comment 323

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 173-503-060(1)(c). Language should be inserted in this section that gives a clearer process for the review and approval or denial of proposed mitigation plans, including a provision making such decisions easily available for the public to review.

**Response:** Ecology cannot require mitigation, it must be done voluntarily, and therefore Ecology does not have written requirements for determining application approval. However, Ecology does have a mitigation digest that describes the process for mitigation approval, and this is sent out to applicants.

The mitigation plan is not available for public viewing prior to approval, but is part of the water right record which can be appealed.

Comment 324

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 060(1)(d). All water right applications should only be approved if no other municipal or public systems for water supply are available. This condition of new water right approvals applying only to public Water systems is too narrow.

**Response:** All users needing a potable water supply are required under the rule proposal to connect to an existing public water supply if service can be provided in a timely and reasonable manner. Other applications will only be granted if the basin or stream has not been closed and where they do not impair existing water rights and the instream flow right, and where they meet the other provisions of these rules and state statutes.

Comment 432

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/11/2006

**Comment:** WAC 173-503-060 Future permitting actions. As it pertains to this entire section after each subsection we would recommend to delete the period add a semicolon and add an or.

**Response:** The last sentence of subsection (1) states in part "if all statutory requirements are met and if any of the following situations apply:" Ecology believes that this language is the functional equivalent to adding a semi-colon and an or after each subsection.

Comment 433

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/11/2006

**Comment:** In regards to subsection (1) (c) there needs to be a process identified that the department will comply with as it relates to its determination of whether a mitigation plan is approved. As written the authority is given to the department with out any process being provided to the proponent of the plan which is somewhat ambiguous.

**Response:** Ecology will review each mitigation plan on a case by case basis and will only approve a plan if it can be shown that it will not impair senior water rights, instream flow rights or diminish water quality. Ecology cannot create a list of requirements for a viable plan because mitigation plans must be created voluntarily and cannot be required by the department. Ecology provides a mitigation digest to applicants which details the review process, among other things.

Comment 434

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/11/2006

**Comment:** In regards to subsection (1) (d) the Tribe reiterates its previous comments pertaining to the department's efforts to shift its statutory obligation pertaining to hydrolic continuity. This language has transferred the burden from the department's obligation pursuant to RCW 90.03.290, and current case law, to the proponent of the mitigation plan. This burden shifting is an attempt by the department to avoid its statutory scientific obligation of establishing hydrological continuity to determine that an impact has occurred to the instream resource and instead forces an individual to meet a nearly impossible standard. The Upper Skagit Tribe reiterates its previous request of the department, as to the legal basis and authority to amend RCW 90.03.290 through this amendment by shifting the burden as it relates to establishing an impact due to hydrological continuity from the department to the proponent.

**Response:** Ecology respectfully disagrees that the language in RCW 90.03.290 creates a statutory scientific obligation of establishing hydraulic continuity. It is the duty of Ecology under this statute to determine what water if any is available for an applicant, but this determination is to be based on information provided by the applicant in the permit application as deemed necessary by Ecology, as stated in RCW 90.03.290. This rule will abide by RCW 90.03.290 and all other statutes, and this rule is not an attempt to amend or bypass any statute.

Comment 435

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/11/2006

**Comment:** In regards to subsection (5) the Upper Skagit Tribe recommends deletion of the last sentence as there is no legal basis for this obligation and it unduly burdens a permit holder.

**Response:** Please see 173-503-060(5) for this change.

Comment 440

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/31/2006

**Comment:** Adaptive Management. First and perhaps most importantly the Tribe strongly supports the use of adaptive management to inform future decisions when additional data/information is available. Understanding that the current information the Department relies upon when making specific determinations may change subject to future studies and development of better technology to both measure and gather data, the Tribe strongly supports WAC173-503-116. However there needs to be a process which ensures that if a party creates new data or additional information that the Department will be required to review said information/data and the manner in which the information may affect the rule. Furthermore the Tribe understands that there are current proposals to study the ground water hydrology of the basin by the USGS. This is precisely the type of work the Tribe supports and believes that this section promotes. With the data that this study may generate issues such as hydrolic continuity as well as better defining the boundaries of the basin may be produced which in turn would allow for a stronger rule.

**Response:** Ecology also supports the concept of adaptive management and will manage the reservations according to the most up to date science and information available. Ecology recognizes that additional scientific information may be relevant to the administration of this rule and has made provisions in the rule amendment that would allow the agency to administer the rule according to the new information. See section 173-503-060(1)(d) and 173-503-116.

Comment 46

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** You have now specified overall water reservations in the various sub-basins but these may encourage SPRAWL-a GMA NO NO and this County still has hopes to attain an 80/20 Urban/County population % ratio. This might happen if enough people settle in the cities and their expanding UGAs yielding attainment of this County's Countywide Planning Policy (CPP 1.2) Goal as delineated in the draft Comprehensive Plan.

**Response:** Thank you for your comment related to ensuring that the groundwater "reserve" does not lead to sprawling development. Please see response to comment 523.

Comment 47

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** More sprawl induced or widened existing roads and their attendant automobile related pollutant collecting aspects may create water quality problems with the best of intentions regarding catch basin designs to minimize these mobile (public and private transportation mode) pollutant sources.

**Response:** Ecology agrees that automobile pollution diminishes water quality, however, it is not within the purview of this rule to manage land use.

Comment 517

**Commenter:** Robert Helton

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** One of the things that comes to mind here is that there certainly must be a limit to the amount of subterranean water for all the future growth that's envisioned in this county. There will be 150,000 people by 2025. And I would take an exception for all the well drillers that might not have jobs for the next 100,000 people because there just might not be enough water. This is a rural county and I think all of us living here now moved here because it's a nice place to live. It won't be a nice place to live if there is not enough water or a perceived lack of water.

**Response:** Ecology respectfully disagrees that well drillers might not have enough jobs due to these rules. Ecology's economists calculated the financial impacts to businesses as a result of this rule in both the Economic Impact Statement and the Small Business Economic Impact Statement and concluded that the financial impacts to businesses were minimal and that the benefits from the rule outweighed the costs. Further, Ecology determined that this rule will support the projected water demands in WRIA 3 and 4 for at least 20 years.

Comment 518

**Commenter:** Robert Helton

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Now, one of the things that really got my goat was Joe Hendricks' comment about GMA forces us to provide all these home sites for growth. GMA also I think specifically says -- and you can correct me, sir -- that growth does not occur in areas where there isn't enough water. That's one of the exemptions about growth.  
Now, am I right in that?

**Response:** Thank you for your comment related to ensuring that the groundwater "reserve" does not lead to sprawling development. Please see response to comment 523.

Comment 186

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Skagit County should retain the discretion to manage growth and to determine water availability by managing the water budgets.

**Response:** This rule does not affect Skagit County's authority to manage growth and determine water availability by managing the water budgets because the rule or reservations created do not limit or facilitate growth. Please see response to comment 523.

Comment 191

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology is continuing its efforts to subject post-2001 water uses and users to the instream flow rule. These uses would be counted against the water budgets, at 800 gpd for each individual residence, and at 5,000 gpd for each commercial use.

**Response:** Ecology has updated the rule to assume 350 gpd rather than 800 gpd, which is closer to the actual daily household water usage in the Skagit Basin.

Comment 484

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Fourth, the county currently makes water availability determinations. We think that the county should be able to retain the discretion to manage growth and determine water availability, and not have that answer provided to us by the Department of Ecology. We understand Ecology wants to track the use of water from the reservations, and that's fine, but as far as making sure that water is matched to the development that's occurring, that's something that Ecology can't do by itself. These are primarily exempt wells. Ecology will not have the information to determine how much a well is using and when they're actually being used.

**Response:** This rule does not affect Skagit County's authority to manage growth and determine water availability by managing the water budgets because the rule or reservations created do not limit or facilitate growth. Please see response to comment 523.

Comment 493

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** We can agree that reservation quantities should be directly related to stream sites, and I think Ecology has been done a reasonable job of trying to determine what flows are in the tributaries that are described in trying to determine what appropriate impact withdrawal would be without causing impact. We think that two percent of 1710 which is the formula Ecology uses is a workable formula. We would like to have an opportunity to look at how that formula was used in these tributaries and work with Ecology during the rest of public comment today to make sure that we are all in agreement that those are the right numbers.

**Response:** Ecology has provided our calculations, methodology and data in the document titled Skagit Rule Amendment Background on the Reservations, Closures, and Hydraulic Continuity, which was provided to Skagit County and the public during the public comment period.

Comment 537

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** WAC 173-503-073(3)(a) makes the domestic, municipal, commercial/industrial and stockwatering reservation available to exempt well users. Subsection (1) appears to allow certain water uses to be exempt from the instream flow rules or stream closures. These include the following:

- nonconsumptive uses;
- use under a water reservation;
- use under a mitigation plan; or
- use that does not impair instream flows or other senior water rights.

Subsection (1) creates confusion by implying that exempted uses must nevertheless obtain water rights permits. Ecology should clarify that subsection (1) does not require water users who are exempt from the permitting process to obtain a water rights permit.

**Response:** Ecology agrees with many of these comments and has updated the rule accordingly. See WAC 173-503-060(1) in the updated amendment.

Comment 538

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Subsection (1)(c) appears to require that when future permitting actions are based on a mitigation plan, mitigation must be maintained throughout the entire year. This is a significant departure from the earlier rule which required mitigation only during periods of potential impact to instream flows. There is no reason to require mitigation for actions that do not have an adverse impact on instream resources. This provision should therefore be deleted from the amendments.

**Response:** When the reservations are fully appropriated and a stream is closed, it will be closed year round. Therefore, mitigation plans in effect to take water from a closed source will need to be maintained year round or as long as the water is removed from the source.

Comment 539

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Subsection (2) prohibits issuance of a new water rights permit within the retail service area of another public water system. The term "retail service area" is not defined, nor is there a requirement that service actually be available from an incumbent service provider in a timely and reasonable manner. Under WAC 173-503-073(3)(f), water should be made available under a water reservation unless "a municipal water system has been established and a connection can be provided in a timely and reasonable manner." This discrepancy between WAC 173-503-060(2) and WAC 173-503-073(3)(f) appears to favor exempt uses over permitted uses, which would have the unintended effect of stimulating development of individual exempt wells, and discriminating against smaller public water systems.

**Response:** Ecology has updated the rule to include a definition of "retail service area" that specifies that the supplier currently provides direct water service and plans to provide new service. See WAC 173-503-025 in the updated amendment.

Comment 540

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** An additional problem with subsection (2) is that it forces non-potable water users to connect to potable water supplies. Not all water uses require potable water. Forcing users of non-potable water to connect to public water systems could interfere with public water purveyors' ability to supply domestic needs. Ecology should allow non-potable water withdrawals even if public water systems can provide a connection in a timely and reasonable manner. This would help ensure that public water systems remain available to serve those that benefit most from their services.

**Response:** Ecology respectfully disagrees with this assessment of the rule. The words "domestic potable" are meant to imply that only domestic water users who require potable water are required to connect to a public water system.

Comment 95

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (c) Because of the biological impacts to returning salmonids, mitigation via cross basin transfers should be prohibited. Taking water from one tributary to put to another tributary can have adverse impacts to returning adults, and can effect the groundwater hydrology in each of the effected tributaries.

**Response:** Mitigation projects are evaluated on a case-by-case basis, based upon the specific mitigation proposal and the physical characteristics of the mitigated area. Impacts such as presented in your comment will be addressed as part of the mitigation acceptance by Ecology.

Comment 96

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** This section should also provide that mitigation measures have to be implemented and demonstrated to be effective before additional water can be allocated from the water body where the original effects will take place. Once infrastructure and other capital investments are made based on mitigation actions, even if those actions fail, it is unlikely that Ecology will curtail the use of the water so permitted. Demonstration "up front" is an effective way to insure that unmitigated resource impacts will not occur.

**Response:** Please see Ecology's response to comment 44.

Comment 97

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (d) Language should be inserted in this section that sound scientific studies should be made available through SEP A to provide for public review and appeal.

**Response:** Thank you for your comment.

Comment 98

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (2) All water right applications should only be approved if no other municipal or public system for water supply is available. This limitation of new water right approvals applying only to public water systems is too narrow. Moreover, language should be added as follows: "Before the department can approve a water right application for a new public water supply under this section, the applicant must also demonstrate that it is not in the service area of an existing municipal water supplier (as defined as of the date of this Rule). If applicant is in the service area of such a municipal supplier and the supplier is able to provide water service on a timely and reasonable basis, the department shall reject the water right application. If the applicant is not in the service area of such a supplier (as defined above), but timely and reasonable water service is available and the service area of the supplier is expanded under the law, the Department will reject the water right application and will count water use from the expanded portion of the service area as a use of the tributary or mainstem reservations, where applicable."

**Response:** It is the policy of the State of Washington that future growth should be served by public water suppliers. Ecology carefully developed the language in this section so as to promote this policy, yet remains consistent with public water supply, growth management, and building permits rules and regulations.

Comment 99

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (3) Language that states that the "withdrawal can be managed" should be changed to "will be managed" to clarify that this is a requirement of the Rule. Moreover, to receive such an interruptible right, the water user should be required to enter into agreement with Ecology that he/she will stop using water during low-flow periods and that he/she will provide written assurances to the Department that he/she has in fact stopped using water during each low-flow season, in the absence of which Ecology will consider the right revoked.

**Response:** Please see Ecology's response to comment 44.

Comment 100

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Language in this section should also state that once the reservations are exhausted, this provision will not be available. The language as written allows for future withdrawals within basins even if they closed. If that is the intent of the Department, then the provision for basin closures is merely illusory.

**Response:** Ecology agrees that this language could be misinterpreted and has changed it in the updated amendment to clarify that if a basin is closed, new withdrawals with new wells will be available only under very specific circumstances. See 173-503-060(3) in the updated amendment.

Comment 101

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (4) The citation to OCPI is unnecessary here and is potentially misleading because it suggests that exemptions could be broadly granted, when in fact, the statute, as interpreted in Pollution Control Hearings Board decisions, would only allow use of OCPI in very narrow circumstances, where there was a specific, pressing human domestic need that could not otherwise be served. We therefore ask that the section be amended to delete the OCPI reference. The last clause would then read "except as provided in RCW 90.54.020(3)(a)".

**Response:** Ecology has updated the section of rule accordingly. See WAC 173-503-060(4).

Comment 102

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Add language to subsection (5) providing that such meters must measure maximum daily water use, and this measure must be used to calculate the amount of the reservations that have been used. Such meters must use best available technology or remote-reading technology. No future use pursuant to a reservation will be allowed if during the preceding calendar year less than 95% of the meters installed pursuant to this rule were not regularly read and the data reported to the Department, if data from such meters was not analyzed by the Department to calculate the amount of the reservations that has been used on a tributary-by-tributary basis, or if a local entity did not submit notice to the Department and other interested parties of any building permits issued and/or subdivision applications approved which will utilize such reservations, including the location of the well at issue.

**Response:** Ecology has made some amendments to the sections referenced in your comment, WAC 173-503-060 since the public review of the rule amendment proposal. Please see this section for more information. Additionally, Ecology has provided additional information on how the agency will implement the metering conditions in the implementation plan for this rule.

Comment 608

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** 2(c) Because of the risk to instream resources, we believe the standard for review for mitigation plans should be the requirement that an applicant must conclusively show by clear and convincing evidence that the water withdrawal will not impair senior water rights. Furthermore, the requirements for a viable mitigation plan should be further defined and should be based on the best available science as defined in WAC 365-195-905(5)( a) and (b) and WAC 365-195-920( 1).

**Response:** Please see Ecology's response to comment 433.

Comment 609

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** We believe that if monitoring shows that that mitigation is not effective, it is extremely unlikely that Ecology will require the applicant to stop diverting or withdrawing when instream flows are not being met. We also believe it is unlikely that Ecology will enforce the rule that applicants must cease diverting or withdrawing in closed basins under these circumstances. The lack of enforcement of the current rule by Ecology can only lead us to this conclusion, particularly if individual businesses might be closed as a result of enforcement. We therefore believe that adequate mitigation performance must be demonstrated "up front" prior to the issuance of any permits for withdrawals.

**Response:** Even if adequate mitigation performance is demonstrated up front, continued compliance is not assured. Ecology will make a best faith effort to enforce mitigation plans and other sections of this and other Ecology rules.

Comment 610

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** We believe it is important for Ecology to provide specific information with regard to why the Cultus Mt. tributaries will remain open. Furthermore the use of the 200 cfs maximum withdrawal amount as a "limit" on future withdrawals from the tributaries is arbitrary and capricious and potentially violates the Endangered Species Act. That withdrawal limit is tied to the mainstem. The flows of tributaries themselves drop to zero cfs or one or two cfs in some cases, and their low flow periods may not correspond with the mainstem's low flow periods. Finally, with groundwater withdrawal, it is virtually impossible to tell when the effect of a withdrawal is going to impact surface water.

**Response:** This comment is on a previous rule amendment proposal and is no longer applicable to the existing rule amendment. Please see sections 173-503-040 and 173-503-074 for the status of the Cultus Mountain Tributaries in the current rule amendment proposal.

Comment 611

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** (4) Ecology's dependence on overriding considerations of public interest (OCPI) is contrary to law, is a recipe for disaster for instream resources, and makes protection of instream flows entirely illusory. As seen in this amendment, and in supporting Ecology documents which suggest that Ecology may next address other potential future water needs such as agriculture, industry, and municipal water supplies and that the rule may be reopened in order to do so, broad, unbounded use of OCPI makes the priority date for the protection of instream flows meaningless. Further, it is unclear how the interests of all the citizens in Washington State can be overridden by speculative and economic interests of future individual investors. Ecology is reserving water for individuals many of whom have not yet moved to Washington State, and some of whom have not even been born. Moreover, without any basis, Ecology assumes in doing so that future generations will value development over a vibrant natural environment. Ecology's incremental reduction of in stream flows based on OCPI ignores the cumulative effects of past or future reductions in flows, including those reductions resulting from lack of enforcement of the current instream flow rule. There has been no analysis of the loss of salmon habitat resulting from previously permitted uses or claims, nor has there been any analysis of the impact of inchoate rights resulting from the passage of HB 1338. We are unaware of any analysis regarding how future withdrawals in Skagit basin tributaries by municipal water purveyors, combined with additional withdrawals, as a result of the reservations will affect fisheries resources. The illegality of the broad use of OCPI is supported by two attached PCHB decisions.

**Response:** This comment is on a previous rule amendment proposal and is no longer entirely applicable to the current rule amendment proposal. However, please see responses relating to the issue of the use of overriding considerations of the public interest (OCPI).

Comment 612

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** Ecology should require reporting requirements regarding establishment of new wells, how much water is being used, the use and availability of sewer (including updates when sewer becomes available), use of stockwatering reservation, location of wells, and building permits issued. The results of the reporting requirements should be provided in a format such that results can be analyzed by interested parties on a routine basis. Moreover, raw data should also be made available to interested parties.

**Response:** This comment pertains to the previous proposed rule amendment. Ecology believes that our metering requirement in the current rule amendment satisfies this request. Ecology will also publish yearly the reservation use and remaining amounts in a newspaper of general circulation in each county in the Skagit River basin.

**Section - 173-503-061**

Comment 248

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Why does Department Of Ecology ignore additional water to be provided via the Baker project FERC relicensing?

**Response:** Ecology agrees that the flows agreed to in the Baker River Project settlement agreement will positively benefit instream resources. We have included some language pertaining to the Baker River flows. See WAC 173-503-061 in the updated amendments.

Comment 436

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/11/2006

**Comment:** The Tribe objects to the reference to the Baker River flows as separate and apart from the overall basin flows. As we stated previously the adjustments to the releases from the Baker River Project were for the specific purpose of protecting spawning grounds, which are primarily upstream of the pipeline near Sedro Woolley. If the department does in fact recognize the Baker Project releases as somehow separate and apart from the overall basin flows then they should be available down stream of the pipeline for a portion of the out of stream needs in this process.

**Response:** Ecology agrees in part to your comment and has updated the language of section 061 to make clear the future withdrawals or diversions between Sedro Woolley and the Baker River will only be allowed if it can be shown that there will be no reduction in the benefits from mitigation associated with the Baker River relicense. See WAC 173-503-061 in the updated amendment.

Comment 501

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** As it relates to the Baker River project settlement language, the Baker River flows were addressed at the Fir Creek licensing process. Those flows -- the Department of Ecology had a representative at the table during those negotiations. Those flows were never a part of this rule and have no place in this rule unless the department recognizes that that water is new water or water that is not a part of the Skagit basin in some manner. If the department recognizes that this is, in fact, water that is different, new, somehow apart from the other basin water we would strongly urge that the department allow that water to be used downstream of the spawning grounds in order to provide for the mitigation for out-of-stream uses.

**Response:** Ecology agrees in part to your comment and has updated the language of section 061 to make clear the future withdrawals or diversions between Sedro Woolley and the Baker River will only be allowed if it can be shown that there will be no reduction in the benefits from mitigation associated with the Baker River relicense. See WAC 173-503-061 in the updated amendment.

Comment 541

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** This entire section is superfluous because Ecology is already required to do a public interest review when evaluating water rights and must follow the prior appropriations doctrine. Subsequently, this section should be removed. However, should Ecology decide to retain this section, it should clarify the reference to "project releases submitted to the Federal Energy Regulatory Commission for relicense of Puget Sound Energy's Baker River project." The document containing the pertinent release information should be properly cited to include the title, date, author, and page number(s).

**Response:** Ecology has updated this section accordingly. See WAC 173-503-061 in the updated amendments.

Comment 103

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Change language to the following: "The department acknowledges that project water releases agreed upon under the Federal Energy Regulatory Commission relicensing settlement agreement for Puget Sound Energy's Baker River Project, entered into in furtherance of the parties' obligations under the Endangered Species Act, are a necessary component to adequately mitigate for the ongoing impacts of Baker River project operations. Therefore, new permits for withdrawals or diversions that would impact the portion of the Skagit River Basin between Sedro-Woolley up to and including the Baker River, will only be issued if the applicant can demonstrate that there will be no reduction in the mitigation benefits associated with the flow release provisions associated with the Baker River relicense.

**Response:** Please see updated section WAC 173-503-061.

**Section - 173-503-072**

Comment 515

**Commenter:** Bill Clotyie representing D&C Well Drilling

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I can see the scenario that -- and these basins that get to the point where it includes the scenario I mentioned, that a developer drills a whole bunch of wells, and he comes along and wants to have a well in that same sub basin. He can't do it because those wells have already been drilled and/or the scenario that C sells a piece of property to D, but D not knowing that the basin is closed pays the price for the land and he's stuck. So I can see some real problems with the total administration of this thing.

**Response:** Ecology will provide notice as to the status of the reservations, which will be published yearly in local newspapers of general circulation in each county in the Skagit River basin. However, Ecology recognizes that the current up-to-date information on the status of the reservations is necessary in order to effectively implement this rule. Ecology has outlined how we will inform the public of the status of the reservations in the accompanying implementation plan to this rule amendment.

Comment 280

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** If the DOE thinks that people will report their water usage to them or the county, they are wrong. If people do not have an incentive to report, they won't. The DOE cannot even get those who have water rights to comply. How do you expect a single homeowner to? If you have an outside person to gather the info, who will pay and will a private homeowner allow strangers to access their meters?

**Response:** Ecology believes that measuring water use is a more accurate method of managing and accounting for water use under the reservations. Ecology is working with local jurisdictions on implementing the water measure conditions in the rule. Ecology has removed single residential exempt well owners from the metering requirement and will debit these uses at 350 gallons per day and therefore these users will not be required to report or allow access on their property. Ecology's implementation plan for the Skagit Instream Flow Rule contains more detailed information on metering and measuring water use.

Comment 104

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** The reference to "whenever possible" should be deleted as the sentence at issue, requiring local governments to exercise their powers in accordance with this rule, does not impose potentially impossible requirements. Moreover, "whenever possible" appears to create a loophole.

**Response:** The sentence "All agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter," Is a direct quote from RCW 90.54.090, and since agency rule cannot override a state statute, "whenever possible" cannot be deleted.

**Section - 173-503-073**

Comment 41

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** 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.

**Response:** Ecology carefully considered the impact to instream resources as we developed the reservations. First, Ecology would like to emphasize that the amendment is not changing the existing instream flows set in this rule. Ecology has proposed these amendments to set forth future closures of streams, provide limited reservations of water that can be used for out-of-stream uses, and to provide guidance on future water rights. Ecology sized the reservations based on 1-2% of the estimated weekly low flow seen every ten years. In a normal year, the impact would be much less than 2%. In a dry year, the impact would be closer to 2% in some subbasins. The size of each of the reservations has been limited to amounts that Ecology and WDFW fish biologists believe are unlikely to significantly impact the long term sustainability of the fish population. Ecology does not believe that providing for these reservations is contrary to the state’s obligation to protect and restore habitat for the recovery of ESA-listed fish.

Ecology agrees that adequate instream flow is an important building block for recovery of ESA-listed species. Ecology believes that the existing instream flow and the rule amendment support fish recovery by limiting the depletion of stream flows in the future from more diversions of water during low flow times. The instream flow rule does not add water back to the stream nor guarantee a certain flow will be in the river. An achieving flow program needs to be coupled with the established flow to more fully ensure stream flow is not limiting salmonid production. The reserves will help fish recovery in the future, by limiting depletion during low flow times.

Comment 45

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** We recommend limiting new withdrawals under the reservation if the new withdrawal is “within the service area of a municipal water supplier” rather than “where a municipal water system has been established.”

**Response:** Ecology respectfully disagrees with CELP's suggested language. The language in the rule is consistent with public water supply laws and policies to encourage connections to public water supply when connection is timely and reasonable.

Comment 58

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** Metering of these future potential uses is absolutely necessary in order to ensure actual use does not exceed the projected reservations. We applaud Ecology for requiring metering of all water users availing themselves of the reservation, including permit exempt users. This is particularly critical in light of the recent AGO formal opinion that states stock watering use is unlimited. However, because permit exempt users receive no permit from Ecology, we recommend the rule identifying clearly how and how frequently such water users will report their water use to Ecology. [WAC 173-503-073] (Section(3)(d)).

**Response:** Ecology has updated the rule amendment to remove single residential permit exempt well owners from the metering requirement, and will instead debit these users from the reservation at 350 gpd. Please see the implementation plan for more details on implementation of the metering provisions of this rule amendment.

Comment 59

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** If metering data is not available for domestic uses, Ecology must assume 5,000 gallons a day of use per connection for domestic use and debit the reservation accordingly. Because the rule cannot, and does not purport to, act to limit actual water use by an exempt well, and exempt well users are legally entitled to 5,000 gallons a day, the only reasonable way to maintain a credible accounting system and ensure actual use does not exceed the reservation is to assume 5,000 gpd use in the absence of actual data.

**Response:** Users of the reservations, other than single residential exempt well owners, will be required to measure water use to ensure fair accounting and management of the reservations. For single resident exempt well users, Ecology will use a fair estimate of local household water use derived from local water system plans and water use estimates for Western Washington. Average water use for households in the area is approximately 350 gallons per day in comparison to the limit of the groundwater exemption, 5,000 gallons per day. Ecology believes the default water use figures represent a more accurate estimate of household water use and allows the agency to fairly manage the reservations.

Comment 64

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** We also applaud Ecology for requiring connections to public water supplies when available in a timely and reasonable manner. We believe, however, that these "requirements" are easily avoided by developers who merely deem the cost of installing connecting pipes to a public water system to be prohibitive, and therefore "unreasonable." We recommend Ecology add language that the cost of extending infrastructure is deemed to be reasonable.

**Response:** Please see Ecology's response to comment 150.

Comment 65

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** We also recommend that Ecology require connection to public water systems in the future if water becomes available in a timely and reasonable manner, and that permit exempt wells then be decommissioned.

**Response:** Ecology does not have the authority to force people to retroactively connect to public water supplies, and the timely and reasonable requirement cannot be met if there is already connection to a water supply.

Comment 67

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** Generally, CELP does not believe that Ecology has met its burden of proving future growth or multiple other needs for water for agriculture or commercial/industrial use 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). Neither future growth nor future economic development are emergency situations that warrant application of this limited exception. Rather, these future needs should be addressed by progressive planning that takes into consideration the current status of instream resources in the Skagit basin.

**Response:** In making our determination establish the reservations based on OCPI, Ecology sought public interest and received comments from the public and stakeholders and found a significant interest in providing water for the uses outlined in our rule amendment. Ecology does not believe that this is inconsistent with 90.54.020.

Comment 68

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** In 2004, the Department of Ecology issued a Guidance document, Guidance: Setting Instream Flows and Allocating Water for Future Out-Of-Stream Uses, which provides a good deal of direction on when there would be “a clear showing of overriding consideration of public interest,” and under what circumstances reservations should be allowed. The general approach includes: • “Reservation [sic] may be used to provide water for single or small group domestic uses in urban and transitional urban areas where public water supplies are not yet available on a timely and reasonable basis.” • “... such reservations should ordinarily be limited to areas, such as rural areas where the use of exempt withdrawals or very small community systems is generally the only available water supply.” • “In these limited areas and amount of water can be reserved and made available for future small domestic uses not limited by the instream flow regulations.” • “... use of OCPI to create reservations in instream flow rules should ordinarily be limited to in house use with possibility of some limited outdoor uses, and, where appropriate, only until public water supplies become available.” • “The greater the level of avoidance, minimization, and mitigation of harm, the more likely that an OCPI showing can be made. Typically, withdrawals established using OCPI would include a requirement that withdrawals occur pursuant to a mitigation plan that provides the most protection.” In its Guidance document, Ecology cites RCW 90.54.020(5) as justification for allowing water to be reserved for domestic uses when there is no other practical alternative source of supply. There are no similar provisions Ch. 90.54 RCW that similarly heighten Ecology’s obligations to provide water for agricultural, commercial or industrial uses. In fact, CELP notes that RCW 90.54.020 has been interpreted by courts to apply in matters of “public” rather than “private” interests.

**Response:** Please see response to comment 67.

Comment 69

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** 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. 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 document 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.

**Response:** Ecology is not proposing to change the instream flows established in the existing Skagit Instream Flow Rule. The IFIM studies were used to develop the original flows and were used to quantify how fish habitat increased or decreased with changes in streamflows. This study was based on the shape of the stream channel and determined how streamflow changes affect fish habitat. The historical hydrograph was not part of the IFIM study. However, the results of the IFIM study were then compared to the historical streamflows to determine likely streamflows that could occur in the future. This analysis used assumptions because the future is not known. The reservations were developed using actual or estimated stream flows and estimating a 2% reduction of the low flow seen every ten years, not the annual low flows. As a consequence, in the majority of years, Ecology expects the reductions to be much less. Ecology believes that this method does represent a conservative approach. The 2% reduction is a biological threshold that Ecology and WDFW biologists believe will not result in a significant long term impact to the sustainability of fish resources. Additionally, Ecology has placed several conditions of use on future withdrawals from the reservations to further mitigate the impacts. Ecology believes that the approach taken in this rule allows for limited out-of-stream uses while protecting instream resources.

Comment 470

**Commenter:** Tom Anderson representing Public Utility District, Whatcom County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** And it also seems problematic for me in that if we're by legislative mandate trying to manage water for fish, farms and people that saving -- reserving 10 CFS for agriculture and 15 CFS for domestic use is out of balance. Ag uses more water than domestic. It should be at least the other way around. But it seems to me that ag needs to be a lot bigger.

**Response:** The reservation quantities were developed based on biological consequences of withdrawals, water demand forecasts, and by input from some stakeholders in the Skagit Basin. Ecology's Skagit Rule Amendment Background on the Reservations, Closures and Hydraulic Continuity describes the process used to develop the reservations in more detail.

Comment 471

**Commenter:** Tom Anderson representing Public Utility District, Whatcom County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** So my ending comment is that it's a goal which I think is a valid goal, and what is needed is to get people's attention, and move forward and then get people paying attention. I can certainly see putting a rule in place that has some significant limits in it, but I would highly recommend that the rule include a set-aside of a significantly larger portion of that 800 CFS that isn't going to impact fish in the lower basin to be decided on in the future. And if the studies demonstrate that it's needed for fish, then fine, dedicate it to the river, but if the economic changes, say that 10 years from now or 15 years from now it's really needed for ag, then let's use it for ag so that we can keep agriculture viable. Planning for only 2,000 acres of when you've got 40,000 acres of unirrigated ag land doesn't seem like good planning.

**Response:** The agricultural irrigation reservation is one of many tools to meet future water demands for future irrigation demands. Other tools that may be able to meet agricultural demand include interruptible water rights, transfers of existing water rights, water rights leases or purchasing water from water utilities, more conservative irrigation practices, and changes in cropping . Ecology is working with the agricultural community through efforts like the Skagit CIDMP to identify existing and future water demand needs to meet agricultural uses.

Comment 472

**Commenter:** Tom Anderson representing Public Utility District, Whatcom County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I don't believe -- I haven't been involved, but I don't believe that the agricultural community in Skagit County has finished their CIMP or their detailed look at what their needs are in the future. So it seems very premature to lock in a measly 10 CFSs for agricultural use. Thank you.

**Response:** Ecology is working with the agricultural community through the Skagit Community Irrigation District Management Plan (CIDMP) process to further assess current and future irrigation water needs.

Comment 273

**Commenter:** Timothy Bates, Mayor representing Town of Hamilton

**Type:** Letter, 1/27/2006

**Comment:** We believe that the most critical issue that requires changes in this rule is the need to insure that there is an accurate and accountable process to determine how much water is actually being used from the water reservations so that we can be sure the water reservations are not exceeded. We believe that having accurate information about actual usage by consistently reading the daily use from meters on the new wells will insure that there will be no future disputes about how much water is left in the water reservations. The Rule should provide that the water reservations require such recording practices or other equally accurate measurements.

**Response:** The rule requires that new water users install and maintain a water source meter, provide Ecology a reasonable right of inspection, and report data to Ecology or a designated local entity. These meters are intended to provide Ecology an accurate measurement of how much of the reservation has been used and therefore how much is left. Single residence exempt well users will be deducted at a uniform assumed rate of 350 gpd, or 175 gpd for residences on a septic system. Ecology will publish annual notice that shows how much water has been used and is left in the reservation. Ecology believes that such an accounting system is sufficient to calculate reservation water usage, and to require daily monitoring would create an unnecessary burden on Ecology water users.

Comment 274

**Commenter:** Timothy Bates, Mayor representing Town of Hamilton

**Type:** Letter, 1/27/2006

**Comment:** The use of a guesstimated recharge measure in this analysis complicates the calculations and injects uncertainty into the process, and may result in individuals or organizations bringing future challenges as to the level of recharge credit that should be applied in individual cases or across the board. It is for this reason that we believe that no recharge credit should be provided within the rule.

**Response:** Reservation deductions will be calculated using the maximum average consumptive daily use, which will be determined by taking the use of water measured over the highest period of use, measured by metering data or 5000 gpd in the absence of a meter, or 350 gpd for single residential exempt wells, divided by the number of days in that period, less any applicable septic return flow, which is 50% of the water use. Ecology respectfully disagrees that this calculation injects uncertainty into the process. For uses other than single residential exempt wells, and where available, metering data will be used instead of estimates. If scientific evidence or other information becomes available that conflicts with Ecology's determination of 50% recharge, then Ecology will publish this finding and may amend the rule accordingly.

Comment 275

**Commenter:** Timothy Bates, Mayor representing Town of Hamilton

**Type:** Letter, 1/27/2006

**Comment:** It is the goal of the Town of Hamilton to provide a regional water system for the surrounding community, consistent with our own projected water needs. We support the protection of the measured and controlled provision of water through public utilities such as the Hamilton Water System whenever possible, rather than through a more loosely regulated system of private wells within our service area.

**Response:** Ecology appreciates the importance of connecting with local communities on instream flow issues and welcomes your comments and support.

Comment 276

**Commenter:** Timothy Bates, Mayor representing Town of Hamilton

**Type:** Letter, 1/27/2006

**Comment:** The Town of Hamilton stands ready to deliver water to those residences within our present and future jurisdictional boundaries. We want to make sure that everyone who possibly can, will connect to our water system. This will result in better water management, and a greater likelihood that there will be a safe and adequate drinking water supply in the future. For this reason, we believe that the rule should require everyone to hook up to a public water system wherever is practically possible, for domestic needs as well as for commercial and industrial purposes. In addition to providing the certainty as mentioned above, it will result in more water being available to support fisheries resources in the future.

**Response:** The rule requires that water users seeking potable water supply hook up to a public water hook up to a public water system if service can be provided in a timely and reasonable manner. Current water users may hook up to a public water system at their option, which Ecology would encourage them to do. Ecology appreciates the Town of Hamilton's willingness to serve future water users in your service area.

Comment 147

**Commenter:** Joseph Brogan, Foster Pepper, PLLC representing City of Anacortes

**Type:** Letter and Email, 1/31/2006

**Comment:** Because the proposed reservations would not be subject to instream flows, the size of any potential reservation must be carefully analyzed and balanced against existing and future water demands (out-of-stream uses) and the long term sustainability of fish populations in the basin. Population demand and associated reservation quantities must be based on recognized statistical models and data adopted and recognized by the State of Washington's Office of Financial Management (OFM).

**Response:** The reservations proposed in this rule amendment were carefully sized to minimize impact to instream resources while providing for limited out-of-stream uses. Ecology's background document, Skagit Rule Amendment Background on the Reservations, Closures, and Hydraulic Continuity explains the process in greater detail.

Comment 149

**Commenter:** Joseph Brogan, Foster Pepper, PLLC representing City of Anacortes

**Type:** Letter and Email, 1/31/2006

**Comment:** Finally, Ecology should clarify how it will administer any reservation. Ecology's Background Paper (January 3,2006) states that local administration of the reservation is anticipated, but fails to mention Ecology's involvement. By way of contrast, WAC 173-503-073(3)( e) appears to suggest that the department is primarily responsible for administering the reservation. The City believes Ecology must have a direct role in overseeing the efficient allocation of any proposed reservation. Subsection 3( e) should be expanded to clarify Ecology's role and include a requirement that local governmental authorities and purveyors enter into an intergovernmental agreement concerning the management and tracking of reservation allocations across the County.

**Response:** Local governmental authorities and water purveyors do have a significant role in the implementation of the reservations set forth in this rule amendment. However, Ecology does not want to impose any limitations on the framework that local governments and water purveyors develop to define their implementation responsibilities under this rule amendment. The method outlined in the comment could be one of many means to structure an implementation agreement. However, Ecology recognizes the need for more clarity on the roles of these parties and therefore has provided more detail in the implementation plan for this rule.

Comment 238

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Has Department of Ecology factored into their equations, the extension of P.U.D lines into areas where concern for low flows have existed and no longer are wells and surface water being used for domestic use, (ex. Big Lake in the Nookachamps)?

**Response:** Ecology supports the extension of public water supplies to meet future water needs in tributary areas experiencing growth pressure and low flows.

Comment 241

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Why does Department of Ecology use 800 gallons a day as a typical water usage when the actual amount statistically is below 250gallons a day?

**Response:** In the interest of uniformity, Ecology developed the assumed daily water use value of 800 gpd to be consistent with the Department of Health domestic water planning figures. However, Ecology has updated this figure to 350 gpd, which more accurately reflects the average daily water usage in the Skagit Basin. See, WAC 173-503-073 in the updated amendment. These figures are accounting tools and if data demonstrates the actual use varies, Ecology will utilize the actual withdrawals in tallying reservation water consumed.

Comment 245

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Why doesn't the Department of Ecology fund P.U.D expansions to low flow areas?

**Response:** Ecology has provided grant funding to entities like the Skagit PUD to expand water supplies to areas experiencing low flows and growth pressure.

Comment 247

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Did Department of Ecology research, with the help of local well drillers, the types of wells and/or aquifers that exist currently to help come up with reservation numbers?

**Response:** Ecology did consider the local geology and hydrogeology in the development of the reservation numbers but the primary focus was to estimate the amount of flow in the streams during low flow conditions. The reservation numbers that were ultimately proposed in the rule were based on the hydrology of the streams and an estimated loss of habitat during low flow conditions. Ecology did not consult with local well drillers or use well logs to calculate reservation numbers.

Comment 249

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** Why do neighboring counties have more water allocated to them out of smaller supplies?

**Response:** Instream flow reservations vary for several reasons such as water characteristics, the degree of aquifer recharge, rainfall, population size, amount already allocated and many other reasons. Therefore, there is a large degree of variation in water that can be set aside for future appropriation, and Ecology cannot create uniform regulations among WRIAs.

Comment 513

**Commenter:** Bill Clotyie representing D&C Well Drilling

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I have four real concerns. My primary concern -- one of the concerns is this setting precedent. And we've heard a lot of things about precedent the last couple of days. Precedents you agree with are a good thing and precedents you don't agree with are bad things.

Well, I think from my view precedence is a bad thing. That all the water in the state, looking at the same kind of scenario with the same anticipated results, that basins will be closed very early on and landowners' rights and privileges to use that land in a meaningful way will be eliminated simply because they can't get water.

**Response:** Due to great variations in water abundance, populations sizes, topography and many other factors, each WRIA will be assessed and each rule created very differently. Consequently, no one rule may be said to set precedent for any other. Further, Ecology believes that these rules will sustain Skagit County's growing population for at least 20 years, and therefore will be a benefit to property owners seeking to develop their land.

Comment 514

**Commenter:** Bill Clotyie representing D&C Well Drilling

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I have a position with the American Ground Water Association. We have taken the position that everybody should have the right to have water on their land for their own beneficial use and appropriate volumes of water. This whole scenario at times is pitting man against fish. And I'm not sure that I agree that the fish take precedence.

**Response:** It is Ecology's intention to create a solution in which people, fish, and those people who rely upon fish and instream resources for their livelihoods can have adequate water supplies. This rule does not affect existing water rights, only those rights that post-date April 14, 2001, when the existing instream flow rule was effective. The reservations created by this rule are expected to meet the projected growth and use demands of the Skagit basin for at least 20 years and will create legally reliable water supplies for future water users. Ecology believes this rule amendment creates benefits for people while maintaining protection of instream resources that include not only fish but recreation, navigation and other beneficial uses.

Comment 278

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** The second ruling is more stringent on water use per household. Why?

**Response:** Please see response to comment 241.

Comment 279

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** A legal well in the state of Washington is 400 gallons a day; The average 'household uses 250 gallons a day, Why does the DOE use 800 gallons a day? The Department of Health used the 800 gallons when designing public systems where storage is an issue; but these numbers should not be used for individual homes on a single well.

**Response:** Please see response to comment 241.

Comment 281

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** The DOE is only allowing a 50% credit for recharge through septic systems. National average says that number is 70 to 90%. Why does the DOE think that the Skagit basin is so different?

**Response:** There are several factors that determine the amount of recharge that actually occurs from a septic system, such as household water use patterns, soil types, vegetation, and septic design. Ecology based the 50% assumption on an analysis prepared by the Economic and Engineering Services (EES) consulting firm, which looked at low, medium, high and maximum water use. The EES determined that the amount of recharge decreases significantly as outdoor landscape irrigation increases. Rather than have the recharge amount credited vary with the seasons, Ecology used the estimated range return flow for medium water use, which estimated the return flow at a range of 51-72%.

Comment 285

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** According to Skagit County if PUD were to expand to its fullest service area and feed all of the building lots, their water right is not big enough. What is DOE's answer to meet these demands?

**Response:** There are many different options for obtaining water supplies to meet future water needs. For instance, developing interruptible water sources, using reclaimed or recycled water, purchasing or leasing water, and transferring an existing water right could be used to meet future water needs. The answer to meeting potential water needs for any applicant will depend on the applicant and particular water need.

Comment 286

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** By making these reservations so small, the DOE is making an appearance of a water shortage when there are no hard facts in place. However, if someone wants to repeal one of these questionable reservations after it is full, they have to do an intensive and expansive study. Why does the public standard have to be higher than the DOE? And isn't it true that by making a perceived problem, it makes it easier for the public water purveyors to access funds for these pipelines.

**Response:** Without this rule amendment, uses developed after April 14, 2001 are subject to interruption when the instream flows are unmet. By establishing these reservations Ecology is providing an uninterrupted source of water, albeit in a limited quantity. The Legislature recognized the finite and variable supply of water adopting the Prior Appropriation doctrine into law many years ago. It is axiomatic that at some point in time, available supplies will be allocated. At that point in time, new or additional water uses will have to be met from reallocation of existing supplies, conservation, or new supplies developed in areas where instream flow and existing rights are not impaired. The proposed rule provides for these options and provides guidance to the public on mitigation.

Comment 294

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** You have allowed 1.6 million gallons of water for the Skagit Basin. The Skagit River is the 5th largest river flowing into the Pacific Ocean from North America. The Skagit Basin is roughly ten times that of the Stilliguamish Basin. You have set aside 3.45 million gallons for that basin. Why is there a difference?

**Response:** This comment was submitted on a previous rule amendment proposal and is no longer applicable to the current proposal. Generally, however, the size of the basin is only one of many factors that are considered in determining the quantity of water available for a reservation. For instance, the amount of water already allocated to out of stream uses differs among basins as well.

Comment 295

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** A legal well in the state of Washington is 400 gallons a day. In this rule the DOE has put a 350 gallon limit on such wells against the reserve. If a landowner is only allowed 350 gallons will this affect his right to get a building permit?

**Response:** This comment was submitted on previous rule amendment proposal and is no longer applicable to the current proposal. Please see answers to comment 279 for more information about current household water use assumptions.

Comment 296

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** The exempt well, or as you now call it, the permit exempt well under current law is 5,000 gallons a day. That law was established in 1945. So in theory every piece of property has a 1945 priority date. If not, please explain why.

**Response:** The 1945 statute did not exempt wells from the other elements of the water code, such as a priority date, only from the requirement to obtain a permit from Ecology. The statute did not create a particular water right or priority date, instead it sets forth the actions individuals must take to establish a water right and to obtain a priority date. One purpose of a priority date is to give a level of certainty to the holder of the right, consistent with the "first in time, first in right" principle of the prior appropriation doctrine. Those with senior rights can count on having a full supply of water. Those with junior rights know that in short years they will be prorated. Giving everyone the same priority date eliminates the first in time first in right principle and eliminates the ability of some water rights to be used even in times of shortage. In short years it means that no one has a full supply.

Comment 299

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** According to USGS the use of a domestic well and septic system has the least effect on instream flow. However, your rule is encouraging the use of large public water systems which draw from surface waters. This is a direct negative impact on instream flow.

**Response:** For the most part, public water systems water rights have been previously granted and are therefore senior to the instream flow right established in WAC 173-503. Consequently, a new hook up to a public water system does not increase the overall water right and cannot be legally curtailed since the water right is senior to the instream flows.

Comment 300

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** Has the DOE looked at the impact to the shallow aquifers when pipelines are installed through the recharging shallow surface flows?

**Response:** Ecology has not specifically reviewed the impacts of leaking water lines to shallow aquifers for the development of the proposed rule. However, Ecology acknowledges that in general, water lines do leak and much of this water may contribute to shallow aquifer recharge.

Comment 304

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** The DOE allows pump and dump mitigation on its municipal water rights. The DOE in its rule has a conservative return on septic tanks. Is this not similar to a pump and dump? And if the wells were completed in a confined aquifer, wouldn't this be considered a benefit to instream flow; if not, why?

**Response:** Ecology has agreed to some mitigation proposals that allow pumping ground water and discharging it directly to streams as a form of mitigation for new water right withdrawals. In all cases the mitigation plan for these projects were based on site-specific conditions. Ecology agrees that allowing a "credit" for septic return flows is similar to the concept of a "pump and dump" mitigation project. The proposed septic recharge return flow credit is intentionally on the conservative end of estimated septic recharge credit. The amount of ground water withdrawn that is ultimately returned to the saturated zone as recharge is heavily dependent on site-specific conditions as well as the behavior and practices of the individual using the water. In general, higher outdoor water use results in a smaller percentage of water returned to the saturated zone as recharge and it is likely that there will be individuals and situations where less than half of the water withdrawn will be returned to the system. Because we have not placed limits on outdoor water use beyond those that exist in existing laws, Ecology believes that it is prudent to be on the low end of estimated septic recharge credit. See answer to comment 281 and 305 for more detail. In regard to impacts of pumping from a confined aquifer please refer to the response to comment number 293.

Comment 305

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** The DOE has continually set septic flow returns at 50%. However, now most state hydrologists have them set at 90% to 95%. In the state of Colorado it is at 80%. Why is the DOE so conservative?

**Response:** Please see response to comment 281.

Comment 310

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** Under your plan some basins are now closed or will be within a year.

**Response:** No basins are or will be closed until the rule amendment proposal becomes effective, which is 31 days after the rule amendment is adopted. Because certain basins have experienced a lot of water development since the original rule was effective (April 14, 2001), some basins may be closed soon after adoption. Ecology will notify the public of the status of reservation each year in a notice published in a newspaper. Ecology will notify the public when 50, 75 and 100 percent of the reservation has been allocated, see section 173-503-073(5). Within those basin opportunities for mitigation, transfers, or conservation may continue to make water available for new uses.

Comment 458

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Another thing we have need to worry about here is that 90 percent of the world's liquid fresh water is underground. The other ten percent, seven percent of it is lake and wetlands, three percent is in streams. So most of the fresh water is underground, and to be denied access to it, you know, it is a losing proposition. And so I have a whole bunch of written comments, and you've heard a bunch of them already over past meetings and you'll be getting some more.

**Response:** Please see Ecology's response to comment 289.

Comment 265

**Commenter:** Dorothy Freethy, SCARP representing (Skagit Citizens Alliance for Rural Preservation)

**Type:** Letter, 1/17/2006

**Comment:** The Hansen/Thomas Creeks water line extension near Sedro-Woolley is a prime example of Ecology's habit of wasting millions of taxpayer dollars on utterly senseless projects that promote overuse of the very resource the department is mandated to protect. In funding Skagit County's public water utility in this endeavor, Ecology did not even request an Environmental Impact Statement from PUD, although the project is within the Pacific Flyway and will cut through unstable slopes and wetlands, disturbing other wildlife such as elk and even fish! Building five miles of eight- and 12-inch water main to deliver chemically treated Skagit River water to a sparsely populated rural area where property owners neither need nor want the service is not our idea of conservation.

**Response:** Although Ecology did provide grant funding for this project, questions about permitting related to this project are outside of the scope of this rule amendment proposal.

Comment 266

**Commenter:** Dorothy Freethy, SCARP representing (Skagit Citizens Alliance for Rural Preservation)

**Type:** Letter, 1/17/2006

**Comment:** According to PUD's permit application, the main reason for building this line is "to serve future growth." Skagit County planners and citizens are trying to control growth per the Growth Management Act, but PUD and Ecology make the task difficult by undercutting those efforts with convoluted schemes that are of little or no benefit to the Skagit River Basin or the people who live and work in the region.

**Response:** Ecology believes that meeting future growth from water supplies outside of tributary basins will positively benefit instream resources in critical tributary basins like Hansen Creek.

Comment 267

**Commenter:** Dorothy Freethy, SCARP representing (Skagit Citizens Alliance for Rural Preservation)

**Type:** Letter, 1/17/2006

**Comment:** SCARP particularly objects to the following proposals:  
water meters on private rural wells unless there is reasonable cause to believe that usage exceeds 5000 gallons per day;

**Response:** Ecology's intention for requiring measurement of water use under the reservations is to ensure that an accurate measure is taken of water usage. There is a limited quantity of water reserved under the reservations for future water uses and Ecology believes that metering uses will ensure that the reservation is maximized. Ecology has made provisions for how the agency will calculate water use in absence of metering data. Please see Section 173-503-073(7)(b).

Comment 268

**Commenter:** Dorothy Freethy, SCARP representing (Skagit Citizens Alliance for Rural Preservation)

**Type:** Letter, 1/17/2006

**Comment:** forced hook-ups to "public water" which is of inferior quality to most private rural wells;

**Response:** New water users will be expected to hook up to public water systems if the public water availability is timely and reasonable as defined in local rules and regulations. Please see response to comment 150.

Comment 260

**Commenter:** Randy Good representing Skagit County Cattlemen

**Type:** Letter, 1/10/2004

**Comment:** DOE proposes 15 cfs for the Skagit River basin. This amount of water falls drastically short of the existing irrigation and water used now. We all know the assumptions used to create this instream flow is based on a flawed model as the State of Oregon will attest to.

**Response:** The reservations only pertain to new water users and do not affect current users. The reservations were developed based on the biological impacts of withdrawals, future water demand forecasts and input from local stakeholders. Ecology believes the reservations can meet a significant portion of future irrigation demands and can meet water demands for forecasted growth for at least 20 years. Ecology does not know of the model used by Oregon that the comment references.

Comment 261

**Commenter:** Randy Good representing Skagit County Cattlemen

**Type:** Letter, 1/10/2004

**Comment:** The Dept. of Ecology must stop this instream flow rule amendment and review the amount of water to be allotted for irrigation.

**Response:** In developing this rule amendment proposal, Ecology did in fact consider the amount of water reserved for future agricultural irrigation and the conditions for its use.

Comment 322

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** In light of the fact that (1) numerous tributaries are currently listed as water: quality impaired pursuant to the Clean Water Act Section 303(d), and (2) the purpose of this rule is in part to insure "waters of the state shall be of high quality," then further reductions of flows in streams that are temperature impaired appears to be an improper use of the overriding consideration of public interest exception. DOE's own studies (Lower Skagit tributary TMDLs) have shown that reductions in stream-flows will have adverse impacts on water temperatures in streams currently on the 303(d) list. This does not appear to have been considered in the environmental analysis associated with the adoption of this rule.

**Response:** Several Skagit River subbasins are listed as impaired under the Clean Water Act Section 303(d). Ecology has considered the impact of further withdrawals of ground water in these sub-basins when developing the water budgets for these basins. See the Environmental Checklist prepared for SEPA documentation.

Comment 325

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 173-503-073 Water Reservations. Again, we believe that there, has not been an adequate analysis of the impacts to instream resources as a result of the proposed rule amendments. This is further discussed in the comments to the supporting documentation in Sections II and III of this letter.

**Response:** Ecology has considered the impacts to instream resources when developing the reservation sizes and has placed many conditions on future uses under the reservations to protect instream resources. Please see supporting documents and Ecology's Skagit Rule Amendment Background on Reservations, Closures and Hydraulic Continuity for more detail.

Comment 326

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 073(1)(a). The agricultural quantities of waters proposed to be reserved are not supported by any meaningful data. Our understanding is that the Qa is based on a 12 month irrigation season, when in fact we believe that irrigation rarely exceeds 20-30 days/year. We are unaware of any empirical information that would lead one to conclude that an additional Qi of 10 cfs is warranted. Finally, the reservation should include both a Qi and a Qa, not one or the other as proposed. DOE has not shown the basis for either a 10cfs Qi or the Qa as proposed and should do an independent analysis of future agricultural water needs.

**Response:** Ecology agrees that as written in the rule amendment proposal, it was confusing as to the size of the agricultural irrigation reservation. Therefore, Ecology modified section 173-503-073 to be more clear on the size of the reservation. The reservation was sized using the process the agency uses to develop water duties associated with an irrigation water right permit. Ecology assigns a water quantity that can be used throughout the irrigation season. While it may be true that a typical irrigation use may be 30 days per year, the dates and number of days water is used for irrigation can vary considerably from year to year based on crop needs and climatic conditions. It is Ecology's typical permitting practice to assign a broader irrigation season to provide flexibility for irrigation water users.

Comment 327

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 073(1)(b). The 15cfs is unwarranted because it is unclear how DOE arrived at the need for these systems or the quantities proposed for reservation. From the small business economic statement, it appears that a total of 1.5cfs is necessary to meet exempt well use and new rural public systems. Even if 1 cfs is necessary for stockwater, which in and of itself is unsupported by the data that would result in a total of 2.5cfs demand. To add 12.5 cfs to meet future need without any justification is unwarranted.

**Response:** Ecology developed the reservations based on biological consequences of withdrawals, water demand forecasts and by input from stakeholders. The reservations were limited by the stream flow depletion threshold of 1-2% of the low stream flow. Ecology's economic assessment documents and the Background Paper on Reservations, Closures and Hydraulic Continuity provide additional information on the process of developing the reservation and the costs and benefits of the water reservations.

Comment 328

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 073(2)(d). The "irrigation season" should be defined by DOE as a general statement, with individual applicants providing permit specific support for any departure from these dates. In this way, transfers of water rights, or use by subsequent owners of the right will still be applicable to the season as either defined by this rule or the specific language on an application.

**Response:** Please see Ecology's response to comment 326.

Comment 329

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 073(3)(e). The department should have the sole responsibility for administering and accounting for use of the reservations. If local governments will be consulted in the administration and accounting of the reservation, we would expect that the same provisions would be made for tribal consultation in this rule as well.

**Response:** Ecology will consult with both local and tribal governments alike when administering and accounting for use of the reservations, and will publish reservation information in a newspaper of general circulation. Ecology also anticipates providing current information on the reservation status to the public and local and tribal governments. Please see the implementation plan for the rule amendment for more details.

Comment 330

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 073(5). The rule should include language that DOE must notify effected Indian tribes, as well as the appropriate County, when portions of the reservations have been allocated.

**Response:** Ecology will publish notice periodically when portions of the reservation have been used up. Notice and timeframes will be discussed in more detail in the implementation plan.

Comment 331

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 7(a). This section should provide that the record will be available for review to any interested party.

**Response:** Reservation withdrawal information will be published yearly in a newspaper of general circulation. Until publication, withdrawal information will not be made available to the public other than what is available in the water record. Ecology also anticipates providing current information on the reservation status to the public and local and tribal governments. Please see the implementation plan for the rule amendment for more details.

Comment 437

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/11/2006

**Comment:** WAC 173-503-073 Water reservations. The Upper Skagit Tribe recommends the deletion of the last two sentences in subsection (1) be amended to read as follows: As of the effective date of this amendment the department does not anticipate the ability to make additional future reservations. Cross off: "given the volume of water previously allocated in the basin; for out-of-stream uses and the distressed condition of the fishery resource. Further reservations would be expected to exceed "potential" negative impacts and create actual negative impacts." As written the language reaches a legal conclusion which is inappropriate for the purposes of this rule and could be used in either the current or future litigation.

**Response:** The volume of water and the fishery conditions were scientific determinations, not legal conclusions. Similarly, the conclusion that additional withdrawals would create actual negative impacts is scientifically based. The finding of negligible negative impacts up to a particular point, allows the OCPI standard to be met and the creation of an uninterruptible right in a watershed where instream flows are not met. Going beyond this scientifically established threshold, however would result in actual negative impacts under the present set of circumstances that include a constant volume of water allocated in the basin and continued distressed conditions for the fishery resource.

Comment 438

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/11/2006

**Comment:** WAC 173-503-073 (7)(k). This section, as written, could be read to be in conflict with the stated purpose of the amendment as provided for in section 173-503-020 wherein the department explicitly states that "this chapter creates a reservation of a limited amount of water for specific future uses.". Section 173-503-073(7)(b) provides that all water uses will be deducted against the reservation. Understanding that all uses could be read to include those uses prior to the amendment the Upper Skagit Tribe would request the language be change to provide for all uses after the effective date of the amendment will be deducted from the reservation.

**Response:** Ecology understands that this may be confusing and has amended the referenced sections to clarify the agency's intent. However, it is Ecology's intention to deduct uses initiated after April 14, 2001 from the reservations so as to allow those uses to be uninterruptible, unless the agency is advised by the water right holder that they wish to continue with an interruptible supply. Ecology does not intend, as your comment suggests, to deduct only those uses that begin after the effective date of this rule.

Comment 443

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/31/2006

**Comment:** Calculation of Recharge. The Tribe has always taken the position that the use of a static number to calculate recharge is inappropriate. The formulas as presented previously by the Tribe more accurately reflects actual recharge and as such the Tribe reasserts that the better course for calculation of recharge is through the use of the formula as previously presented.

**Response:** Please see Ecology's response to comment 587.

Comment 70

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** You state that DOE and the USGS intend to investigate Skagit County hydrogeology conditions to check on water availability but will these confirmatory data be suitably available before a residential build out occurs that could harm spawning fish or smolt downriver migration and estuarine adaptations even with your seemingly conservative sub-basin water reservations and household/business water allocations (800 and 5000 gpd respectively)?

**Response:** Ecology anticipates that a ground water study will be started within the next year and can provide useful information on hydrology of the Skagit River basin. Although we expect that the study being proposed will be finished before complete build out occurs, Ecology anticipates that this study will be the start of an on-going effort to characterize and monitor water levels and impacts of development so that future decisions regarding ground water development can be made using actual data and information regarding the hydrogeology of the basin. Whether the study is finished or not, however, Ecology has sized the reservations specifically to exclude the possibility of significant harm to the sustainability of the fishery resource.

Comment 71

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** I'm concerned that your seemingly conservative Reservation Quantities outlined in Table 1 of the above cited "Team Paper" could create new environmental problems as well as solutions for providing potable water services to augment new growth. Are there any studies that support this concern and provide reasonable (cost effective) solutions for this perceived problem (if it actually exists)?

**Response:** Ecology is not aware of any such studies; as proposed, the reservations in and of themselves do not limit or facilitate growth. Local governments through their zoning and related land use tools remain in charge of determining growth in the area. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for at least twenty years. The purpose of the reserve is to provide water for development consistent with the local land use plans and zoning.

Comment 72

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** So called Property Rights outlined in our State Constitution of 1889 and further listed as one of the objectives of the 1990 GMA were quite appropriate when resources and specifically water rights were not in contention when State and County populations were in better balance re "supply and demand". The question for today is whether or not the GMA will actually limit growth in non-exempt well regions or induce water pipeline construction to divert more water where growth is desired or is occurring anyway that it can; such as by purchasing farm water rights as in the State of California for the Los Angeles Basin Region.

**Response:** Impacts from a water system in a rural area are for local governments to consider within the local planning processes. The use of public water systems in either an urban or rural area to meet water needs is a local decision, guided in part by the Coordinated Water System Plan, water system financing, local ordinances, and State law. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for at least twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with each county's land use plans and zoning. The rule does not change the local jurisdiction's obligation under the Growth Management Act.

Comment 73

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** A Potentially Inadequate Additional Farm Irrigation Water Allocation (10cfs). Skagit County is still basically a rural county, which depends on farms to sustain the ambiance we all enjoy here. With an inadequate water allocation for this still most important element of our local economy, DOE is hastening the progression towards a Kent Valley situational history to my way of thinking.

**Response:** Ecology recognizes that the reservations of water are finite and that they will be fully used someday. However, Ecology believes the reserved water for agricultural irrigation can meet a significant portion of future demand for irrigation water and will help sustain agriculture in the Skagit River basin. At that point in time, new or additional water uses will have to be met from reallocation of existing supplies, conservation, mitigation, development of or new supplies from areas where instream flow and existing rights are not impaired. The proposed rule provides for both.

Comment 74

**Commenter:** Robert Helton

**Type:** Letter, 1/30/2006

**Comment:** Viable irrigated or not farmlands are supposed to be protected against adverse development re the GMA Hearings Board decisions and the DOE's limiting (just another 2376 irrigated acre allocation) of this positive County attribute is counter productive to my way of thinking.

**Response:** Meeting water needs for current and future agriculture irrigation can be accomplished through many means. The tool provided in this rule, the agricultural irrigation reservation, sets aside some water that can meet much of the demand. Other potential solutions to meeting agricultural irrigation demand include transfers or changes to existing water rights, interruptible water rights, purchasing water from water utilities and short term seasonal leases. Ecology is committed to working with the agricultural community to find solutions to their water needs. For example we are participating in the Skagit Comprehensive Irrigation District Management Plan to investigate current and future water needs and available solutions.

Comment 519

**Commenter:** Robert Helton

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** As an interested citizen of Skagit County I think that the Native Americans certainly have the first absolute right to the waters that existed in this county for hundreds of years, and, therefore, I see nothing the matter with providing all the water that they need or want far into the future. I think that farmers have been here much longer than I have ever lived here in the State of Washington since 1935, and I think that's part of the rural atmosphere. So I think they need their full share of planned water.

After that, after we preserve our quality of life with farming and a moderate amount of people, then I think we need to figure out how much water might be in the reservoir down here so that we don't end up like the Ogalala situation in 100 years.

**Response:** Ecology agrees that more scientific information on water supply is an important aspect to good water management.

Comment 520

**Commenter:** Robert Helton

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** And I certainly don't like to see people having to pay for water to the PUD when they should be able to suck it out of their own land. So I think there is a lot of politicing here. And I think until we can get a good handle on how many people we can accommodate waterwise we better answer that question first. And I think we're very far from answering that geologically.

**Response:** Ecology anticipates that future ground water studies will help us characterize the hydrologic system better as well as help us quantify the impacts to streams from future ground water withdrawals.

Comment 521

**Commenter:** Robert Helton

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I haven't really brought any serious reports that show any measurement of water down several hundred feet below where we're standing. I know out in the Carpenter Creek area where I live a well driller went in there and found salt water at 900 feet. So there is not a heck of a lot of water underground there. So it's mostly ground water.

So that's one geological hole with references. So let's put our hats on and figure out what the limits of growth are first before we continue on with this farce. Thank you.

**Response:** Thank you for your comment.

Comment 34

**Commenter:** Carolyn Kelly representing Skagit Conservation District

**Type:** Letter, 1/31/2006

**Comment:** WAC 173-503-073(1)(a) provides an agricultural irrigation reservation in the amount of 10 c.f.s. or 3,564 a.f. annually, not subject to the instream flows. We have noted that there are currently about 36 c.f.s. of pending agricultural irrigation water rights applications, nearly four times the planned allocation. Even if some applicants withdraw their applications, it appears that in reality there will be no additional reserve for new irrigation needs in the basin. However, agricultural production trends show just the opposite - an increased need for irrigation water in the future, and we are concerned that the proposed rule amendment will act as a limiting factor for sustain agricultural production.

**Response:** Ecology recognizes that the proposed reservation may not meet all current applications for irrigation water supply in the Skagit Basin. However, it is difficult to estimate true irrigation demand from the limited information supplied on water right applications. It is likely that some of the applications are duplicative or some of the applications may no longer be needed. Ecology is working with the agricultural community to determine a more accurate future water demand through the Skagit CIDMP process. Additionally, the agricultural irrigation reservation is one of many tools to meet future water demands, interruptible water rights, transfers to existing water rights, water rights leases or purchasing water from water utilities may be available to meet future water needs in those areas.

Comment 75

**Commenter:** Carolyn Kelly representing Skagit Conservation District

**Type:** Letter, 1/31/2006

**Comment:** WAC 173-503-073(1)(b) provides a combined reservation of 15 c.f.s. or 10,840 a.f. for domestic, municipal, commercial and industrial and stock watering. We would encourage separate allocations for agricultural/stock watering versus commercial or residential use. Lack of ground water accessibility has limited growth in many areas of the basin - as water is made available we anticipate the total reserve could very quickly be allocated for residential development, with no residual for agricultural/stock water use.

**Response:** Ecology agrees that providing for a specific allocation of water for future stock watering provides more certainty. Consequently, Ecology has changed sections 173-503-073 and 173-503-075 to provide a dedicated allocation for larger stock uses, while allowing small scale livestock operations to be included in the domestic, municipal and commercial/industrial reservation.

Comment 256

**Commenter:** Randy Lilburn representing Sierra Pacific Industries

**Type:** Letter, 1/27/2006

**Comment:** As currently written, the proposed draft amendments appear to preclude SPI from obtaining a groundwater right, by requiring SPI to connect to the Public Utility District No. 1 of Skagit County (PUD) public water system for its industrial water use.

**Response:** The rule does not require industrial users to seek service from an existing public water supply. Ecology has further clarified the language in the reservations section to note that public water supply connection requirement only applies to potable domestic uses, and even then only if certain conditions are met. Other requirements may address Sierra Pacific Industries' ability to obtain a water right permit, such as mitigation, and these requirements can be found in WAC 173-503-060.

Comment 257

**Commenter:** Randy Lilburn representing Sierra Pacific Industries

**Type:** Letter, 1/27/2006

**Comment:** Specifically, the proposed rule includes the following new subsection as a condition for the use of reserved commercial/industrial water:

WAC 173-503-073 (3)(f) A new withdrawal under this reservation is not allowed in areas where a municipal water system has been established and a connection can be provided in a timely and reasonable manner. If an applicant for a building permit or subdivision approval cannot obtain water through a municipal system, the applicant must obtain a letter from a public water supplier prior to drilling a well which states that service was denied. Such a denial shall be consistent with the criteria listed in RCW43.20.260.

WAG 173-503-025 (excerpted from October 2005 version) "Timely and reasonable manner" means the way in which potable water service can be provided by a public water system to a property as defined in local coordinated water system plans, or by public water systems or local legislative authorities.

In February of 2005, Ecology proposed a different version of the Skagit rule amendments that included a more specific definition of "timely and reasonable manner," as follows:

WAC 173-503-025 (excerpted from February 2005 version) "Timely and reasonable manner" means potable water service can be provided by a purveyor within one hundred twenty days of a purveyor's written approval of the request for service, to a property located within the public water system and five hundred feet of the purveyor's water pipe line. The department may determine that water service is unreasonable if the applicant for service provides sufficient information to show that the cost of connection with an appropriate public water system would be more than twice the cost of an individual alternative source.

SPI would like to request that Ecology's earlier February 2005 version "timely and reasonable manner" be included in any final rule amendments for the Skagit River, rather than the October 2005 version. The October 2005 "timely and reasonable manner" definition indirectly refers to the Skagit County Coordinated Water System Plan (CWSP). The CWSP allows for appeal and review of water service issues, but published rates and fees are specifically excluded from the appeals process. SPI considers it imperative that Ecology's definition of "timely and reasonable manner" include reference to potential unreasonable costs for an industrial connection to a public water source, relative to the cost of operating an individual 'non-exempt' well as an alternative source

**Response:** The requirement to connect to a public water supply is only if the intent of the permittee is to obtain potable water, consistent with Department of Health regulations, and would probably not pertain to SPI's permit. Further, it is not the intent of Ecology to allude specifically to the Skagit County Coordinated Water System Plan, however, it is Ecology's intent to look to local rules and regulations for the definition of Timely and Reasonable.

Comment 474

**Commenter:** Janet McRae representing Skagit County Cattlemen

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** But I come to these meetings and I hear things that, boy, just make me really wonder, and one thing is they say you can't use water if instream flow gets down low. Then you have to seek public water. Well, I may be wrong, but I think Judy Reservoir was all headed for the Skagit River. The only difference is if it's PUD water we get to pay for it. It's still the same water. It all runs downhill. And if Judy Reservoir wasn't there it would be in the Skagit River. You all need to think about that. So it's okay if they get paid for it, but if we get to use it free we can't. We have to pay for it.  
Is that the way you understand it? That's the way I understand it.

**Response:** Most public water systems' water rights, such as the Skagit County PUD, predate the April 14, 2001 priority date of this rule. Consequently, those water rights are senior to the instream flow rule and requiring people to connect to public water systems does not expand a public water systems' water right. Requiring people to connect to public water does not decrease the amount in the reserves as a new water right would.

Comment 165

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Flexibility should also be allowed in the rule for modifications to assumed reservation debits based on new scientific investigations, such as the USGS study.

**Response:** Ecology recognizes that additional scientific information may be relevant to the administration of this rule and has made provisions in the rule amendment that would allow the agency to administer the rule according to the new information. See section 173-503-060(d) and 173-503-116.

Comment 170

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Water reservations should provide adequate, reliable water supplies without causing harm to aquatic resources.

**Response:** Ecology agrees that water reservations should provide adequate and reliable water supplies to meet the needs of both people and fish.

Comment 171

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Domestic Supply Reservation - The Skagit River instream flow rule amendment should establish a domestic water supply reservation that includes enough water to satisfy the County's 50-year, medium population growth projection. The County estimates that Anacortes and its out-of-basin customers have enough water to satisfy their future needs through about 2055. In contrast, Skagit Basin residents will experience a shortfall by 2025, and some tributary basins already have inadequate water supply based on the retroactive application of the rule. It is inequitable for Ecology to provide a water supply for Skagit Basin residents that is less than Skagit River water supplies provided for water users outside the Skagit Basin residents. The County estimates the reservation for domestic supply purposes should be no less than 37 cfs.

**Response:** Ecology appreciates the information Skagit County has provided on its future water demand estimates. However, we respectfully disagree that the reservations in this rule amendment are inadequate to meet projected growth by 2025. Ecology believes that overall, the reservation quantities contained in the rule can meet future residential and commercial water needs for the Skagit County preferred growth rate until 2050. Ecology acknowledges that in some subbasins, the reservations will likely be used up much sooner and for those subbasins, alternative water supplies will need to be developed.

Comment 173

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Tributary Water Budgets - Ecology has used a statistic referred to as 7Q10 as the basis for establishing tributary water budgets. This approach overstates impacts of groundwater withdrawals on stream flows. Instead, a longer-term statistic, such as 30Q10 is more appropriate given the documented linkage between fish production and 30- to 60-day flow levels.<sup>3</sup> 30Q10 is a more accurate reflection of anadromous fish habitat needs and should be used as the benchmark for determining appropriate tributary water budget quantities.

**Response:** 7Q10 means the lowest consecutive 7 day flow in 10 years. Likewise, 7Q2 is the lowest consecutive 7 day flow in 2 years and so on. We believe that use of the 7Q10 statistic is reasonable for determining the effect on fish during a low flow case. This is not a worse case scenario for streamflows since streamflows do go lower than the 7Q10 streamflow. There is a balance between using an extreme statistic such as the 7Q100 to represent low flow conditions or a more average flow of 7Q2. Biologists for Ecology and WDFW believe that a flow that lasts for 7 consecutive days is of a long enough duration and the once in 10 years occurrence is also frequent enough to affect the fish population.

Comment 175

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Accounting for reservation allocations should more accurately reflect water use. Ecology should estimate water use based on average daily demand, not peak demand, and should assume water use at 350 gpd as previously proposed, not 800 gpd.

**Response:** Please see Ecology's response to comment 241.

Comment 176

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology plans to debit use from the reservations using an estimate of the maximum average consumptive daily use." Until metering data become available, Ecology will debit the reservation budgets at 800 gpd for each individual residence, and at 5,000 gpd for each commercial use. This approach is an unnecessary departure from that taken in the previous rule amendment proposal, where the average annual consumptive use of 350 gpd was used when debiting from the reservations.

**Response:** Please see Ecology's response to comment 241.

Comment 177

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology's rationale for using the maximum average consumptive daily use rather than the average consumptive daily use appears to be based on an assumption that the effects of groundwater withdrawals on a stream are immediate, as would be the case for a surface water withdrawal. This assumption ignores typical groundwater/surface water interactions, including expected lag effects associated with groundwater pumping and effects on surface water flows. Lag effects can be significant (months or even years) depending on the degree of hydraulic continuity and the distance between the point of withdrawal and stream. Furthermore, with increasing distance and hydraulic separation, the effects of daily and seasonal variations in groundwater pumping rates on surface water flows are even further attenuated, and approach a constant flow impact throughout the year.

**Response:** Ecology respectfully disagrees that we are assuming that the effects of ground water withdrawals are immediate. Rather, the value proposed is intended to represent an average of all potential water withdrawals. Depending on the outdoor watering practices of an individual, the maximum consumptive use could far exceed 175 gallons per day. The very basic and generalized assumptions in the proposed rule are also based on steady state rather than transient conditions and it would be impractical to design a rule that would account for the lag time regarding ground water/surface water interactions for all possible cases. In addition, the rule amendment is built on the assumption that once a domestic withdrawal is established it will go on indefinitely. Thus, even if the capture of surface water occurs with a lag time, once it begins, it will occur from that point forward. Ecology also disagrees with the concept of the "degree" of hydraulic continuity. As applied under Washington water law, hydraulic continuity either exists or it doesn't. Ecology does acknowledge that there are instances where less than 100 percent of the ground water withdrawn from a well is captured from a surface water source.

Comment 178

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology's use of the maximum average consumptive daily use when debiting reservation accounts overstates the net effect that a typical domestic well will have on streamflow. Using this method in the current rule proposal represents a step backwards from the previous rule proposal in trying to realistically assess likely impacts from domestic wells.

**Response:** Ecology will account for uses under the reservation using the maximum average consumptive daily use. Please refer to the response to comment 177 for your issue relating to the timing and impact of withdrawals on streamflows.

Comment 179

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology's supporting documents for the proposed rule amendment significantly overstate the amount of water available under the Skagit River Instream Flow Rule. The proposed rule amendment assumes residential exempt wells will withdraw 800 gpd. Ecology's SEPA checklist, however, evaluated the adequacy of the reservation based on residential exempt well withdrawals of 350 gpd. Based on Attachment 1 to Ecology's SEP A Checklist, Ecology wrongly concludes that the "proposed reservation in the rule proposal will provide water that can meet domestic supply needs forecasted for Skagit County for at least 20 years." At 800 gpd, the reservation quantities in the proposed rule are inadequate to meet Skagit County's domestic supply needs through the next 20-year planning cycle, with some tributary basins already over-allocated when the retroactive nature of the proposed rule is considered.

**Response:** The assumed daily household use value has been updated to 350 gpd in the rule amendment. This value represents the quantity of water that would be deducted from the reservation for single permit exempt users. For other households, 350 gpd would only be taken into account in the event that a house does not provide metering data. Please see response to comment 241.

Comment 180

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Recharge credit should more accurately reflect hydrology -- Ecology's proposed rule amendment provides credit against tributary water budgets for recharge from septic systems and nonconsumptive outdoor water use. Ecology assumes 50 percent recharge credit, unless residential water users are converted to sewer systems.

**Response:** Ecology has proposed using a value of 50% consumptive use for well withdrawals associated with septic systems. Ecology recognizes that this value could underestimate or overestimate the actual consumptive use which would be dependent on several site-specific conditions as well as the practices of the individual using the water. Since the septic recharge return flow is in essence a "mitigation" credit, Ecology believes it is important to take a more conservative approach, by using the low end of the recharge estimate. Please see also Ecology's response to comment 281.

Comment 181

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology's proposed rule amendment understates recharge and thus inaccurately reflects groundwater hydrology.

**Response:** Please see Ecology's responses to comments 180 and 281.

Comment 182

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Skagit County's recommended changes to the recharge provisions of the proposed rule amendment are as follows:  
•• Recharge credit should be estimated at 65. percent of total water withdrawals for domestic uses .

**Response:** As was stated in the proposed rule, the 50% return flow estimate is a conservative assumption. It is important to note that the "medium water use" scenario alluded to in the rule is not the middle or average scenario, as the word medium typically denotes. Rather, in the proposed rule, the "medium water use" scenario is the 2nd lowest of 4 different scenarios. Thus, while 65% is closer to the average of the "medium water use" scenario's percentage return flow range of 51-72%, given the "medium water use" scenario's position on the scale of 4 different scenarios, 50% is an appropriate approximation for all scenarios. Ecology recognizes that actual return flow percentages will vary due to local conditions and the individual water user's practices. It is beyond the scope of this rule to tailor return flow percentages to individual circumstances. Further, using an estimate of 65%, or conversely 35%, or even 60%, would imply a higher level of certainty (increase in significant figures) that, given the issue's complexity and variability, unfortunately does not exist.

Comment 183

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Recharge credit for outdoor water use should continue regardless of whether sewer systems are connected.

**Response:** Ecology respectfully disagrees that a recharge credit should remain for outdoor water use on water users that subsequently convert to sewer. The scientific literature reviewed by Ecology indicate that almost no recharge occurs from landscape irrigation, unless water users apply water in excess of the crop irrigation requirement. The purpose of outdoor water use is typically for uptake by plants which is a consumptive use. Outdoor water uses are also subject to evaporation which does not occur with indoor uses that drain immediately to a septic field. Ecology does not believe that many water users apply water at that high rate. For that reason, Ecology has chosen not to apply the recharge credit based on outdoor water use alone.

Comment 184

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Recharge credit should be reduced only where out-of-basin wastewater discharge occurs.

**Response:** Thank you for your comment.

Comment 185

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology should credit tributary reservations for return flows from imported water. Currently the rule amendment only allows for recharge credit from those utilizing the tributary water budgets. The tributary budgets should be credited whenever water is imported through water system extensions to provide a supply for existing water users as well as new ones.

**Response:** The rule allows for mitigation and the situation described in your comment could potentially be a component of a mitigation proposal, which would have to be approved by Ecology after application.

Comment 187

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Skagit County currently makes water availability determinations as part of the building permit and subdivision approval process. Under the rule proposal, Ecology would track water use and would inform Skagit County when the reservation quantities were exhausted. This would effectively preempt the County's authority to determine water availability. The County should retain the authority to determine water availability, and should be given authority to determine when and the extent to which the water budgets are utilized.

**Response:** This rule does not preempt county authority, however, it is within Ecology's authority to track and protect water resources, see RCW 90.54. Of course, Ecology will need to work closely with water systems and local and tribal governments to administer the reservations. Ecology anticipates a demand from the public for up-to-date information on the status of the reservations, in addition to the yearly notifications of the reservation status published in newspapers. Please see the implementation plan for this rule amendment for more details.

Comment 192

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Counting existing development against the reservation will hasten water shortages in lower Skagit Basin tributaries. Under the current proposal, we are estimating that the Fisher and Nookachamps creeks water reservation already have been consumed, and that the Carpenter Creek water reservation will be consumed within five years. This estimate does not take into account commercial or industrial use or stockwater use. The rule will be difficult to administer against pre-existing water uses. Many in fact may have water right priorities that are senior to the 2001 instream flow rule. Making the rule prospective only would resolve potential problems with implementation, and will restore enough water to the tributary budgets to resolve the County's concerns about their adequacy in lower basin tributaries.

**Response:** Ecology's intention in developing this rule was to provide for legally certain water supplies for out-of-stream uses, while continuing to protect instream resources within the prior appropriation water law framework. Under the existing instream flow rule, all uses developed after April 14, 2001 are subject to regulation when the senior instream flow is not being met and could be forced to shut down their use during those time periods. Our rule amendment would allow wells developed after April 14, 2001 a legally secure water supply by including their uses under the reservation. We recognize that it would be difficult to ask those users that have been using their water supply for several years to take action to be included in the reservation, although they may request to continue as an interruptible source. Therefore, Ecology is not requiring those users to take action to be included in the reservation. We believe this is a fair method for providing legally certain water supplies within the prior appropriation legal framework. For areas experiencing low flows and growth pressure, Ecology is committed to working with local governments, water systems, and property owners to develop alternative water supplies.

Comment 193

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** If Ecology decides to subject post-2001 water users to the instream flow rule it should treat post-2001 and post-amendment water users equally. The proposed amendments apply to a 50-percent reduction in consumption to exempt well withdrawals from the reservation where the withdrawals are associate with on-site septic systems. The 50-percent reduction does no apply to post-2001 exempt well withdrawals from the reservation that are associated with on-site septic systems. Ecology should at least apply the 50-percent reduction to all exempt well withdrawals utilizing septic systems.

**Response:** You stated in a clarification that you revoke this comment and wish to have it deleted from the overall text. Ecology will comply with this revocation and will provide no comment to this final paragraph. "Second, after reviewing the final paragraph of the letter, I realized we had misconstrued proposed WAC 173-503-150. That section uses the term "maximum average consumptive daily household water use," which is defined in proposed WAC 173-503-025 to provide return flow recharge credit. To avoid confusion, the final paragraph is deleted from the corrected version of my letter."

Comment 204

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Additionally, Ecology proposes to reduce consumptive use associated with exempt well withdrawals by 50-percent where such wells are associated with "on-site septic systems." This is problematic for two reasons: First, Ecology does not recognize a comparable consumption credit where post-April 14, 2001 wells are associated with septic treatment. Similar withdrawals should based simply on the date of exempt well construction.

**Response:** Ecology agrees that the septic recharge credit should apply to post-2001 wells if applicable and has updated section 150 to clarify this point. The septic recharge credit will apply to permitted and exempt wells alike. See WAC 173-503-150 in the updated amendments.

Comment 205

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Second, all septic systems associated with an exempt well should be subject to the consumption credit. Exempt wells that utilize off-site septic system and drainfields or group wastewater, treatment facilities associated with subsurface disposal provide the same groundwater recharge benefit and should be credited accordingly.

**Response:** Ecology has amended the rule to clarify that the recharge credit is applicable for community drainfields. Please see section 173-503-073(7)(c).

Comment 212

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** There is no analysis supporting the representation that “[o]ver time, Skagit PUD or other public water systems should be able to provide service to most areas of the Nookachamps, Fisher, and Carpenter subbasins.”

**Response:** The DNS offers the assumption that existing public water systems will be extended to meet the projected need, based on water availability in the Skagit River mainstem. It is Ecology’s understanding that the PUD currently provides service in Carpenter and Nookachamps basin and is charged with serving water needs throughout Skagit County. Still, Ecology acknowledges that if/when/how that would occur is totally within the purview of local jurisdictions and water providers.

Comment 213

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Under this scenario, many parcels will have no water supply and cannot be developed. The localized effects are most significant in the lower tributary subbasins, none, of which have sufficient reservation capacity to meet their most basic needs. The cumulative effects of this reduction are equally significant, dramatically changing the shape of development within Skagit County.

**Response:** Ecology acknowledges that ground water will not support full development and alternate water supplies will have to be made available in some subbasins to allow full or continued development. Please see Ecology's response to comment 206.

The rule amendment creates reliable water supplies where they did not previously exist. The rule amendment clarifies where there is water available and how much. The rule amendment also clarifies where there is no additional water available because it has already been allocated for existing instream and out-of-stream uses. The rule amendment does not create the shortfall, but only documents an existing condition.

Comment 215

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Conflicts with Growth Management & Land Use  
The effect of the proposed amended rule's emphasis on connecting to public, water systems is to increase public water system expansion into rural areas. This conflicts with existing growth management planning. Ecology, however, concluded without analysis that the proposal "does not conflict with any local, state, or federal laws or requirements for the protection of the environment." Ecology previously recognized this risk, noting that requiring expansion of public water systems to rural areas "may create conflicts with the Growth Management Act (GMA) if the areas proposed for water supply extension are not within an urban growth area. The extended availability of public water supplies may create pressures to develop or redevelop affected areas at higher density."

**Response:** GMA sets the following goals to guide the development of comprehensive plans and development ordinances by cities and counties planning under the Act (in part):

- \* Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. (RCW 36.70A.020(1))
- \* Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development (RCW 36.70A.020(2))
- \* Encourage economic development within... the capacities of the states natural resources, public services, and public facilities. (RCW 36.70A.020(5))
- \* Maintain and enhance natural resource-based industries, including... fisheries industries. (RCW 36.70A.020(8))
- \* [C]onserve fish and wildlife habitat. (RCW 36.70A.020(9))
- \* Protect the environment and enhance the state's high quality of life, including air and water quality and the availability of water. (RCW 36.70A.020(10))
- \* Ensure those public facilities and services necessary to support development shall be adequate to serve the development... (RCW 36.70A.020(12))

In RCW 36.70A.030 Definitions:

(12) 'Public facilities' include streets, roads, highways,... domestic water systems...

(13) 'Public services' include fire protection and suppression...

(14) 'Rural character' refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan: (e) that reduce the inappropriate conversion of Undeveloped land into sprawling, low-density development. (f) that generally do not require the extension of urban government services; and (g) are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.

(16) 'Rural governmental services' or 'rural services' include those public services and public facilities historically and typically delivered at an intensity usually found in rural areas, and may include domestic water systems, fire and police protection services, transportation"

RCW 36.70A.070 (5) (b) states in part "The rural element shall provide for a

variety of rural densities, uses, essential public facilities, and rural government services needed to serve the permitted densities and uses."

These GMA statutes fully support the amended rule, including the potential extension of public water systems into rural areas when necessary to support allowed levels of development. The county determines the allowed levels of development. Skagit County must determine when and if it will redesignate and rezone any rural areas to accommodate denser development. Environmental review will be required at that time, should redesignation occur.

Comment 216

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Throughout the rulemaking process, Skagit County has been clear that extension of water service is a preferable water supply method in certain areas of the county. However, Ecology is incorrect to assume without any analysis that extension of service can occur in all areas where the water reservations do not provide sufficient supply. Given the rural character of many parts of Skagit County, Ecology cannot simply assume that extension of water service will solve the problems caused by the insufficient groundwater 'reservations for many subbasins.

**Response:** The DNS/checklist did put forth the assumption that the PUD would be able to extend water service into subbasins where water supplies were determined inadequate. Although this is a likely outcome, since the PUD continues to expand service into some of these basins, it is by no means certain. Other water sources may be identified, such as purchasing existing water rights or transferring saved water gained by water conservation practices. The extension of water service may also be shown to be economically unfeasible in some subbasins. Development would be delayed in these areas until a viable option can be implemented.

Comment 217

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Requiring expansion of public water systems to rural areas “may require revisions to local comprehensive land use plans and/or update of the water system plan of the participating public water system. Funding would need to be identified to finance major water line extensions.” Furthermore:

Establishing instream flows may limit the potential for obtaining new water rights from an affected water body. In such cases, the lack of available water may limit or alter the nature of new development. Where water supplies cannot be obtained from another source or ‘created’ through water use efficiency measures, comprehensive land use plans may need to be amended.... Local governments may need to modify their comprehensive land use plans if establishment of an instream flow adversely impacts the projections water resource availability upon which such plans are predicated.

**Response:** Ecology has no authority to “require” expansion of public water systems. The Watershed Planning FEIS was intended to facilitate the environmental review required prior to the adoption of watershed plans (created by multi-jurisdictions, including public water purveyors) by jurisdictional counties. Together, these entities have a much wider scope of decision-making authority and ultimately must decide whether the existing comprehensive land use and water system plans for their area requires revision, or not.

Please also note that his rule amendment does not establish instream flows. Instream flows were established through adoption of the existing rule.

Comment 218

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Ecology previously noted that encouraging public water systems to extend service into rural areas as an alternative to exempt well development “could result in increased development of current rural areas. Increased suburbia and its more intensive land uses will result in adverse impacts on water quality, habitat, earth, and other environmental media. Therefore, [requesting public water systems to extend service into rural areas] may result in significant cumulative and unavoidable adverse impacts.”

**Response:** Agreed, although the extension of public water systems and the determination of planning and zoning that establish the allowed density of development are local decisions and outside the authority of Ecology or this rule amendment.

Comment 220

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Ecology's conclusion that the, "proposed reservation in the rule proposal will provide water that can meet domestic supply needs forecasted for Skagit County for at least 20 years" is based on use calculations that are less than half of the use assumptions contained in the proposed rule amendment. Increasing assumed use from 350 to 800 gallons per day greatly reduces effective reservation capacity. Under the best-case scenario, the proposed reservation can supply less than two-percent of the domestic water needs in the lower tributary subbasins, Fisher Creek is without sufficient water to supply existing residents, and nine tributary basins are without sufficient water to supply legally developable lots. These arbitrary restrictions will force development elsewhere and result in consequences that were never identified or anticipated. Changing the assumptions upon which Skagit County and major water purveyors planned will significantly impact planning efforts and necessitate wide ranging, amendments to planning efforts.

**Response:** The calculations were based on 2.6 persons and 175 gpd consumptive use per household. This assumes that households will use on-site septic systems, a prevalent practice in rural areas where public water supply systems are not available. It also assumes that actual metered use will be consistent with current household averages for Skagit County. The implementation and success of water conservation measures and water use practices could influence this number.

The rule amendment requires metering of all new uses other than single residence exempt wells (see updated amendment). Only where metering information is not available, would 350 gallons per day be debited from the reservation. Ecology has amended the assumed household water use figures to more accurately reflect household water use in the Skagit River basin to 350 gallons per day.

The rule amendment will not impact existing water rights, although those residences that are currently junior in priority to the existing instream flows can gain reliability by participating in the reservation program created in this amendment.

Reservation quantities were not determined arbitrarily. Ecology published extensive information which described the process for developing the reservations in addition to underlying data used to generate the reservations. This information was available to the public to review during the public comment period.

Ecology has acknowledged that the reservations in some subbasins are not sufficient to meet the water needs of full build-out. Alternative water sources will have to be made available to support development beyond the capacity of the reservations. It has been determined that the reservations created under this amendment are sufficient basin-wide to meet anticipated levels of rural

development for at least the next 20 years and still maintain rural development densities allowed by Skagit County.

This rule amendment does not create water shortages but conversely creates reliable water supplies in areas where currently none exist. By quantifying the availability of water for new uses, Ecology expects to aid future planning efforts by the county and local water purveyors which are required every five years under other regulations.

Comment 231

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** The burden of connecting to public water systems cannot be overstated because, as Ecology recognizes, “[e]xtending public water supplies into areas served by exempt wells may result in increased costs to existing exempt well owners who, if they choose to connect to the public system, may be required to pay part or all of the costs of extensions and/or connections.” Impacts to affordable housing are deeply disturbing because almost 6,000 Skagit County households have a demonstrated need for affordable housing.

**Response:** Ecology grants that some impact on the cost of rural housing is likely to occur due to the shortfall of domestic water supplies in some subbasins. Still, this rule amendment does not create the shortfall but only clarifies its extent, which should facilitate local planning efforts to minimize the resulting impacts. Moreover, provision of the reservations actually significantly diminishes the previous shortfall of uninterrupted water supplies for new development.

Comment 232

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Impacts on Public Services  
Ecology recognizes that requiring connection to public water supplies “may increase demands on public water systems, but only to the extent that water systems have planned for, and are capable of, providing the water.” Ecology’s conclusions are highly suspect given the deficit in water supply and ‘uncertainty regarding which parcels will choose to develop exempt wells utilizing the reservation. The fundamental uncertainty in Ecology’s conclusions is evident in the statement that “[o]ver time, Skagit PUD should be able to provide service to most areas of the Nookachamps, Fisher, and Carpenter subbasins.” Multiple qualifiers make this conclusory statement meaningless.. Uncertainty over which areas will receive service, when that service will be made available, and the cost of providing such services make it impossible to determine the significance of requiring connections.

**Response:** Public water systems may not provide service beyond their planned service area or the limits of their water rights and infrastructure without formal modifications and permitting. Some level of increased demand within the service areas is expected, but not outside these limitations. Where the public water systems are unable to meet the needs of development, the amended rule would allow the use of exempt wells in most areas of the river basin. Where further exempt well development is not allowed, the public water purveyors may CHOOSE to extend their service area and infrastructure if they have or can gain sufficient water rights.

Ecology is not aware of any factors precluding Skagit PUD from providing water for these areas but acknowledges those decisions are outside Ecology’s purview.

Comment 481

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Second, I think that Ecology should estimate water use based on an average day demand as they had proposed in February, not on peak demand, and should assume water use at 350 gallons a day as previously proposed and not at 800 gallons a day as they’re proposing now.

**Response:** In the interest of uniformity, Ecology based our assumed daily water use value of 800 gpd on the Department of Health domestic water planning figures. However, Ecology has updated this figure to 350 gpd, which is more accurate to the average water usage in the Skagit basin. See, WAC 173-503-073 in the updated amendment.

Comment 482

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Third, the recharge credit. We don't think it really well reflects hydrology, and we think that part of the rule needs some more work. The outdoor water use -- outdoor water use would continue regardless of whether a house is connected to a sewer system. And so even if the rule speaks to discontinuing the credit for return flows, if the house is connected to a sewer system, we don't think that's entirely correct. We think that if -- you know, if the credit is eliminated it should only be eliminated for sewer disposal that occurs outside of the tributary basin.

So if a home is connected to a sewer system they should still get recharge credit for that. If the sewer system is discharging water within that same basin, it's only in a place like the Nookachamps where the waste water is actually being discharged into the Skagit River that there should be an effect on the tributary credit.

**Response:** Please see Ecology's response to comment 183.

Comment 483

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** And finally -- this is something that we've talked about for years now in negotiations -- there should be a recharge credit for reported water. If water is being provided reported into the Nookachamps basin by Skagit PUD then we think that there should be a credit for the recharge that results from new water actually coming back into the Nookachamps.

**Response:** Please see Ecology's response to comment 185.

Comment 488

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** And you know, I wish we could go back to that map that shows the basin. We understand that water is short in the tributaries where spawning occurs, and in particular in those tributaries where growth has been occurring. It shouldn't be any big surprise. They are the Nookachamps, Fisher Creek, Carpenter Creek, and probably Hansen Creek.

And I've spent hours and hours working with staff and consultants to try and fine tune an evaluation. If I could tell you how many houses are left to be built, how many have been built, how much of this water is left. And I can tell you that I've tried five different ways to do this and however I do it I come up with the same answer, which is the water is very short in those four tributaries, and with the rule written the way it is today I think there is a very good likelihood that there will be a building moratorium in the Fisher Creek basin almost immediately. In fact, it could occur right after this rule is adopted. I think it is quite likely that a moratorium would occur within five years of the others, and we're committed to trying to work with Ecology, and with the Skagit PUD and with others to try to find mitigation for water use in those basins.

**Response:** Ecology agrees that Fisher Creek could close soon after the rule is effective and that certain other closures may follow within the next few years due to water shortages that are out of our control. Ecology will work with Skagit County, property owners and water systems to provide water for these basins and evaluate alternatives discussed above. Ecology combined Fisher and Carpenter Creeks under the rule amendment as a result of new hydraulic information.

Comment 489

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** That's why the recharge credit. We can get credit for imported water into the Nookachamps. It's imported. There is probably more water in the Nookachamps basin today than there was ten years ago, because of the expansion of public water via the Skagit PUD into that basin. That trend should continue as more homes are connected by the PUD. Wouldn't it be great if we could have a system where people in the upper watershed, for which it's not feasible to connect up to the PUD, to pay to connect homes that are even predating 2001 in the lower basin where water is available and affordable? And that's the kind of mitigation plan that we would like to be working on and not spending all of our time in court.

**Response:** Ecology is willing to work with the County to develop water supply alternatives for basins such as the Nookachamps, which are experiencing low flows and growth pressure. We agree that working constructively together on solutions is a better use of our time than litigation.

Comment 490

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** So I want to say that Ecology's presentation underscores the importance of adequate reservations, and the critical nature of providing adequate water supply in this basin. There should be enough water under the domestic supply reservation to provide an adequate supply of water for this county through about 2035, but that depends on the assumptions that you make about how much water is used by an individual or per capita water use. It depends on how much recharge credit and whether the rule is made retroactive. It depends on a number of assumptions. And the county has consistently asked Ecology to establish a reservation that is at least an adequate supply of water for the county to meet its needs under the Growth Management Act to plan for growth in this basin.

So, at a minimum, there needs to be enough water in the reservation to meet those needs. At 15 CFS, as I said, we're probably there, but without it we will not be.

**Response:** Ecology believes that reservations in our rule amendment can meet projected growth for Skagit County for at least 20 years.

Comment 491

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Water will limit agricultural water use -- will limit the development of agriculture in this basin eventually. All of the studies the county has developed and will be submitted in the record will show that agricultural water use has been increasing over the last 40 years and we expect that it will continue. Water should -- there should be enough water in this reservation to supply the needs that we expect through the year 2020, but water will be a limiting factor for agricultural development after that point.

**Response:** Ecology acknowledges that the reserved amount for agricultural irrigation may not meet future irrigation water demand indefinitely. However, the agricultural irrigation reservation is one of many tools to address agricultural irrigation water needs. Interruptible water rights, public water supply, transfers and changes to existing water rights, more efficient technologies and crop variations are all possible solutions to meeting future irrigation needs in the basin. It is likely that many of these tools will need in combination to be used to serve irrigation needs.

Comment 492

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Without the USGS study, and if we continue to have this view that the rule should apply in the area that's covered by the rule, there will be a shortfall within the next ten years. We don't think that's an appropriate balance of water use and we don't think it's appropriate to try to regulate water use outside of the Skagit basin for the sake of protecting stream lows in ways that won't be affected by that use.

**Response:** Please see Ecology's response to comment 164 for a discussion on the USGS study.

The Skagit instream flow rule applies only to areas within the Skagit River Basin.

Comment 494

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I want to put those numbers in context, also. Two percent of 1710 in the main stem is between 120 and 125 CFS. 25 CFS, which is the amount that's included in the draft rule is 24 percent, .4 of one percent of 1710.

**Response:** Thank you for your comment.

Comment 495

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Finally, I want to say that -- just remind everybody that a water reservation is not an appropriation of water. It is a reservation of water for future use. That water reservation is still subject to fundamental concept of beneficial use. If the water isn't needed it won't be used.

**Response:** Ecology agrees.

Comment 543

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Subsection (1) states, "the department does not anticipate the ability to make additional future reservations given the volume of water previously allocated in the basin for out-of-stream uses and the distressed condition of the fishery resources." This statement implies that the fishery is distressed because of low flows and that low flows are the limiting factor. However, the Limiting Factors Analysis report (LFA) for the Skagit Basin identifies low flow analysis as a data gap rather than as a limiting factor. This statement is inappropriate since the limiting factors impacting the fishery are not yet known and, even if these factors were known, Ecology is already obliged to evaluate the impact of any potential future reservation as part of its rulemaking and water right evaluation process. Subsequently, this statement is superfluous and should be removed.

**Response:** Low flows have been documented by scientists as a factor in declining fish populations, but Ecology agrees that low flows are not the only limiting factor. Given that there are ESA-listed fish in the Skagit Basin it is not superfluous to state that the fisheries in the basin are distressed, rather it is a realistic description of current conditions.

Comment 544

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Subsection (2) prohibits otherwise allowable reservation withdrawals where public water service is available in a timely and reasonable manner. Not all water uses require potable water. Forcing users of non-potable water to connect to public water systems could interfere with public water purveyors' ability to supply domestic needs. Ecology should revise this section, allowing users of non-potable water to withdraw from the reservation even if public water systems can provide a connection in a timely and reasonable manner. This would help ensure that public water systems remain available to serve those that benefit most from their services.

**Response:** Subsection (3)(f) of section 073 requires only water users with a need for a potable water supply to connect to a public water system. Ecology has amended language in 173-503-073(3)9f) and 173-503-060(2) to emphasize this point.

Comment 545

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** In subsection (3)(b), Ecology set tributary reservation amounts to two percent of the 7Q10 flow, which its biologists suggest will not cause irreparable harm to the fishery. Ecology proposes to debit all water uses in a tributary basin, consisting of both surface water and groundwater uses, to its respective reservation. However, the proposed rule only allows groundwater uses in tributary basins. The prohibition of surface water diversions in the tributary basins does not make sense since the reservation amount is based on a surface flow reduction. If Ecology's rationale for the surface water use prohibition includes recognizing that a groundwater withdrawal does not have an immediate and absolute impact on surface water flow, then only that portion of a groundwater withdrawal that does reduce stream flow should be debited against the tributary reservation.

**Response:** Ecology has amended the rule to include withdrawals from surface water sources only under certain conditions. See WAC 173-503-073(3)(b) in the updated amendment.

Comment 546

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Agricultural and irrigation reservation – The rule amendment provides 10 cfs, not to exceed 3,564 af each year. As previously stated, areas such as the Skagit delta that do not affect instream flows should be excluded from rule coverage. If they are, and if current irrigation trends continue, 10 cfs may be enough to accommodate the majority of additional irrigation needs within portions of the basin that are likely in continuity with instream flows. Conversely, if irrigation in the entire area described in WAC 173-503-010 is subject to curtailment, 10 cfs will satisfy only a small portion of latent demand. After that time water supply will be a limiting factor for irrigated agriculture and future use will be constrained. This is not an adequate water supply to sustain agriculture as a viable economic activity in the future. This provision also ignores agricultural needs in tributary basins.

**Response:** Please see Ecology's response to comment 491.

Comment 547

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Domestic Use Reservation – Subsection (1) states that reservation withdrawals are not subject to instream flows. Paragraph (7)(b), however, proposes to debit interruptible withdrawals against the reservation. Reservation withdrawals are by definition not subject to interruption and debiting interruptible withdrawals against the reservation undermines the purpose of the reservation.

**Response:** There is a legal difference between an administrative closure of a basin and a basin subject to instream flows. A basin that is closed, is closed to all new water sources, all year, regardless if a certain flow is met. Ecology must protect basins that are to be closed after the reservations are fully allocated and added this provision to make sure that Ecology is not allowing water uses after Ecology has made the legal determination that the basin is closed and no new water is available for use. Ecology has provided some exceptions to the closures in the rule. Please see section 173-503-060 for examples of how water supplies may be developed in basins subject to closure.

Comment 548

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** The second sentence of Paragraph (3)(f) appears to require a letter from a public water supplier “denying” water service before a new reservation withdrawal can proceed. This conflicts with the first sentence, which suggests that reservation withdrawals may proceed where public water service is not available in a “timely and reasonable manner.” The definition of timely and reasonable manner contained in WAC 173-503-025 makes clear that local legislative authorities play an important role in determining whether the provision of services is indeed timely and reasonable. In addition, the largest local municipal water utility in Skagit County, the Skagit PUD, typically does not issue letters of denial to applicants. Rather, Skagit PUD usually responds by providing a cost estimate and potential schedule for hookup, which in many cases does not meet the definition of timely and reasonable provided in WAC 173-503-025. Subsequently, the language in this section should be modified to require the applicant to provide evidence that a municipal provider cannot provide service in a timely and reasonable manner, rather than a denial letter.

**Response:** Ecology agrees and has updated the rule to read that only written evidence is required to prove that water service availability is not timely and reasonable. See WAC 173-503-(3)(f) in the updated amendments.

Comment 549

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Stockwater -- Stockwater should not be included as a use of the domestic reservation. Stockwater is exempt from permitting and should be exempt from the instream flow rule. Skagit County has no control over new stockwater uses since building permits and land subdivisions are not required. Consequently, there is no way to prevent stockwater uses from exhausting domestic, commercial and industrial water supplies.

**Response:** Ecology agrees in part with this comment, and has updated the rule to include a specific reservation for large scale stock water uses while allowing for limiting stock water uses to be part of the domestic, municipal and commercial/industrial reservation. See WAC 173-503-073(1)(b), (7)(a) and section 075 in the updated amendment.

Ecology does not agree that stockwater should be exempt from the instream flow rule. An exemption from permitting does not preclude a use from regulation. Further, Ecology is charged with protecting and managing all beneficial uses of water, and stockwatering is a beneficial use of water pursuant to RCW 90.54.020.

Comment 550

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** WAC 173-503-073(3)(a) also refers to a nonexistent definition for “stockwatering.” This cross-reference should be deleted since stockwater use should be exempt from the rule. Ecology should also clarify that, as in prior versions of the proposed amendments, the stockwatering reservation is unavailable to commercial dairies and feedlots. Allowing these potentially large users to withdraw from the domestic reservation could severely compromise Skagit County’s ability to provide for rural residential use.

**Response:** Please see Ecology's response to comment 549.

Comment 551

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Recharge Credit – Recharge credit is provided based on the unsupported assumption that 50 percent of all water use is consumed. As the attached documents demonstrate, 65 percent is a much more accurate and defensible measure of return flows, while still being sufficiently conservative, and should be applied instead of the arbitrary 50 percent figure contained in the proposed amendments.

**Response:** Please see Ecology's responses to comments 180 and 281.

Comment 552

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Skagit County objects to provisions in the draft rule amendment that would remove the onsite septic system credit for water users that are subsequently connected to sewer systems. The onsite septic system credit should be removed only when a treatment system discharges to a point outside a tributary basin. Eventually, small communities could develop small community sewer systems with shared drainfields. Provided that the drainfield is within the tributary basin, the effect on tributary streamflows should be the same as numerous septic systems. Ecology's most recent proposal would discourage the development of public sewer systems. This conflicts with the County's public health and water quality goals.

**Response:** Ecology has updated this subsection to include community septic systems. See WAC 173-503-(7)(c) in the updated amendments.

Comment 553

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Similarly, a significant percentage of return flow actually results from outdoor water use. Even where public sewerage is provided, recharge credit should be reduced for sewer systems only for that portion of return flow resulting from indoor water use.

**Response:** Please see Ecology's responses to comments 180 and 281.

Comment 554

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Additionally, the reservation for tributary basins that receive return flows from residential connections should receive credit for new return flows even if the water use was not initially debited against the reservation. Return flows have an additive effect to stream flows that increases when the water source is from outside the basin. This additive effect is ignored by assuming 100 percent consumption is associated with residential sewer connections. Skagit PUD plans to extend water service in the Nookachamps subbasin, connecting existing as well as new residences. Extending service to existing residences could provide an increase in return flows without depleting the tributary basin reservation. Return flows from these connections should be credited to the tributary water budgets.

**Response:** Please see Ecology's response to comment 185.

Comment 555

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Subsection (3)(f) states that the connection requirement should only apply to uses that require potable water. Beneficial uses that do not require a potable water source should be allowed to use non-potable surface or groundwater, either via a permit or through use of a permit-exempt withdrawal, regardless of whether or not a municipal water system connection is available in a timely and reasonable manner.

**Response:** There is no requirement in subsection (3)(f) that water users of non-potable water connect to a public water supply.

Comment 556

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Finally, applicants located in areas where a municipal water system has been established are required to obtain a letter documenting denial of service from the municipal provider before they are able to drill a well and access the water reservation. Skagit PUD, typically does not issue letters of denial to applicants. The language in this section should be modified to require the applicant to provide evidence that a municipal provider cannot provide service in a timely and reasonable manner, rather than a denial letter.

**Response:** Please see Ecology's response to comment 548.

Comment 60

**Commenter:** Michael Mayer, Ross Freeman representing Washington Environmental Council/  
American Rivers

**Type:** Letter, 1/31/2006

**Comment:** Finally, WEC and American Rivers support the mandatory metering and reporting provided in this proposed amendment. WAC 173-503-060(5) (permits); 173-503-073(2)(e) (agricultural reserves); 173-503-073(3)(d) (remaining reserves). Metering and reporting are essential components to sound water management, and given the reserves at issue here, they are key to the implementation of this rule. If Ecology is determined to apply reserves, it must do so with comprehensive information on water use in the basin. We would add only that Ecology should create clear lines of authority to ensure that the information is properly collected and compiled. For the future, we encourage Ecology to require similar information gathering as it goes forward with setting instream flows in other watersheds.

**Response:** Details on metering requirements will be outlined in the implementation plan, see also WAC 173-173, Requirements for Measuring and Reporting Water Use.

Comment 76

**Commenter:** Michael Mayer, Ross Freeman representing Washington Environmental Council/  
American Rivers

**Type:** Letter, 1/31/2006

**Comment:** This approach to OCPI, however, turns the concept on its head. Rather than an examination of the public's need – and interest – in future water, Ecology has presumptively reduced streamflow based on what it considers an acceptable level of habitat degradation. The Pollution Control Hearings Board has found that the OCPI exemption must be narrowly construed, holding that the determination is on a case-by-case examination with the onus on the proponent of a withdrawal to demonstrate a public benefit. See *Black Diamond Associates v. Ecology*, PCHB 96-90 at 19 - 20 (1996). Creating reserves purely based on biological estimates removes both constraints articulated by the Board and fails to consider the intent of the statute to preserve flows for "wildlife, fish, scenic, aesthetic and other environmental values, and navigational values," with limited exceptions. In sum, Ecology's approach places all risk of uncertainty on the environment and the Skagit's diminishing salmon populations while carving off water to meet unknown future needs.

**Response:** Comments received identify interests in secure water supplies for domestic and municipal, agricultural irrigation, commercial/industrial, and stock watering uses, as well as water for instream purposes. The reservations were designed to minimize potential impacts on fish and river ecosystem functions. The size of each of the reservations has been limited to amounts that Ecology and WDFW fish biologists believe are unlikely to significantly impact the long term sustainability of the fish population. Consequently, Ecology has determined that the public interest of having secure water supplies can be done without significantly impacting the public interest of protecting instream flows.

Comment 506

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** What I read on the website was a specific number allocation that they're proposing that included agriculture, municipal, commercial and industrial uses. So I figured well, we only have one number to go by. Then I come and listen here and it's all -- you don't know if you're coming or going. And like I said, you don't know when it starts and ends. And when we get there the water will be gone anyway. So what's the point?

**Response:** Ecology has made many modifications to the rule proposal in an effort to make it more clear based upon comments such as yours. The reservation for agricultural irrigation is separate from the reservations for domestic, municipal, commercial/industrial and stock water, and is set at 3,564 acre feet per year. The reservation for domestic, municipal, commercial/industrial is set at 39,370,208 gallons per day. The reservation for stock water uses is 324,000 gallons per day. The reservations are for future users and those who have initiated water use since April 14, 2001, and does not affect water users who's rights predate April 14, 2001. When the reservations are fully allocated, water supplies will need to be met through other means such as changes to existing water rights, using interruptible water supplies, water reuse and developing mitigation plans to mitigate for the impact on instream flows.

Comment 507

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** You take, for example -- they pick a number of 50 percent recharge on a septic. Well, on a well -- on a well system that's supposed to be exempt anyway. You know, I concur with the previous comment. You know, if they just left the exempt wells out of the picture that might be a big step forward, because that's basically what the state law says.

**Response:** Use of the word "exempt" refers to the ability to install a well without first getting a permit for the water use from Ecology. Permit-exempt is a more accurate phrase to describe what is commonly called an exempt well as these wells are otherwise subject to the water code.

Comment 510

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Well, I've got a water right permit I filed years ago. I got a little notice in the mail saying I received it. That's the end. You know, how many times do water rights have to be on file with the Department of Ecology now and what are they going to do with those? How are they going to fit into this mixture? I didn't really hear that.

**Response:** The reservation will be accessible to people with applications if their use qualifies for the reservations. Applications are assessed by Ecology in the order in which they are received. The reservations are also accessible for those who wish to install a permit-exempt well.

Comment 580

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 3/9/2005

**Comment:** There have been pipelines funded by DOE to PUD in this area in anticipation of the implementation of the instream flow planning in both watersheds. That's a conflict of interest. I object entirely to this plan, both in the Skagit and the Samish. The only way to resolve this is to scrap it and start over. Thank you.

**Response:** Thank you for your comment. Ecology did provide some grant funding to extend public water supplies by the Skagit PUD in certain areas of the basin. It is the public policy of the State of Washington to support public water supplies and we do not believe that it is a conflict of interest with our instream flow program.

Comment 29

**Commenter:** Mike Shelby representing Western Washington Agricultural Association

**Type:** Letter, 1/25/2006

**Comment:** As you are aware, agricultural landowners and the drainage/irrigation districts are developing a Comprehensive Irrigation District Management Plan (CIDMP) which will be addressing ESA and CWA compliance for drainage and water conveyance systems in the lower Skagit River basin. The plan is also addressing current and future agricultural irrigation water use and management options. The CIDMP process, when completed, will provide an added technical and information base to pursue agricultural irrigation efficiencies, improve water conservation and explore options for development of new agricultural water sources that will be protective of instream flow needs. As we have discussed with you previously, we would expect the Department of Ecology to remain receptive to considering the information gathered during the CIDMP process and continuing this discussion of future agricultural water needs.

**Response:** Ecology is actively participating in the Skagit CIDMP process and plans to continue participating in that planning effort. Ecology is committed to working with the CIDMP process to implement recommendations developed from that process, as our governing laws and resources allow.

Comment 30

**Commenter:** Mike Shelby representing Western Washington Agricultural Association

**Type:** Letter, 1/25/2006

**Comment:** However, in our review and evaluation of the total reserved water allotments, agriculture remains considerably under-served in the apportioning of this water compared to amounts provided for other future uses in the proposed rule.

**Response:** Please see Ecology's response to comment 491.

Comment 31

**Commenter:** Mike Shelby representing Western Washington Agricultural Association

**Type:** Letter, 1/25/2006

**Comment:** Currently there are approximately 36 c.f.s. of pending agricultural irrigation water rights applications, intended to serve about 2,500 acres of farmland in the lower Skagit basin, that are on file with the Department of Ecology. The 10 c.f.s. reservation amount proposed in the rule will address less than 30% of this documented need. Published reports and observations by others have identified a changing trend in agricultural crops that also forecasts a need to plan for additional agricultural irrigation water in the future. While we had expected to see a larger reservation in this draft rule for addressing current and future agricultural irrigation need, we will consider, for the present, both the instantaneous and annual quantities defined in the rule as the minimum available offer for agricultural needs proposed in the rule amendment.

**Response:** Please see Ecology's response to comment 491.

Comment 39

**Commenter:** Mike Shelby representing Western Washington Agricultural Association

**Type:** Letter, 1/25/2006

**Comment:** Additionally, we note that Skagit County is nearing completion of the 2005 Comprehensive Plan update. It is likely that residential permitting in the Skagit River floodplain may be further limited in the updated plan. Further, much of this area has service available from the Skagit PUD. These factors would suggest that the water reserves proposed in the rule for domestic use particularly in the Skagit lower and middle subbasins may not be fully utilized. We recommend the rule include a provision to hold any unused domestic use reservations in these subbasins for future general agricultural purposes including irrigation.

**Response:** Ecology has considered your proposal carefully but has decided not to allow agricultural irrigation users to access the domestic, municipal, and commercial/industrial reservation. Over time, if the irrigation demand outstrips the demand for residential and business water, Ecology could amend the rule to change the terms of the reservation. Section 173-503-100 allows for regulation review.

Comment 40

**Commenter:** Mike Shelby representing Western Washington Agricultural Association

**Type:** Letter, 1/25/2006

**Comment:** We also want to again identify the tidally influenced subbasin area of the lower Skagit River below the Mount Vernon gauge as an area where the preponderance of ground water flow is directly to marine waters. Furthermore, according to the information provided in the Supplemental Environmental Assessment for the original rule (which is also summarized in WAC 173-503-030), the fisheries concern in the Fir Island segment of the Skagit River is the available estuary habitat. To protect this habitat, a total maximum allowable out-of-stream withdrawal amount was set in the rule at 836 cfs for the entire river basin for the months of February through August. There is nothing in the documents supporting the rule that justifies the application of minimum instream flows measured at the Mount Vernon gauge to the tidally-influenced section of the Skagit River adjacent to Fir Island. Because of these reasons, we recommend that the proposed rule include a provision that water rights in this area not be subject to interruption based on the instream flow measured upriver at the Mount Vernon gauge, but remain subject to the total maximum allowable out-of-stream withdrawal amounts to protect the estuary habitat.

**Response:** The purpose of the estuary study done for the original rule was to specifically determine the effect on Chinook of diverting surface flow from the Skagit River in the estuary.

There is extensive documentation about this rule and the original rule on the Skagit River (i.e. Final Technical Report Lower Skagit River Instream Flow Studies dated June, 1999 by Duke Engineering & Services Inc.) . The original instream flow rule did an extensive study of the estuary habitat to determine the streamflows needed to protect Chinook fry feeding habitat. The study was complex because of the difficulty in measuring a tidal habitat where water levels were constantly changing from the tides and then determining how the tidal water levels are influenced by specific streamflows coming downstream from the Mount Vernon gage. The Instream Flow Committee determined that a loss of 836 cfs of flow in the river combined with the effect of tides would cause a 10% loss of over-bank inundation which is when conditions would be right for Chinook fry to feed. The Committee decided a loss of 10% of this feeding habitat would be significant and that 10% loss should be a limit on the loss of feeding habitat from the Skagit River in the estuary.

Diverting water from the Skagit River in the estuary would directly lower the water levels needed in the estuary needed to provide feeding habitat for Chinook fry.

Comment 78

**Commenter:** Mike Shelby representing Western Washington Agricultural Association

**Type:** Letter, 1/25/2006

**Comment:** The proposed 15 c.f.s or 10,840 a.f. reservation is a substantial increase in the total allotment of the reservations from the previous rule amendment proposal for these water uses. However, we are concerned with the construction of this provision in that it combines all the non-agricultural uses together with stock watering. While this reservation is more generous and is intended to accommodate potential growth and development in the subbasin management units, we are concerned the specific tributary subbasin reservations could be consumed quickly by these other uses. No reserved water would then remain available for future stock watering use. We recommend that a stock watering reservation in the amount of 1 c.f.s or 724 a.f. annually be separated from the water to be set aside for the other uses. This reservation should be solely for stock watering. It should be available and apportioned for use within any of the subbasins for stock watering. The stock watering use established under this reservation should not be allowed to be changed to a non-agricultural use.

**Response:** Ecology agrees that providing for a specific allocation of water for future stock watering needs provides more certainty for future stock users. Consequently, Ecology has changed sections 173-503-073 and 173-503-075 to provide a dedicated allocation for larger stock uses, while allowing small scale livestock operations to be included in the domestic, municipal and commercial/industrial reservation.

Comment 449

**Commenter:** Aubry Stargell

**Type:** Oral, Bellingham on 1/11/2006

**Comment:** I pretty much stated my concerns already via questioning, but I want to make sure that rural landowners whereby it's not practical to hook up to a public water system because of cost and distance from service, et cetera maintain their abilities to drill private exempt wells.

**Response:** Please see Ecology's response to comment 256.

Comment 84

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** The rule states that these reservations are necessary to satisfy stock watering requirements. It appears to us, based on Ecology documents, that the new rule would provide enough stockwater to support a five-fold increase in stock over those presently utilizing exempt wells or surface flow. In the face of a declining agricultural land base, we believe Ecology has been arbitrary and capricious in its determination of the need for this quantity of water to support future stock.

**Response:** In the proposed rule amendment available for public review, future stock water users could potentially access the 15 cfs of water reserved for domestic, municipal, commercial/industrial and stock watering use. Ecology understands that this arrangement of adding reserved water for people and for livestock is confusing and has created a separate reservation for stock water uses. See section 173-503-075 WAC.

Comment 106

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (1) We believe that there has been an inadequate analysis of the impacts to instream resources as a result of the proposed rule amendments and that avoiding such impacts has not been adequately weighed as part of the public interest. More importantly, we do not believe that a Rule of general applicability, creating additional water availability throughout the Basin on the basis of a sketchily theorized future need, is appropriate fodder for the OCPI exemption. Instead, we ask that you delete the first two sentences of the paragraph and the clause beginning with "that" and ending with "impacts" in the third sentence and replace with the following: "Based on information that has been submitted to Ecology during the rule-making process for the amendment of WAC chapter 173-503, the Department has considered the negative effects to instream resources and the possible impacts to human populations and has determined that limited reservations for domestic and agricultural use are appropriate."

**Response:** Ecology did consider the impacts to instream resources was when developing the reservations and has placed many conditions on future uses under the reservations to protect instream resources. We have added language expressing that Ecology believes that future withdrawals of water could harm instream resources. Please see the accompanying economic assessments and the SEPA documents for more information on our consideration of the effect on instream resources of the rule amendment.

Comment 107

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Except the above-noted changes, we support the remainder of that first paragraph and the conditioning of the reservations described in the second paragraph.

**Response:** Thank you for your comment. Comment noted.

Comment 108

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (a) We believe the agricultural quantities of water proposed to be reserved are not supported by any meaningful data. See Wassell and Hedrick report (attached). Our understanding is that the Qa is based on a 12-month irrigation season, when in fact we believe that irrigation rarely exceeds 20-30 days/year. We are unaware of any empirical information that would lead one to conclude that an additional Qi of 10cfs is warranted. Finally, the reservation should include both a Qi and a Qa, not one or the other as proposed. Ecology has not shown the basis for either a 10cfs Qi nor the Qa as proposed. It would also be helpful for Ecology to show the water duties associated with each crop to determine the appropriate reservations necessary to meet future agricultural demand. Data provided by Skagit County did not substantiate the water duties prescribed, the basis of the growth analysis for specific crops, or the underlying assumptions regarding predictions for increased acreage projected into the distant future. See Wassell and Hedrick report (attached). Finally, an analysis of the percentage of lands expected to be lost to development, based on current trends, is an indispensable component of any forecast of future agricultural needs.

**Response:** Ecology agrees that as written in the rule amendment proposal, it was confusing as to the size of the agricultural irrigation reservation. Therefore, Ecology has clarified section 173-503-073 to be more clear on the size of the reservation. The reservation was sized using the process the agency uses to develop water duties associated with an irrigation water right permit. Ecology assigns a water quantity that can be used throughout the irrigation season. While it may be true that a typical irrigation use may be 30 days per year, the dates and number of days water is used for irrigation can vary considerably from year to year based on crop needs and climatic conditions. It is Ecology's typical permitting practice to assign a broader irrigation season to provide flexibility for irrigation water users. For more background on irrigation requirements and crop water duties, Ecology has references to sources containing this information in the Background Document on Reservations, Closures and Hydraulic Continuity.

Comment 109

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (b) The conditions for this reservation should include both the Qi and the Qa, not one or the other. It is unclear to us the basis for the 15cfs reservation. In the small business economic statement, it appears that a total of 1.5cfs is necessary to meet exempt well use and new rural public systems. Even if 1 cfs is necessary for stockwater, that results in a total of 2.5 cfs demand. To add 12.5 cfs to meet future need without even any request from the Skagit PUD or the City of Anacortes, let alone substantiation of such a request, is unwarranted. The 15cfs is unwarranted for the following reasons:

**Response:** Ecology has provided some additional clarity on quantity of measurement of the domestic, municipal, and commercial/industrial reservations. It has also separated the stock water use into a separate reservation quantity. Please see sections 173-503-073 - 075.

Comment 110

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Although we do not object to expansion of the Judy Reservoir system into rural areas in a manner consistent with PUD' s current water rights (as provided for in the 1996 MOA), we do not believe there should be an expansion of new rural public systems. Further, it is unclear how Ecology arrived at the need for these systems or the quantities proposed for reservation.

**Response:** Ecology developed the reservations based on the biological consequences of withdrawals, water demand forecasts and by input stakeholders. The reservation was sized to meet growth needs estimated for 2050. Ecology does not believe that the rule will encourage expansion of new rural public water systems. In fact, Ecology has provisions in the rural that require appropriations for new potable water must connect to existing public water supplies, if those supplies can be provided in a timely and reasonable manner. See sections WAC 173-503-060(2) and 173-503-073(3f).

Comment 111

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** The 1996 MOU, to which Skagit PUD, the City of Anacortes, Ecology, and Skagit County as well as three Skagit Tribes, were parties, clearly required that the PUD and Anacortes would not be requesting additional uninterrupted water supplies. The MOA was premised on the revised water rights that were the result of this agreement. Ecology's utter disregard for past agreements is very disappointing, and clearly is inconsistent with the basic understanding of all parties. Additional water should not be provided to PUD and Anacortes as a result of this Rule in violation of the 1996 MOA.

**Response:** In light of the legal challenges of the existing rule, it is Ecology's opinion that the consensus that once existed on the Skagit Instream flow rule no longer holds true. Ecology has been trying to work with the signatories of the MOA to develop a resolution to Skagit County's legal challenge of the rule and the outstanding water management issues in the basin. Since we could not come to a consensus resolution of the issues with the existing instream flow rule, Ecology has proposed this rule amendment in hopes of developing a compromise solution.

Comment 112

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** As previously mentioned, there is no rational basis for the quantity of water proposed for stockwatering. It is incomprehensible that there will be 50,000 new animals dependent on unpermitted stockwater in the future, and it is absolutely unclear how Ecology arrived at this number based on a public interest test.

**Response:** In the rule amendment proposal available for public review, future stock water users could potentially access the 15 cfs of water reserved for domestic, municipal, commercial/industrial and stock watering use. Ecology understands that this arrangement of adding reserved water for people and for livestock is confusing and has created a separate reservation for stock water uses. See section 173-503-075 WAC.

Comment 113

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** It appears that there is no quantitative analysis that would demonstrate anticipated commercial and industrial needs in excess of current water supplies contained within existing PUD/Anacortes/Public Water Supply permits and certificates. This appears to be a number that Ecology has arbitrarily determined to be necessary to meet this need, with no analysis regarding environmental impacts.

**Response:** Ecology sized the commercial/industrial, domestic, municipal reservation based on the biological impacts of the withdrawals, water demand forecasts and by input from some stakeholders. Water supply planning for commercial and industrial uses is a difficult activity, as water use can vary according to the business activities of the operation. The primary basis for determining the future water demand forecasts was residential population growth. Ecology's Background Document on Reservations, Closures and Hydraulic Continuity describes the reservation sizing in more detail and includes references to other documents where further information can be found.

Comment 114

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Ecology has not stated the underlying basis for the domestic needs identified. Are the reservations based on low population projections with a 50-year planning target, or a high population projection with a 20 year target, or something in between? Lacking this analysis, how can a benefit-cost analysis have been completed?

**Response:** Please see the response to comment 340 for a detailed description of how the domestic water demand forecasts were used to develop the reservation sizes. See also the Background Document on Reservations, Closures and Hydraulic Continuity.

Comment 115

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (2) (c) The "irrigation season" should be defined by Ecology as a general statement, with individual applicants providing permit-specific support for any departure from these dates. In this way, transfers of water rights, or use by subsequent owners of the right will still be subject to the season as either defined by this rule or the specific language on an application.

**Response:** Ecology would request this information as part of its permitting activity. The irrigation season is typically defined on water right documents.

Comment 116

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (e) Meters should be required to measure maximum daily water use, and this measure be used to calculate the amount of the reservations that have been used. Such meters must use best available technology or remote-reading technology. No future use pursuant to a reservation should be allowed if during the preceding calendar year less than 95% of the meters installed pursuant to this rule were not regularly read and the data reported to the Department, if data from such meters was not analyzed by the Department to calculate the amount of the reservations that has been used on a tributary-by-tributary basis, or if a local entity did not submit notice to the Department and other interested parties of any building permits issued and/or subdivision applications approved which will utilize such reservations, including the location of the well at issue.<sup>3</sup> Finally, data reporting dates should be standardized, with special attention given to low-flow months, so that interested parties can expect to review data at a particular time of year.

**Response:** Ecology has made some changes to the sections referenced in your comment, WAC 173-503-060 since the public review of the rule amendment proposal. Please see this section for more information. Additionally, Ecology has provided additional information on how the agency will implement the metering conditions in the implementation plan for this rule.

Comment 117

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (3)(f) Municipal Suppliers. Add, after the first sentence, the following statement: "If the service area of an existing municipal supplier is expanded under the law from that existing as of the date of this Rule, water use from the expanded portion will be counted as a use of the tributary or mainstem reservations, where applicable."

**Response:** Ecology believes that the language in this section as written is consistent with the rules and regulations relating to municipal water supply.

Comment 118

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Future appropriations made as part of the use of these reservations will only be available so long as the Department continues to maintain and update on an annual or more frequent basis a database associated with the amount of water used from the reservation and only so long as meters continue to be read.

**Response:** Ecology will provide yearly notices as to the status of the reservation on Ecology's website, through newspaper publication and other means. Ecology anticipates the need for current reservation status available for public, and local and tribal governments in order to effectively administer this rule. When the reservations are fully allocated, no water will be available and the subbasin management unites will be closed and no more water will be appropriated. WAC 173-503-073(5). Please see the implementation plan for this rule amendment for more detail.

Comment 119

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Ecology should, in 5-year increments, evaluate the number of acres of farmland converted to non-farm uses during that 5-year period and reduce the remaining water available through the agricultural reservation accordingly.

**Response:** If water allotted to agricultural irrigation is no longer desired to be used for that purpose or has been abandoned or relinquished, then it will be credited back to the reservation upon notification of abandonment to Ecology. See section WAC 173-503-073(2)(g).

Comment 120

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** The quantity of water routinely provided by the PUD or Anacortes to meet irrigation needs should be subtracted from the amount of water provided for in the reservation. No estimation of water needs met by public system is provided as part of this analysis.

**Response:** Water served currently or in the future by public water suppliers like the PUD or Anacortes is authorized under water rights which predate the instream flow rule. Ecology does not believe it is appropriate to reduce the reservation based on what supplies these systems can or might serve as it is entirely within the discretion of those systems and the water users to determine how and when service is made available. It would be administratively burdensome to Ecology to calculate on a continuous basis how and when agricultural water needs are served by public water supplies. Moreover, the agricultural irrigation reservation has been developed to minimize the impact on instream resources.

Comment 121

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** To make use of the domestic reservation for stockwatering purposes, the stockowner using the reserved water must report to the Department by January 1 of each year the maximum number and type of stock utilizing reserved water, the periods of the year that the stock are utilizing the water, and whether the stock are drinking from the stream directly or utilizing well water.

**Response:** Ecology anticipates administering and managing the stock water reservation in a manner to similar to the method outlined in this comment. Please see section 173-503-075.

Comment 122

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Because additional water for agriculture should not be provided when there is currently unlawful use of water to which there is no right, or use that is not consistent with the right. Use of the additional reservation should therefore be contingent on the cessation of illegal uses and a clean-up of existing rights.

**Response:** As part of the permitting process, Ecology will request information on existing water rights held by the applicant to determine if there is a demand for the requested water use.

Comment 123

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** 3(a) This section seems to allow for virtually all beneficial uses. Why not say that it is available for all beneficial uses. The language as proposed does not provide for any use of the water for environmental or recreational needs.

**Response:** The reservations in this rule amendment are set for water that will be consumed by the public through consumptive uses such as commercial/industrial, municipal, or stockwatering, and the instream flows that have been set by Ecology is water that will stay in the system for non-consumptive uses, such as use by fish and habitat. Recreation is largely non-consumptive, as there is no diversion or diminishment of the source, and therefore is a beneficial use supported by the instream flow right.

Comment 124

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** 3(b) .4cfs should be changed to .04 cfs. This limit should apply to each of the identified tributaries. We assume this is a typographical error, if not, then the quantities of water provided may have a significant adverse environmental impact and we have not seen any analysis that evaluates the number proposed.

**Response:** Thank you, this is a typographical error and the change will be reflected in the updated version of the amendment. See WAC 173-503-073(3)(b) in the updated amendment.

Comment 125

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** 3 (e) The department should have the sole responsibility for administering and accounting for use of the reservations. If local governments will be consulted in the administration and accounting of the reservation, we would expect that the same provisions would be made for tribal consultation in this rule as well. Moreover, use of such reservations should be contingent upon such local governments submitting notice to the Department and other interested parties of any building permits issued and/or subdivision applications approved which will utilize such reservations, including the location of the well at issue.

**Response:** Tribal and local governments will be consulted on issues regarding the reservations. Ecology will publish yearly in newspapers of general circulation the status of the reservations for citizen review. However, Ecology anticipates the need for current reservation status available for public, and local and tribal governments in order to effectively administer this rule. Only new water rights will be subject to the reservations, and therefore, Ecology will be made aware of the water uses that will be subject to the reservation when a new water right permit is granted, or when Ecology is made aware of an new exempt well use.

Comment 126

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** 3 (e) The department should have the sole responsibility for administering and accounting for use of the reservations. If local governments will be consulted in the administration and accounting of the reservation, we would expect that the same provisions would be made for tribal consultation in this rule as well. Moreover, use of such reservations should be contingent upon such local governments submitting notice to the Department and other interested parties of any building permits issued and/or subdivision applications approved which will utilize such reservations, including the location of the well at issue.

**Response:** Please see Ecology's response to comment 125.

Comment 127

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** WAC 173-503-073(5)- In the third sentence of the first paragraph, change "may" to "will." The rule should include language that Ecology must notify affected Indian tribes, as well as the appropriate county, when portions of the reservations have been allocated

**Response:** Because the alternative sources will only be available if certain conditions are met, Ecology feels that "may" is appropriate.

Comment 128

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** (6)- The language in this section should be changed such that if water use is not in compliance with conditions as described for use of the reservations, Ecology shall rather than may take action under 090.

**Response:** Thank you for your comment.

Comment 129

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** 7 (a) This section should require the Department to report to interested parties on an annual basis the use of water from the reservations.

**Response:** Please see Ecology's response to comment 331.

Comment 130

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** 7(a) This section should also include language regarding debits against the reservation for water withdrawals from exempt wells that have occurred since the April 2001 rule adoption.

**Response:** A certain amount will be debited against the reservation as stated in WAC 173-503-150 of the amendment.

Comment 131

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** 7(b) The Tribe supports the provision that all water uses will be debited against the reservation whether interruptible or not. The Tribe believes the reservation should be contingent on a high percentage of compliance with the metering requirements, including reporting of the relevant data.

**Response:** Thank you for your comment.

Comment 132

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** 7(c) Recharge. We object to any credit for recharge and even more emphatically object to the high percentage of recharge credit given and the fact that it is being calculated on an individual basis. Among other problems, the high percentage allowed in the proposed language fails to account for the fact that recharge will be the lowest when water use is the highest (because of outdoor lawn watering). Thus, any recharge credit allowed should be as low as possible to reflect peak use periods, which are the same periods that the streams are at their most vulnerable. Furthermore, as shown in the attached critique by Dr. Joel Massmann, Ecology's approach will result in an overestimation of recharge to the detriment of fisheries. Several PCHB decisions do not allow credit for septic recharge because of uncertainty issues related to timing, amount, and quality, and because of the potential for future sewer service (Manke Lumber, Cedar River Water & Sewer Dist.; Oetken & Blackerby). Moreover, calculating the recharge on an individual basis leaves the determination open to potential challenges by individuals and therefore makes the reservation caps less definite and certain.

**Response:** Ecology believes that the 50% recharge credit is a conservative, yet fair, estimate of recharge from on-site septic systems. Recharge from septic systems varies, according to some of the factors mentioned in this comment, such as septic design, geology and outdoor water use. It is for these reasons that Ecology chose to use the low end of the estimated recharge percentage, to account for the variation in septic system and water use conditions. Ecology's Background Document on Reservations, Closures and Hydraulic Continuity describes more of the information that Ecology used to determine recharge rates from on-site septic systems. We have also inserted conditions to remove the septic recharge credit if homes are subsequently sewered to account for the loss of septic recharge to the basin.

Comment 136

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Furthermore, we understand that, given Ecology's proposed septic recharge provisions, the reservations are actually double what they appear on paper.

**Response:** Ecology has clarified that the unit of measurement of the reservations is the maximum average consumptive daily use, which does include any applicable return flow recharge credit. Only appropriations that use septic system will be eligible for a return flow recharge credit. Ecology has also clarified the rule to indicate that should a septic field be replaced by community sewer systems that the recharge credit will be removed.

Comment 137

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Finally, there is no basis by any stretch of the imagination for tributary reservations that are in excess of reasonably anticipated growth. There can be no basis for finding that the negative impact to instream flow resources is outweighed by the need to provide water when there is in fact no need to provide water.

**Response:** Ecology developed the reservations based on biological consequences of withdrawals, water demand forecasts and by input from stakeholders. The reservations were foremost limited by the stream flow depletion threshold of 1-2% of the low stream flow seen every 10 years.

Comment 584

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/21/2005

**Comment:** Additionally, the justification should not rely on overriding considerations of public interest because the use of that justification, under the relevant Pollution Control Hearings Board ("PCHB") decisions, is limited to very narrow and specific circumstances. Thus, the justification cannot lawfully be used to facilitate certain types of development carte blanche. Rather, the amendment should be based on an alternative justification that is permissible under the AP A, such as change of circumstances or additional information having come to light after promulgation of the original rule.

**Response:** This comment is on a previous rule amendment proposal and is no longer applicable to the existing rule amendment. Please see responses to other comments relating to the issue of overriding consideration of the public interest that were submitted on the current rule amendment.

Comment 587

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/21/2005

**Comment:** Recharge. No credit should be given for recharge; it is not scientifically or legally supportable. Discounting for future recharge in calculating withdrawals violates the mandate of PCHB decisions such as Manke Lumber, Covington Plateau Sub Area, and Cedar River Water & Sewer District, as well as the information in the TMDL report.

**Response:** The proposed rule would debit the reservation 50% less for homes on septic systems. However, this “credit” is different than what was rejected by the PCHB in the Manke Lumber and other cases which proposed using septic returns as a form of mitigation or to claim their proposed use was non-consumptive. As explained in Ecology’s background document for the Skagit rule amendment, Ecology intends to account for consumptive use against the reservation and the 50% “credit” for septic system returns represents an accounting tool for managing the reservation rather than a credit to or mitigation by the individual using the water for domestic purposes. The proposed rule also includes conditions to remove the septic recharge credit if homes are subsequently converted to sewer systems.

Please also see Ecology's response to comment 132.

Comment 589

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/21/2005

**Comment:** Metering. Any purported limits on the reservations will be meaningless if no metering occurs. Moreover, metering is required under WAC 173- 173-040. The primary stakeholders in the Skagit already agreed to metering as part of the proposed settlement agreement, and Ecology must seize this opportunity and provide for metering in this rule. There is probably no more favorable area of the state for Ecology to begin metering efforts.

**Response:** This comment relates to a previous version of the amended rule and is not relevant here as the updated version does contain a metering requirement.

Comment 592

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/17/2005

**Comment:** 173-503-060(5). Ecology should require the installation of meters at each exempt well, permitted well, and interruptible well established after April for the following reasons:

- b. A average use of water can be disputed later when the limits of the reservation are approached. Individuals demonstrating that less than 350/175 gals/day are being used will call into question that actual amount of water being used. Similar issues occurred in the mid 1980's in the Methow Valley;
- c. Well logs have been notoriously inaccurate, and do not indicate actual quantities of water used;
- d. Tracking of building permits will be based on the commitment and resources of Skagit County, both of which may change over time;
- e. Tracking of actual water use 'Will provide the only viable quantitative determination of water used;

There is no mechanism in place whereby Ecology can track which wells installed after adoption of the rule in 2001, are on sewer or will be hooked up to sewer, so the current determination of water use based upon "discounts" for septic recharge is questionable at best;

Meter costs are relatively inexpensive compared to home construction costs and overall well construction costs;

Meters are the best available known technology for estimating water use;

To protect the river during late summer and early fall when flows tend to be the most depleted, the reservations must be based on cumulative peak flow, not on cumulative average annual flow, and meters are the only mechanism to provide this information;

Ecology itself has repeatedly recognized the indispensability of metering to quantification of water use. For example, in a 3/2/99 Management Briefing, Ecology staff recommended that all new water uses be subject to a metering requirement. In a Q&A document regarding Metering Requirements, Ecology states that without a monitoring device of some sort, it may be difficult to know if the limits of a water right are exceeded." The same principle obviously applies to reservations. Finally, in a 9/25/98 Draft White Paper, Ecology noted the effectiveness of metering as a tool to protect stream flows and stated that, in the future, it would require metering and reporting of diversions "of all water users"; Skagit PUD # 1 has generously volunteered to remotely read the meters, so the use of meters would not require a significant commitment of additional Ecology resources.

**Response:** Please see Ecology's response to comment 589.

Comment 593

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/17/2005

**Comment:** 173-503-073(2)(2:). As explained in detail above, it is absurd that Ecology merely reserves the right to require metering. Ecology should require metering of all exempt wells, as well as all new diversions and withdrawals. Reports of metering results should be made available to all interested parties.

**Response:** Please see Ecology's response to comment 589.

Comment 594

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/17/2005

**Comment:** 173-503-073(6). The lack of metering, coupled with the very inaccurate accounting system proposed in the rule, will no doubt result in uncertainties regarding the extent of reservation use. We disagree that 350 gallons/day or 175 gallons/day with on-site septic are appropriate numbers to use when debiting water quantities from the reservations.

**Response:** Please see Ecology's response to comment 589.

Comment 595

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/17/2005

**Comment:** In addition to the above comments, we have included documents supporting metering. These are listed on the attached sheet and included on the enclosed CD. Furthermore, the Tribe has concerns about the Department's Cost-Benefit Analysis and Small Business Economic Impact Statement and therefore provides an economic critique of those documents authored by Phil Myer of Myer Resources, Inc. The critique and other documents applicable to the Department's Cost-Benefit Analysis and Small Business Economic Impact are included on the enclosed CD as well.

**Response:** Please see Ecology's response to comment 589.

Comment 599

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** We can only assume that each time there is a perceived need for additional water from the Skagit River Basin. Ecology will again amend the rule by an arbitrary declaration of Overriding Consideration of Public Interest (OCPI) thereby further reducing essential water supplies necessary to sustain anadromous fish, notwithstanding the illegality of such a broad use of the OCPI Exception under Washington law. Further, it is truly disturbing that while Ecology avoids taking action that might impair the senior water rights of out of stream users, it appears quite unwilling to protect those senior water rights established specifically to protect instream flows. These rights are held in the interest of all the citizens of Washington State, and, if protected, will help ensure that subsequent generations can partake of the State's vibrant natural environment. Nevertheless, the Department, through this rule, is willing to subvert the common interests of all of its citizens to support the speculative economic interests of a limited number of as of yet unidentified individuals.

**Response:** Prior to making a determination of OCPI, Ecology must ensure that the appropriation would secure maximum net benefits to the public, be put to a beneficial use pursuant to RCW 90.54.020, and would not harm public, economic, or environmental interests. In short, the public interests in the water override other considerations. Ecology's evaluation of OCPI is more fully documented in the Skagit Rule Amendment Background on the Reservations, Closures, and Hydraulic Continuity. Given limitations on the proposed reservations, negligible impacts are expected. Consequently, the public interest expressed in the desire to have uninterrupted water supplies in areas of the Skagit basin where public water supplies are not available has, in Ecology's judgment, overridden these impacts. Ecology also added language in section 173-503-073 that indicates that additional out-of-stream uses beyond those authorized in the proposed rule would create actual significant negative impacts, thereby ensuring something beyond "perceived need" would be required to overcome these impacts should future water requests exceed the quantities in the reservation.

Comment 607

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** 2(b) Is it Ecology's intention to deduct from the reservation the amount of water diverted on a permit, or the amount of water diverted minus some recharge factor? This rule indicates a fundamental shift in the administration of Washington's water code in that it appears that Ecology will now be guesstimating the magnitude of water use as some amount less than the amount actually withdrawn. In other words, it appears that some unsubstantiated recharge factor will be applied to arbitrarily discount the amount actually withdrawn.

**Response:** The recharge credit is only available for water uses under the reservation that return some of the water through an on-site septic system. This credit would be available for both permitted and permit exempt uses. It would not be available for uses that do not have an onsite septic system associated with its use, such as a sewer residential uses or agricultural irrigation uses. The credit will be removed when a system is sewerded.

Comment 614

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** We dispute Ecology's statement that there is a small potential for negative impacts on instream resources as a result of the establishment of these reservations. We come to this conclusion based on documented reductions of instream flows as a result of existing uses, the potential for additional withdrawals as a result of inchoate rights, the results of Ecology's TMDL studies that demonstrate that further reductions in instream flows will further exacerbate temperature problems in streams that currently do not achieve water quality standards. Further, additional reductions in streamflow as a result of the proposed reservations may result in the taking of bull trout or Chinook salmon listed as threatened under the Endangered Species Act Ecology must conclusively determine if the cumulative effects of diversions will result in such a take and prevent withdrawals where necessary to avoid a take.

**Response:** The impact in a normal year would be on the order of 0.05% to 1% loss of habitat, but only during the lowest flow month of September and much less during the other months. In most of the months the effect on fish would be closer to zero percent than 2%.

Biologists from Ecology, in consultation with the Department of Fish and Wildlife, determined that the reservation withdrawals would have little impact on the fish population.

Note that most of the reservations are flow quantities of a few hundredths or even thousandths of a cfs. These quantities are so small that they cannot be measured by a standard streamflow measuring device.

Ecology's assumptions regarding impacts to instream resources is available in our document, "Skagit Rule Amendment Background on the Reservations, Closures, and Hydraulic Continuity" dated May, 2006. Note sections relating to Overriding Consideration of Public Interest and Basis for Reservation Quantities.

Comment 615

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** 2(c) Under what circumstances would existing public water systems be requesting additional water? Ecology should provide more specific requirements as to standards for conservation and efficiency measures. Merely to say that applicant must demonstrate to Ecology's satisfaction that such measures have been met is meaningless.

**Response:** Provisions on water use efficiency for domestic uses have been added. See section 173-503-073(3)(c).

Comment 616

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** 2( d)(iii) The language associated with interruptible water supply should be changed from "may not' to "does not constitute evidence of an adequate water supply."

**Response:** This comment pertains to the previous proposed rule amendment, and is not relevant to the current rule amendment.

Comment 617

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** 2(f) Limiting outside water use to 1/12 acre is a good step substantively, but the Tribes are concerned about the enforceability (and the political likelihood of Ecology's enforcement) of such a constraint, given Ecology's admittedly limited resources. Other than visiting each site to see the size of yards and comparing the date of initial withdrawal it will be virtually impossible to determine the legality of outside watering. Two parcels side by side may both be watering equal areas greater than 1/12 acre, but only the one using a well established prior to the rule is entitled to such watering. Thus visual observations alone will not enable a determination of compliance.

**Response:** This comment is on a previous rule amendment proposal and is no longer applicable to the existing rule amendment.

Comment 618

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** (3) While we support this limitation, we are concerned that the statement that the reservation is a one-time finite resource may be undercut by ecology's liberal reliance on and expansion of OCPI as a justification for the amendment.

**Response:** Please see Ecology's' response to comment 599.

Comment 619

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** (5) While we support the intended objective of this subsection, it is unclear to us (I) how Ecology intends to monitor whether zoning changes and building permit and subdivision approvals will allow for uses inconsistent with this chapter

**Response:** This comment was submitted on a previous rule amendment proposal and is no longer applicable to the current rule amendment. However, the purpose of the reservations is to provide water for development approved by the counties consistent with each county's land use plans and zoning. The rule also does not change the local jurisdictions obligation under the Growth Management Act.

Comment 620

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** What standard Ecology will use to determine whether there are adverse effects on small tributaries and other flow-sensitive areas as a result of increased densities,

**Response:** Please see Ecology's response to comment 589.

Comment 621

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** Whether the Department may limit or restrict the use of the reservation administratively, or whether a rule amendment is necessary. We are very concerned that those salmon bearing tributaries not specifically identified in the rule as being closed to new appropriations, and not having specific reservations, will be adversely affected by a disproportionate use of the mainstem reservations within those tributaries.

**Response:** This comment is on a previous rule amendment proposal and is no longer applicable to the existing rule amendment.

Comment 622

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** 6(a) The department should maintain a record of surface water diversions as well as ground water withdrawals from the reservation.

**Response:** Please see Ecology's response to comment 589.

Comment 623

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** 6(b) We disagree that 350 gallons/day or 175 gallons/day with on-site septic are appropriate numbers to use when debiting water quantities from the reservations. We believe this is the case for the following reasons: Ecology has not provided supporting data for 350 gallons per day water use, including outside watering of 1/12 acre. Use of an average amount of water is inappropriate when the impacts to fish and instream flows are dependent upon the cumulative maximum daily use. While average use, calculated over a whole year may be 350 gallons/day, it might in fact be much higher during summer months, the same period during which withdrawals are likely to cause the greatest detriment, particularly given that the outdoor lawn watering restriction is unlikely to be enforced. When these higher uses within a single tributary occur at the same time (for example, during drought conditions) the impacts to instream resources can be quite large. Since the movement of groundwater may be dependent on surface elevations and other geographical features, recharge may in fact be much less than 50% as proposed within the amendment. Water taken from a deep but connected aquifer may not be recharged if shallow septic systems allow groundwater routing to watercourses or groundwater sources within different aquifers. Watershed boundaries as defined by surface elevations do not provide for any level of certainty that recharge will approach 50%. In addition, the quality of water reentering the aquifer may be of lower quality due to failing septic systems or other sources of pollution. In this regard, there may be a degradation of water quality that will not be reflected by a one size fits all 50% recharge credit. The problems with allowing credit for septic recharge are illustrated by the attached USGS report regarding modeling of groundwater movement in the Puget Sound Lowlands, the attached PCHB decisions addressing septic recharge, and the attached newspaper article regarding the septic system failures in Similk Bay. Ecology has provided for no mechanism whereby if sewer is established in a tributary, additional water will be debited from the reservation. Further, if the sewer is installed at a time when the reservation is close to being entirely consumed, and withdrawals are then debited at 350 gallons/day rather than 175 gallons/day, the maximum use of the reservation will be exceeded. Recharge credit should not be allowed as part of this rule.

**Response:** This comment is on a previous rule amendment proposal and is not longer applicable to the existing rule amendment. Please see responses to comments 418 and 587 relating to septic recharge credits.

Comment 624

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** Reservations should be based on peak daily use, not average daily use, as the cumulative peak use determines the maximum extent of stream flow reduction in many cases, and vulnerable tributaries are likely to face the largest incursions in late summer and early fall when their stream flows are lowest.

**Response:** This comment pertains to the previous proposed rule amendment and is no longer applicable to the current proposal. Ecology has defined the measurement period as the maximum average daily use, which is defined in section 173-503-025. The implementation plan for this rule amendment also has more detail on how withdrawals under the reservations will be managed.

**Section - 173-503-074**

Comment 442

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/31/2006

**Comment:** Quantifying Reservation. The Tribe recognizes that the Department has relied upon its data in order to reach the determination that a 2% impact of the 7Q10 for the various tributary sub-basin management units, however we would request the opportunity to review this data with the Department in order to better understand the basis for reliance upon some of the figures. The Tribe supports the movement by the Department from the previous language as it related to the smaller of buildable lots or 2% but we would request the opportunity to review the data with the Department.

**Response:** The process for developing the reservations, including the hydrological data used to estimate the 7Q10 flows is detailed in Ecology's Skagit Rule Amendment Background on the Reservations, Closures and Hydraulic Continuity. This information was available to the public during the public review period.

Comment 33

**Commenter:** Carolyn Kelly representing Skagit Conservation District

**Type:** Letter, 1/31/2006

**Comment:** The rule amendment makes no provision for a reservation of water for agricultural irrigation within any of the tributary subbasin management units established in WAC 173-503-074. With a documented trend toward more intensive, as well as specialized and niche, farming, we feel there will be a subsequent need for irrigation to support agricultural production beyond the mainstem of the Skagit, and we would encourage an allocation for this need.

**Response:** The rule amendment does limit sources of water under the agricultural irrigation reservation to the mainstem Skagit River basin. This restriction was intentional and was proposed to protect tributary sub-basins where large withdrawals could cause a significant impact to the water resources. Ecology consulted local zoning maps and determined that most of currently zoned agricultural land is in the mainstem areas. Finally, the agricultural irrigation reservation is one of many tools to meet future water demands in tributary subbasins, water sources from outside the tributaries could be brought in, transfers to existing water rights, water rights leases or purchasing water from water utilities may be available to meet future water needs in those areas.

Comment 206

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Table 1 includes a water availability analysis based on 800 gpd residential water Use and 50-percent return flow. Even ignoring all commercial/industrial connections and assuming 100-percent septic use, the proposed reservation falls short of the amount needed to meet existing use in the Fisher Creek and mainstem Nookachamps Creek basins, based on an analysis of permits granted since April 14, 2004. It is noteworthy that Table 1 likely understates reservation debits, and overstates remaining Wells, because an analysis of permits granted between July 31, 2005 and January 2006 is still in progress by Skagit County. Additionally, nine of 23 subbasins have reservations that are insufficient to serve existing lawful lots.

**Response:** Ecology used the information provided by Skagit County for information on development that they have allowed since the adoption of the instream rule, as well as expected future development levels. Ecology has acknowledged that the reservations created through this rule amendment will not provide sufficient water for full build-out in some rural areas and that alternative sources of water supply will have to be used if that level of development is to occur. Alternative sources are identified in WAC 173-503-100, although options are not limited to those identified. WAC 173-503-060 also describes how a mitigation plan for an individual withdrawal or a group of withdrawals can be submitted by an applicant or government agency to allow new water uses outside the reservations.

Comment 207

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** The proposed rule amendment will limit the total availability of water in rural areas of the county. The proposed amendments do not contain sufficient water to meet existing demand within the Fisher Creek and Mainstem Nookachamps Creek subbasins, creating conflicts between water users and inviting attempts to interrupt ongoing domestic use. Similarly, nine subbasins have insufficient reservations to supply legal lots. The proposed rule amendment was intended to avoid precisely this scenario.

**Response:** Ecology acknowledges that alternative sources of water supply, beyond the reservations created in this rule amendment, are needed to meet development demands in some subbasins. This rule amendment is intended to supply reliable sources of water to meet projected needs to the extent possible while maintaining protection of instream resources established in the existing rule.

Comment 557

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** This section establishes water reservation quantities for tributary subbasins. Ecology previously proposed to provide the lesser of two percent of 7Q10 or the amount needed at full buildout for a particular tributary subbasin. Apparently in response to the County's concerns about the unpredictability of buildout numbers, Ecology now proposes to reserve two percent of 7Q10 in all lower Skagit tributary subbasins, and to provide .04 cfs in all upper Skagit tributary subbasins. Nevertheless, reservation quantities remain inadequate to meet foreseeable growth needs in many Skagit River tributaries. Inadequate reservations will unnecessarily cause immediate water supply shortages in the Fisher Creek, Carpenter Creek and Nookachamps Creek subbasins. Shortages are most pronounced in the Fisher Creek and Nookachamps subbasins where there is insufficient water under the proposed rule amendment to satisfy the needs of existing, post-April 14, 2001, development.

**Response:** Please see Ecology's response to comment 488.

Comment 558

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology's analysis of the impacts of establishing tributary water budgets is flawed because use projections assume all existing, pending, and future building permits are for residential use and are therefore likely to consume 400 gpd. If some of these permits are associated with commercial or industrial uses, far fewer building permits could be issued because Ecology assumes 5,000 gpd of use for all commercial/industrial exempt well uses. The vague definition of "maximum average consumptive daily use" also creates unnecessary uncertainty regarding how use will be debited against the reservation. Ecology should debit withdrawals based on average daily use to avoid these concerns.

**Response:** Ecology assumes that the commenter is referring to the 800 gpd assumed daily household water usage found in section 073. The assumed daily household water usage has been updated in the rule to 350 gpd, which is more in line with the actual daily water usage of residents of the Skagit Basin. See WAC 173-503-073(7)(b). The Commenter is correct that use of large quantities by industrial or commercial permit-exempt wells would reduce the reserved amount available for residences. However, Ecology has received requests from the County not to limit the reservation to only domestic use and instead allow the County to exercise its land use and permitting authorities to make decisions about the types of future growth (residential, commercial, industrial) that will occur in Skagit County. The rule was thus modified to allow the reservation to be used for many purposes.

Comment 559

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Finally, WAC 173-503-120 figures 4 and 5 delineate the boundaries of the Skagit River Basin and its subbasin management units. Grandy Creek is shown in both Figures 4 and 5 and appears to fall within WRIA 4, the Upper Skagit River. WAC 173-503-074, however, creates a reservation of 0.228 cfs for the Grandy Creek subbasin. This conflicts with WAC 173-503-052, which states that appropriations within Upper Skagit River subbasins are limited to a maximum average consumptive daily use of 0.04 cfs. To avoid confusion, Grandy Creek should be removed from Figure 4.

**Response:** Ecology understands that including Grandy Creek in Figure 5 is somewhat confusing, since it also defined in Figure 4. Ecology has removed Grandy Creek from Figure 4.

Comment 28

**Commenter:** Mike Shelby representing Western Washington Agricultural Association

**Type:** Letter, 1/25/2006

**Comment:** While provisions have been made to establish a reservation of water for agricultural irrigation in the lower, middle and upper Skagit subbasins, there are no such accommodations for the future of irrigated agriculture in the tributary subbasins. This is very disconcerting in view of the reservations allotted in these tributary subbasins for domestic, municipal, commercial and industrial uses. A review of the zoning in these areas shows that portions of several of these tributary subbasins include designated Agricultural-NRL lands. We are concerned that reservations for new water for future growth and development to the exclusion of future potential agricultural irrigation use may have the unintended consequence of encouraging actions that will contribute to the conversion of agriculture lands to other uses. We recommend that an additional reservation of 1 c.f.s or 724 a.f. annually be set aside solely for the purpose of agricultural irrigation and apportioned for this use within the tributary subbasins where there are agriculturally zoned lands. Additionally, all water use established under this reservation should not be allowed to be changed to a non-agricultural use.

**Response:** The rule amendment does limit sources of water under the agricultural irrigation reservation to the mainstem Skagit River basin. This restriction was intentional and was proposed to protect tributary sub-basins where large withdrawals could cause a significant impact on the water resources. Ecology consulted local zoning maps and determined that most of currently zoned agricultural land is in the mainstem areas. Finally, the agricultural irrigation reservation is one of many tools to meet future water demands in tributary subbasins, water sources from outside the tributaries could be brought in, transfers to existing water rights, water rights leases or purchasing water from water utilities may be available to meet future water needs in those areas.

Comment 135

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** We are disturbed by the fact that water is being accorded to development given the distressed state of fisheries. As reflected in Ecology documents, research shows loss of summer flows has a "strong" correlation to lower salmon numbers. The water needs of such fisheries are corroborated by the attached IFIM study for Nookachamps Basin. However, the effects on salmon are completely ignored.

**Response:** Please see Ecology's response to comment 347.

Comment 625

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** As mentioned above, the amendment as written does not provide protection to other salmon bearing tributaries within the basin. A disproportionate amount of water from mainstem reservations may be utilized in individual basins, particularly if water rights are issued, as provided by the rule.

**Response:** This comment is on a previous rule amendment proposal and is no longer applicable to the existing rule amendment.

**Section - 173-503-075**

Comment 77

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** This section [WAC 173-503-075] is confusing as written. RCW 90.22.040 directly contradicts the policy that livestock be removed from streams. This rule cannot override RCW 90.22.040; therefore, we recommend deleting this section.

**Response:** Ecology agrees that an Ecology rule cannot override a State statute, and that is not Ecology's intent here. The rule language recognizes that RCW 90.22.040 governs stock watering in streams, but as Ecology has been charged with protecting both water quantity and quality. It is the policy of Ecology to encourage that livestock be removed from streams, which is in keeping with the language of RCW 90.22.040. WAC 173-503-075, does not bar livestock drinking from streams, but in the interest of protecting drinking water supplies and sensitive habitat from fecal coliform, Ecology advocates that livestock be watered in zones away from stream banks.

Comment 258

**Commenter:** Randy Good representing Skagit County Cattlemen

**Type:** Letter, 1/10/2004

**Comment:** The State Department of Ecology may not limit the amount of water dairy farmers and ranchers use daily for their livestock watering, this according to Rob McKenna our State Attorney General's opinion. This opinion has been upheld in court. The proposed rule amendment tries to force a regulation on livestock watering. The courts and Attorney General state DOE does not have the authority to regulate stock watering.

**Response:** The Attorney General recently published an Attorney General Opinion (AGO) pertaining to interpretation of the ground water permit exemption for stock watering purposes (AGO 2005 No. 17). As an AGO, this document is the Attorney General's opinion on the meaning of the law. It is not a court ruling and has not been heard or upheld in court. According to this AGO, while Ecology cannot categorically place limitations on the amount of water that can be withdrawn for stock watering purposes from a permit exempt well, the agency can place further limitations to protect surface water flows or levels or groundwater management.

Comment 262

**Commenter:** Randy Good representing Skagit County Cattlemen

**Type:** Letter, 1/10/2004

**Comment:** Any attempt to regulate stock watering in this rule amendment must be eliminated.

**Response:** Ecology does have the authority and responsibility to protect senior water rights, including instream flows from impairment. Theoretically, any new stock water use established after April 14, 2001 would be subject to interruption when instream flows are not being met. Ecology is proposing limited reservations for stock watering to allow for future stock water uses that can be used when instream flows are not met. This quantity is an amount that Ecology has determined will not adversely impact instream flows. Ecology believes providing a provision for a limited amount of water for future stock watering that is uninterrupted is a benefit for stock owners.

Comment 476

**Commenter:** Janet McRae representing Skagit County Cattlemen

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** We are in Western Washington. You have to remember we are not up on a plateau anymore. And I come to these meetings and I hear about them talk about putting meters on stock water. Well, stock water, it's in the law that we can let them drink out of the stream. I know people don't like that, but most people don't have wells for their stock. They don't have electricity to make the wells work. They just -- how do you put a meter on a stream or a cow? It's just not going to work.

**Response:** Ecology agrees as to the difficulty of metering stock water use when it relates to providing drinking water for livestock, and will address this issue further in the implementation plan.

Comment 172

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Stockwater - Stockwater use should not be subject to the instream flow rule, and stockwater use should not be included under the domestic water use reservation.

**Response:** Please see Ecology's response to comment 485.

Comment 188

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Stockwater should not be subject to the instream flow rule, and should not be included under the domestic water reservation.

**Response:** Please see Ecology's response to comment 485.

Comment 189

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Stockwater is exempt from water rights permitting. Nevertheless, Ecology has attempted to include stockwater use under the domestic, industrial and commercial water reservation. This is problematic since neither Ecology nor Skagit County has permit authority over stockwater uses. There have been no studies to estimate stockwater use, and the adequacy of the water reservations will be uncertain, making implementation unpredictable.

**Response:** Please see Ecology's response to comment 262.

Comment 485

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Stock water is a problem. Stock water should not be part of the instream flow rule. I've heard from stock water users their concerns that the domestic leases will fully exhaust the reservations and there won't be stock water available. I've heard the opposite side from people who have an interest in domestic use. Stock water is exempt. We don't permit stock water use. Ecology doesn't permit stock water use. There is no way to control how much water is being used. And while I agree with what Dan said earlier about setting reservations and leaving them wide open to stock water use, that really doesn't provide the certainty that we're all looking for.

**Response:** Ecology agrees in part that Stockwater use should not be included under the domestic water use reservation. Ecology has changed sections 173-503-073 and 173-503-075 to provide a dedicated allocation for larger stock uses, while allowing small scale livestock operations to be included in the domestic, municipal and commercial/industrial reservation.

All beneficial and consumptive uses of water are subject to the instream flow rule, and therefore, stockwater is also subject to the instream flow rule.

The commenter is correct that stockwater is exempt from permitting, however, permit exemption does not also mean exemption from regulation. Under this rule, Ecology is not attempting to exercise permit authority over stockwatering, but Ecology is including stockwatering under the reservations under our RCW 90.54 regulation authority.

Comment 509

**Commenter:** Jean Shea

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** The stock watering can't be included. It's illegal. The courts have said it's illegal. And frankly, I'm offended that it's brought up again as if we're stupid. And you know, it included the municipal use and the commercial use and the industrial use with this rule that's supposed to be lamented, you know, how many years ago, and then they say for the rest we're going to have to apply for a water right.

**Response:** Please see Ecology's response to comment 258.

Comment 626

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** (1) Ecology provides no justification regarding how 130,000 gallons/day for stockwatering was determined. Is there an expectation that there will be additional stock acquired in the future? If so, what is the basis of this expectation and how many animals are expected in what areas of the County? Moreover, it is doubtful that, in a county where there has been a net reduction in agricultural lands, speculative future stockwatering needs could legally constitute an overriding consideration of public interest. We are also concerned that the reservation is not allocated by tributary; thus, a large stockwatering operation could create a considerable drain on a single tributary.

**Response:** This comment is on a previous rule amendment proposal and is no longer applicable to the existing rule amendment.

Comment 627

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** 1(b) No supporting documentation has been provided indicating how the carrying capacity of grazing lands will be determined.

**Response:** This comment is on a previous rule amendment proposal and is no longer applicable to the existing rule amendment.

Comment 628

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** 1 (c) We believe it will be impossible for Ecology to maintain an estimate of the amount of water used for stockwatering for the following reasons:  
No permit is required to report how much stock is being watered  
No separate permit is required for stockwatering. if stock is watered from an unmetered well, particularly one calculated to use only 350 or 175 gallons/day for domestic use, Ecology will have no basis for estimating the use of such water. This problem will be exacerbated if the well is used for dual purposes (i.e., stockwatering and domestic uses).  
Ecology is not requiring any reporting, nor are there any mechanisms provided for to determine whether stock watering began subsequent to the adoption of the rule,

**Response:** This comment is on a previous rule amendment proposal and is no longer applicable to the existing rule amendment.

**Section - 173-503-090**

Comment 27

**Commenter:** Karen Allston representing Center for Environmental Law and Policy

**Type:** Letter, 1/30/2006

**Comment:** 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, at <http://www.celp.org/pdf/WorthOfWater.pdf>.

**Response:** Thank you for your comments and support on the proposed amendments. Ecology agrees that resources to implement the rule will be competing with all the other work done by staff in the Program. It is beyond the scope of this rule for Ecology to 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.

Comment 284

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 1/30/2006

**Comment:** The DOE stated that once a reservation has been depleted, an alternative water source would be required. Does this mean the property owner can access a deeper aquifer or does it mean that they have to wait and pay higher costs for public water to arrive?

**Response:** Connection to public water would only be required where public water can be timely and reasonably obtained. If public water supply can not be provided in a timely and reasonable manner, a property owner can develop a water source through a variety of means including accessing a reservation, developing a mitigation plan that is approved by Ecology or demonstrating that the proposed withdrawal will not impair instream flows or withdraw water from a closed basin. Please see section 173-503-060.

Comment 138

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** This section is too weak to be meaningful, especially given the potential harm to the environment from violations of this Rule. Section (2) should be deleted and replaced with the following language:  
"The Department shall investigate any possible violations of which it knows or has reason to know and shall impose sanctions consistent with its authority. Use of water from a closed basin (not pursuant to a reservation), or use of an interruptible supply of water when instream flows are not being met, is presumed to cause harm to fisheries and fish habitat."

**Response:** The language for WAC 173-503-090, amended, was taken from RCW 90.03.605, and the final paragraph of section (2) of the amended rule is a direct quote from RCW 90.03.605(1)(c).

Comment 585

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/21/2005

**Comment:** Enforceability by Third Parties. The amended rule, including the closure of streams to groundwater withdrawals, must be structured to ensure that the rule is enforceable by Ecology and other parties. In particular, the rule must be structured so that Ecology issues administrative orders closing the streams, which then can be enforced by third parties under RCW 34.05.582. Additionally, the Rule should provide that residents of the tributary basin at issue, as well as entities that have fisheries interests in the Skagit River Basin, have standing under RCW 34.05.530. Finally, the amended rule should state that Ecology will support third party petitions for enforcement of its orders under the amended rule, RCW 34.05.582, and will not move to dismiss any such petitions for enforcement. RCW 34.05.582(3). See also discussion of related issue of metering below.

**Response:** This comment relates to the previous proposed rule amendment. Please see WAC 172-503-090 Amended for the updated rule regarding compliance and enforcement. Ecology has outlined a method of enforcement consistent with RCW 90.03.605.

Comment 629

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** (3) Based on Ecology's current and past practice of not enforcing 173-503-090 as to exempt wells, we have every reason to believe that the limits on exempt wells use will not be enforced. To ameliorate this problem, we believe that rule language should provide a detailed enforcement scheme specifying the actions that Ecology will take upon a property owner's first violation, second violation, etc. We also believe that the rule language must contain a credible commitment that Ecology will enforce the rule. Otherwise, based on Ecology's past practice of ignoring violations in these WRIAs, property owners will assume that they can ignore the use restrictions contained in the rule.

**Response:** Please see Ecology's response to comment 585.

**Section - 173-503-100**

Comment 271

**Commenter:** Dorothy Freethy, SCARP representing (Skagit Citizens Alliance for Rural Preservation)

**Type:** Letter, 1/17/2006

**Comment:** On the other hand, we could support uniform statewide programs that would establish “water reuse” facilities and “alternative sources of water” such as desalination plants. Please consider redirecting the \$1.1 million set aside for the Hansen/Thomas Creeks project to more worthwhile programs such as these.

**Response:** Ecology does support development of alternative water sources, where appropriate.

Comment 139

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Language should be amended as follows  
(2) Alternative sources of water of equal or better quality and quantity than the proposed source have the potential to be used, consistent with Best Available Science, where appropriate to improve stream flows for fish, to offset impacts of withdrawals on stream flows and provide sources of water for future out-of-stream uses. Alternative sources may include, but are not limited to:

- Reuse of reclaimed water;
- Artificial recharge and recovery;
- Multipurpose water storage facilities;
- Conservation and efficiency measures applied to existing uses and the transfer of saved water;
- Acquisition of existing water rights; and
- Establishment of a trust water rights program.

**Response:** Ecology cannot make this change as it would add a standard that may not be appropriate under existing policy.

Comment 630

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** It is important to state that alternative sources of water may be used to improve streamflow or offset impacts and for out of stream uses, rather than that these sources "can" be used. Particularly where flow augmentation is concerned, until site specific proposals are evaluated, it is unclear if these sources will meet the "no impairment" test. Moreover, any instream uses of alternative sources must be based on best available science as defined in WAC 365-1 95-905(5)(a) and (b) and WAC 365-195-920( 1) and subject to the approval of Ecology.

**Response:** This comment pertains to the previous proposed rule amendment and is no longer relevant. The current rule amendment reads "alternative sources of water... have the potential to be used."

**Section - 173-503-110**

Comment 270

**Commenter:** Dorothy Freethy, SCARP representing (Skagit Citizens Alliance for Rural Preservation)

**Type:** Letter, 1/17/2006

**Comment:** "water-right trust programs." Without iron-clad regulations designed to prevent hoarding and other abuses, we cannot support such dubious tinkering.

**Response:** Ecology will implement and enforce the trust water right program consistent with RCW 90.42.

Comment 332

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 173-503-110. Establishment of trust water rights program: We believe that it is inappropriate to utilize the trust water rights program to secure additional water for out of stream uses. This amendment to the previous rule results in a net reduction of in stream flows for fish in order to accommodate future unmet needs. As a result of this additional impact, we believe that the trust program should be used exclusively to mitigate for the impacts associated with the rule change.

**Response:** Ecology believes that the language in section 173-503-110 related to a trust water rights program is consistent with RCW 90.42, Water Resource Management and Ecology's Water Acquisition Program Guidance. The terms and conditions of trust water rights can vary according to the type of transaction (such as donation, short or long term lease, public purchase). Therefore the language in this section is consistent with the array of options under the trust water rights program.

Comment 79

**Commenter:** Michael Mayer, Ross Freeman representing Washington Environmental Council/American Rivers

**Type:** Letter, 1/31/2006

**Comment:** The amended rule also creates a trust water rights program to "facilitate the acquisition of existing water rights[.]" WAC 173-503-110. The water placed in trust, however, can be used either to promote additional withdrawals or augment instream flows. Given that the Skagit currently does not meet instream flow minimums for a total of up to three months of any given year, trust water should be used exclusively for restoring the river. As this region begins to plan for major salmon recovery efforts, the state should not simultaneously expend money to enlarge the out-of-stream water use for the Puget Sound's largest tributary. Moreover, the state as a general matter should avoid subsidizing additional water use with public funds, particularly given the generous size of the reserves that are currently under consideration.

**Response:** Please see Ecology's response to comment 332.

Comment 140

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** We believe that it is inappropriate to utilize the trust water rights program to secure additional water for out of stream uses. This amendment to the previous rule results in a net reduction of instream flows for fish in order to accommodate future unmet needs. As a result of this additional impact, we believe that the trust program should be used exclusively to mitigate the fisheries impacts associated with the rule change.

**Response:** Please see Ecology's response to comment 332.

Comment 598

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** As you might expect, we are disappointed that, after two plus years of negotiations culminating in a 1996 agreement (" 1996 MOA") signed by the Department of Ecology, ECY has unilaterally decided to provide additional water to accommodate future growth at the expense of protecting salmon populations. The 1996 MOA provides for the overwhelming majority of water needed to meet the expected future demands of Skagit County citizens. Moreover, two of the salmon species that will be harmed by the rule amendment, Chinook and bull trout, are listed as threatened under the Endangered Species Act and are currently at risk of extinction. It is truly unfortunately that Ecology has decided to ignore previous agreements and its governmental duty to vigorously defend the initial rule in order to allow for incremental reductions in instream flows.

**Response:** These comments pertain to the previous proposed rule amendments, which were not adopted. Ecology has tried to address the water management issues with the signatories of the 1996 MOA. Since the group could not come to consensus on the solutions to these issues, Ecology had developed this rule amendment proposal which we hope will lead to a resolution.

Comment 631

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** (2) We believe that it is inappropriate for Ecology to "make it up as they go" regarding the allocation of water between instream and out of stream as part of the trust water right program. This determination should be made as part of the rule, or at least criteria for determining how this allocation will be made should be identified.

**Response:** Please see Ecology's response to comment 79.

**Section - 173-503-116**

Comment 234

**Commenter:** Delores Brown

**Type:** Letter, 1/21/2006

**Comment:** I am writing in order to address serious concerns my family and I have with the above mentioned amendment. We feel that certain information in the amendment is information that lacks and/or fails to show sound science, is misleading, and unwarranted, all of which results in unjust constraints on us, and the people of Skagit County. This failure is unacceptable when the consequences of such an amendment are so great. It's in the interest of all citizens of the State of Washington that every calculation, every sentence within this amendment be accurate and true.

**Response:** The information and calculations within the amendment are accurate and true in accordance with the best information available to Ecology. Ecology recognizes that additional scientific information may be relevant to the administration of this rule and has made provisions in the rule amendment to notify the public of new findings through the publication of a Skagit River Water Supply Bulletin.

Comment 161

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Limits on groundwater withdrawals in tributary subbasins should consider the degree of local hydraulic connection.

**Response:** Ecology agrees that hydraulic continuity should be considered when limiting ground water withdrawals. The rule therefore allows for updates in the rule where new scientific information becomes available, after publication and consultation with local and tribal governments.

Comment 529

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** In addition to the USGS study, there should be plain language in the rule amendment indicating that the rule applies only within the Skagit River Basin. Water use in other subbasins that are not in hydraulic continuity with the Skagit River or its tributaries should not be regulated by this rule. Limits on groundwater withdrawals in tributary subbasins should consider the degree of local hydraulic connection with the tributary.

**Response:** Ecology has chosen not amend the area where the rule applies, except to add a clarification that islands surrounded by saltwater are excluded from regulation under this rule. Ecology acknowledges that additional scientific information may identify areas where water withdrawals would not impair or affect the Skagit River. If such areas are identified, Ecology has created provisions in the rule for adjusting the accounting of the reservations or amending the rule based on the new information. Please see sections 173-503-060(d), 173-503-100, and 173-503-116.

**Section - 173-503-120**

Comment 160

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** The Skagit Instream Flow Rule should not apply to areas of Skagit County that are outside the Skagit River Basin, and should only limit water withdrawals that adversely affect Skagit River stream flows.

**Response:** Ecology chose not amend the area where the rule applies, except to clarify the exclusion of additional islands from regulation under this rule. Please see 173-503-010.

Comment 479

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** First of all, the Skagit instream flow rule should not apply to areas of the county that are outside of the Skagit River basin and should only limit water withdrawals that virtually affect Skagit River stream flows. As you can see from the maps that show the area covered and read the descriptions in the rule, the rule as it's written today would include large areas of the county that are actually outside the Skagit River basin and areas that have independent saltwater drainages that don't affect stream flows in the Skagit River at all.

**Response:** Ecology has chosen not amend the area where the rule applies, except to add a clarification that islands surrounded by saltwater are excluded from regulation under this rule. Ecology acknowledges that additional scientific information may identify areas where water withdrawals would not impair or affect the Skagit River. If such areas are identified, Ecology has created provisions in the rule for adjusting the accounting of the reservations or amending the rule based on the new information. Please see sections 173-503-060(d), 173-503-100, and 173-503-116.

Comment 143

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** We believe there are some errors in the watershed boundaries previously delineated and we have attached a more accurate rendition of watershed boundaries for Ecology's use in implementing the proposed rule.

**Response:** Thank you for sharing your information. The watershed boundaries for this rule did not significantly differ from the boundaries previously delineated and so we were not compelled to question the delineation.

**Section - 173-503-130**

Comment 141

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Language should be modified as follows:  
All final written decisions of the department pertaining to water right permits, regulatory orders, and related water right decisions made pursuant to this chapter can be are [sic] subject to review by the pollution control hearings board in accordance with chapter 43.21B RCW.

**Response:** Appeal of Ecology decisions is set by the legislature in statute and provides for review by the Pollution Control Hearings Board. As it stands now, final written water right decisions are subject to review by the Pollution Control Hearings Board (PCHB) if the decisions are appealed. Appeals must be made within 30 days, and any interested person can appeal an water right decision to the PCHB, not just the applicant. To make all final written decisions subject to review without appeal is outside the scope of Ecology's authority.

**Section - 173-503-150**

Comment 153

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/11/2006

**Comment:** Clarification of Effective Date of Amendment. As currently drafted it is unclear if the amendment effects the priority date of chapter 173-503 in its entirety or if there is some other intent, it has been the Upper Skagit Tribe's understanding that the priority date of the entire rule was to be amended to coincide with the effective date of the amendment. This needs to be clear otherwise there is potential for litigation no matter what the effective date.

**Response:** Ecology's intention in developing this rule was to provide for legally certain water supplies for out-of-stream uses, while continuing to protect instream amenities within the prior appropriation water law framework. Under the existing instream flow rule, all uses developed after April 14, 2001 are subject to regulation when the senior instream flow is not being met and could be forced to shut down their use during those time periods. Our rule amendment would allow wells developed after April 14, 2001 a legally secure water supply by including their uses under the reservation. We recognize that it would be difficult to ask those users that have been using their water supply for several years to take action to be included in the reservation. Therefore, Ecology is not requiring those users to take action to be included in the reservation. We believe this is a fair method for providing legally certain water supplies within our the prior appropriation legal framework.

Comment 441

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Letter, 1/31/2006

**Comment:** Priority Date. As it pertains to the priority date of the amendment, although we have submitted specific remarks on this issue the Tribe would urge the Department to consider the verbal comments submitted on behalf of Skagit County ("County") during the public hearing at Mount Vernon at which time the County stated that there have been approximately 175 exempt wells drilled between 2001 and present. In light of the overall magnitude of the amendment the Tribe believes that the potential impact these 175 wells may have on the basin is minimal when contrasted with both the legal and practical problem of attempting to calculate these 175 well against the proposed reservation.

**Response:** Ecology's intention in developing this rule was to provide for legally certain water supplies for out-of-stream uses, while continuing to protect instream resources within the prior appropriation water law framework. Please see Ecology's response to comment 153.

Comment 498

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I'll try to summarize what our concerns are for you. I have initial comments in writing today with some follow-up to come later. The first issue is the effective date of the amendment. I think in terms of providing certainty that it is important to be absolutely certain as to when the effective date of the amendment is going to be, how it will affect this reservation.

Currently it is unclear, although in the purpose portion of the rule it states that the reservation is to be used for future water use. In other sections and in the presentation today it was apparent that the reservation, in fact, would include use prior to the adoption of this rule, which obviously is not future use.

So we would strongly ask Ecology to reconsider that language and to take into account the fact that it is for future use, that it be consistent.

**Response:** Ecology agrees that applicability of the reservations to existing users that established their water use after April 14, 2001 is confusing. Ecology has made several changes in the rule with the intention of clarifying this issue.

Comment 503

**Commenter:** David Hawkins representing Upper Skagit Office of Tribal Attorney

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I come back to our main concern as it relates to the priority date of the reservation and the effective date of this amendment. It's critical that in order for all of the parties at the table to understand what is available for this reservation and in order to truly have an effective rule that the priority date of the reservation be effective the same as the amendment date, and that the amendment date should have a priority date which reestablishes instream flow prior -- meaning the instream flow would now have a priority date the same as the adoption of the amendment.

**Response:** Ecology's intention in developing this rule was to provide for legally certain water supplies for out-of-stream uses, while continuing to protect instream resources within the prior appropriation water law framework. Please see Ecology's response to comment 153.

Comment 155

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 2/1/2006

**Comment:** Second, after reviewing the final paragraph of the letter, I realized we had misconstrued proposed WAC 173-503-150. That section uses the term "maximum average consumptive daily household water use," which is defined in proposed WAC 173-503-025 to provide return flow recharge credit. To avoid confusion, the final paragraph is deleted from the corrected version of my letter.

**Response:** Please see Ecology's response to comment 154.

Comment 190

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** The Skagit Instream Flow Rule only should apply from the date of final adoption of the instream flow rule amendment.

**Response:** The rule amendment is not changing the instream flow levels, it is adding provisions to allow for limited out-of-stream uses while continuing to protect the instream flow levels created by the 2001 rule. Therefore Ecology does not agree that the priority date for the instream flow right should be amended.

Comment 486

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** Finally, the question of retroactivity. We don't think that this rule should apply to water uses that occurred prior to the time this rule amendment -- not the original rule -- is adopted. There are a wide variety of reasons why we think it's unfair and impractical. According to our best analysis today, there have been about 170 to 175 water evaluations made by the county since the time the original rule was adopted, but it's difficult to say when those water users actually perfected their water rights.

Those water rights are exempt from permitting and they probably relate back to a date prior to when the home was actually built. And so many of those could actually have water rights that predate the rule even though a home was connected or even though the water evaluation wasn't made until after the rule was adopted.

175 houses do not result in a measurable amount of water being used, but 175 land owners in a courtroom are enough to wreak havoc on this whole scheme. And to try to add these back at this point is difficult if not impossible.

**Response:** The rule amendment is not changing the instream flow levels, it adding provisions to allow for limited out-of-stream uses while continuing to protect the instream flow levels created by the 2001 rule. Therefore Ecology does not agree that the priority date for the instream flow right should be amended.

Comment 487

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** I wanted to just say one other thing about that. There is quite a bit of the discussion about how much -- if we go back and apply this rule retroactively what is left of the water reservations. Those -- that development that I mentioned is scattered throughout the basin. About 90 or so of those evaluations were made in tributaries to the Skagit River. About close to 20 -- someone mentioned about 20 homes that were built in Fisher Creek since 2001 and that's about the number that we have.

**Response:** Thank you for your comment.

Comment 560

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology continues its efforts to subject post-2001 water uses and users to the instream flow rule. These uses would be debited against tributary water reservations at 800 gpd for each individual residence and at 5,000 gpd for each commercial, use unless actual water use data is available.

**Response:** Ecology requires that water users meter their water usage and allow Ecology access to these meters. Ecology has updated the rule amendment and has removed single residential exempt wells from the metering requirement and will assume a daily water use for that well. In the interest of uniformity, Ecology based our assumed daily water use value of 800 gpd on the Department of Health domestic water planning figures. However, Ecology has updated this figure to 350 gpd, which is a more accurate reflection of the average water usage in the Skagit basin. See, WAC 173-503-073 in the updated amendment.

Comment 561

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology inexplicably treats post-2001 water uses differently than post-amendment uses. Pre-amendment uses would be counted against the water budgets, at the "maximum average consumptive daily" use for each individual residence, and at 5,000 gpd for each commercial use. Ecology proposes averaging domestic use, yet assumes commercial and industrial sources will withdraw the statutory maximum of 5,000 gpd. There is no reasonable explanation for adjusting residential use calculations to reflect measured use while assuming all commercial/industrial uses will withdraw the statutory maximum.

**Response:** Commercial and industrial water uses can vary significantly depending upon the activities of the business. Domestic water use, on the other hand, does not vary that much, so it is easier to develop an accurate estimate of household water use. Due to these issues, Ecology did not believe it could establish an accurate commercial/industrial water use estimate. Ecology has, however, created provisions which would allow a commercial water user to demonstrate to Ecology that the water use of the business is lower than the limit of the permit exemption. See 173-503-150.

Comment 562

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Subsection (7)(b) references water availability certificates issued by the counties as a potential source of information that the Department will rely on to estimate water usage. Neither Skagit County nor Snohomish County issue such certificates. Subsequently, this reference is unnecessary and should be removed.

**Response:** Ecology agrees and has replaced language referring to water availability certificates with language referring more generally to water approvals. See WAC 173-503-073(7)(b) in the updated amendment.

Comment 563

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Subsection (7)(c) also reduces assumed consumption by 50-percent where the use is served by an on-site septic system. No such correction is contained in section 150. Like uses should be treated similarly and Ecology should provide recharge credit for pre-amendment exempt well withdrawals unless the use is served by out-of-basin sewerage.

**Response:** Ecology has updated language in the rule amendment to emphasize this point. See WAC 173-503-150.

Comment 564

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Finally, Skagit County is concerned that “maximum average consumptive daily use” may overstate actual use. Ecology concedes as much in its Background Statement when it notes that “[t]he actual amount of water deducted from the reservation may not be the recorded water use.” The rule does not state how “maximum average consumptive daily use” will be administered or what period of use will apply, leading use to question whether Ecology intends to multiply peak month demand by 12, peak week demand by 52, or even peak daily demand by 365. Any such extrapolation will dramatically overstate average withdrawals because they will capture summer irrigation and wrongly assume that it occurs year-around.

**Response:** In the implementation plan for this rule, Ecology has provided some additional detail on how the measuring requirements under the rule will be administered.

Comment 565

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** There is nothing in the draft rule to suggest how funding will be provided to implement the proposed rule. Furthermore, Ecology has not yet provided a funding commitment for the proposed USGS groundwater study.

**Response:** Ecology anticipates assigning staff to assist in the administration of this rule. Please see the implementation plan for more details.

Comment 142

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** We understand and wish to confirm that there will be no change in the priority date of the 2001 rule. A change in that priority date would violate Ecology's obligations under the 96 MOA. The Tribe has no objection to the water use of the existing well users identified in WAC 173-503-150 simply being counted in the calculations of water being used from the reservations, and this would appear to be the best solution for such users themselves.

**Response:** There will no change in the priority date of the 2001 rule.

Comment 632

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/18/2005

**Comment:** It is our understanding that a water right does not exist until there has been a determination that it has been put to beneficial use. This issue should be clarified. Moreover, language should be added to state that exempt well users who are subject to the 2001 rule but do not opt to come within this amendment will either be shut off by Ecology during low flow periods or their usage, to be estimated at 5,000 gpd each unless metered, will be deducted from the reservation.

**Response:** This comment was submitted on a previous rule amendment proposal and is not applicable to the current rule amendment. Ecology has added a section to clarify the fate of wells that were established after the original effective date of this rule, April 14, 2001. Please see section 173-503-150.

**Section - SEPA**

Comment 198

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** In determining whether impacts are significant, Ecology must consider, among other things: conflicts between the proposal and existing laws and requirements protecting the environment, the precedent the proposal establishes for significant future environmental effects, and impacts to prime farmlands.<sup>1</sup> In evaluating potential adverse impacts, Ecology must consider elements of the built environment including but not limited to, the proposal's relationship to existing land use planning and populations, impacts on housing, and impacts on the provision of public services including public water supplies. The environmental checklist ignores or misstates significant effects, leaving the proposed rule vulnerable to legal challenge and further delaying achievement of our common goals.

**Response:** Skagit County has provided no evidence of an existing conflict with this proposal and laws and requirements protecting the environment, of how this rule amendment establishes a precedent that will have significant future adverse environmental effects, or how this amendment will significantly impact prime farmlands. Ecology has assessed the impacts of this proposal on the built environment, including the elements listed in the SEPA checklist. See also other responses for specifics on these issues, including areas that Skagit County identifies as misstatements.

Comment 199

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Under SEPA, significant impacts are impacts that have a reasonable likelihood of more than a moderate adverse impact on environmental quality. Significant impacts on environmental quality necessitate preparation of an EIS. In determining whether effects are potentially significant, “[t]he lead agency shall make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal”. Here, the information was insufficient.

**Response:** Major agency actions that have a probable significant, adverse environmental impact, if not categorically exempt, require the preparation of an EIS. Please see other responses to Skagit Counties specific comments related to the sufficiency of the information in the checklist.

Comment 200

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Ecology's conclusions are: premised on a fatally flawed and incomplete analysis of the reservation of water for future use. The effects of this flawed analysis are evident throughout the checklist. As we noted in our earlier comments, Ecology also failed to adequately consider localized effects, absolute quantitative effects, and cumulative effects of the amended rule when determining the requisite level of analysis. Ecology failed to adequately consider conflicts, with laws and requirements for environmental protection, the precedent for actions with significant environmental effects created by the proposal, or environmentally special areas including farmlands, all of which are considerations specifically addressed in the regulations for making threshold determinations.

**Response:** WAC 197-11-330(3) discusses, when making a threshold determination, the need for considering that "(a) The same proposal may have a significant adverse impact in one location but not in another location. [In other words, the lead agency should consider any special conditions existing in the specific location that will be effected by the proposal.] (b) The absolute quantitative effects of a proposal... may result in a significant adverse impact regardless of the nature of the existing environment;"

Ecology disagrees that these required elements were not considered.

Ecology has recognized that each water management program and, more importantly, each watershed has unique qualities, which is why one comprehensive EIS for the adoption of instream flow rules statewide is inappropriate and inadequate except as a preliminary step in staged environmental review. Hence, Ecology undertook a separate SEPA evaluation for the Skagit River basin.

Although the rule amendment provides new reliable water for future uses through reservations, Ecology recognizes that in localized areas the reservation will not be enough to meet projected demand. Because these areas are localized and not prevalent, because other potential water management options exist to meet these needs and because other areas within the watershed may accommodate growth, these localized effects were determined to not be significant. This is particularly true considering that under the existing rule, new water uses have the potential to be subject to cut-off whenever minimum stream flows are not met and the rule amendment creates new sources of domestic water not subject to interruption during minimum flows throughout most of the rural portions of the watershed.

Ecology did quantify the maximum number of households within each subbasin that could be served under the reservations, based upon assumptions regarding average household use. Ecology has also provided a cumulative quantity of water for each reservation. Skagit County has not clearly identified other areas needing quantitative analysis.

See also responses to more specific comments from Joe Mentor/Skagit County.

Comment 201

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Skagit County believes that the direct impacts resulting from the proposed rule are significant, that the “marginal impacts when considered together may result in a [cumulatively] significant impact,” and that the proposed rule is in conflict with requirements for environmental protection including the Growth Management Act, Skagit County’s Planning Policies, Skagit County’s Comprehensive Plan, and the Skagit County Coordinated Water System Plan Regional Supplement. These considerations demand withdrawal of the DNS and completion of an EIS prior to adopting the proposed amended rule.

**Response:** Please see Ecology's responses to comments 200, 209 and 215.

Comment 202

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Ecology's proposed amended rule states that if water use data is not available, "the department will account for water use using 800 gallons per day [gpd] for each residential or municipal connection or 5,000 gallons per day for a commercial/industrial use." Attachment 1 to Ecology's SEPA checklist evaluated the adequacy of the reservation based not on these water use assumptions, but on residential exempt well withdrawals of 350 gallons per day (gpd). More than doubling assumed daily water use significantly reduces the amount of growth that can be accommodated by the reservation. Ecology's conclusion that the "proposed reservation in the rule proposal will provide water that can meet domestic supply needs forecasted for Skagit County for at, least 20 years" is not supported by the analysis, yet Ecology repeatedly reasserts this faulty conclusion.

**Response:** We agree that if all future residential development were accounted for by the 800 gpd figure rather than 350 gpd, it would greatly alter the number of households and other uses that could make use of the reservations created by this rule amendment. Since metering will determine actual use for future development using the reservation, we assessed the maximum number of households that would be served using information from local water purveyors. Success of water conservation efforts, the number and type of non-domestic uses of the reservations, and many other factors will affect actual rates of water use and the number of future households that can be supplied.

These generous estimates were formulated to be protective of instream values and are only intended to be used when the quantity of actual withdrawals is unknown. Metering requirements for new uses minimize the need for this conservative accounting of water use.

Comment 203

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Similarly, Ecology proposes to debit reservation withdrawals for commercial/industrial use at 5,000 gpd but excludes all, such connections from, its impact analysis. Even a small number of commercial/industrial connections could dramatically reduce the number of residential connections available. This directly affects provision of services needed to accommodate projected rural growth. Ignoring these uses causes Ecology to understate impacts to rural residents.

**Response:** Ecology acknowledges that allowing these larger water uses to take water from the reservations could alter the number of residences served by the reservation. These other types of uses were allowed to make use of the reservations at the request of Skagit County. Ecology has made strong efforts to include considerations for local priorities within this rule amendment, to the extent that water is available while protecting instream values. Skagit County maintains control over where and whether these types of uses occur through its zoning and related authorities

We have no estimates at this time of the number or type of commercial or industrial uses that may make use of the reservations. Therefore Ecology provided analysis of the maximum number of households that could be served by the reservation and acknowledged that the incidence of these other uses would reduce that number. Commercial and industrial water uses can vary significantly depending upon the activities of the business. Domestic water use, on the other hand, does not vary that much, so it is easier to develop an accurate estimate of household water use. Due to these issues, Ecology did not believe it could establish an accurate commercial/industrial water use estimate. Ecology has, however, created provisions which would allow a commercial water user to demonstrate to Ecology that the water use of the business is lower than the limit of the permit exemption.

Comment 211

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Ecology recognizes “[w]ater availability is one major determinant of land use.” Ecology also recognizes statewide implementation of restrictions on exempt well use “could result in cumulative and significant unavoidable impacts to homeowners and municipalities in the state.” It is troubling that despite this recognition, the DNS contains only cursory discussion of the amended rule’s effect on land use. The DNS states:

In urban areas and other areas served by public water, the proposal requires water users to request service from an existing public water system. For areas not served by public water systems, the proposed rule provides water to satisfy most projected domestic needs. . . . In most cases the future demand is satisfied. In other areas, such as the Nookachamps, Fisher, and Carpenter Creek, public water supplies from outside of the sub-basin will likely be required to meet maximum anticipated demand. The use of the reservation for other allowed uses would further decrease the number of residences that could be served. Over time, Skagit PUD or other public water systems should be able to provide service to most areas of the Nookachamps, Fisher, and Carpenter subbasins.

**Response:** Without the rule amendment, virtually the entire river basin lacks a reliable source of water for new uses without the potential of being interrupted when minimum flows are not met. The rule amendment provides domestic water to serve the needs from projected rural development to the extent possible without impairing instream resources. Ecology recognizes that in some subbasins the reservations provided are not sufficient to meet projected needs and that continued growth in these areas will require the identification and implementation of alternate water sources. Although the DNS offers the assumption that existing public water systems will be extended to meet the projected need, if/when/how that would occur is totally within the purview of local jurisdictions and water providers . Further analysis of development and infrastructure options may have been appropriate if implementation was within Ecology’s jurisdiction.

Comment 214

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** The Relationship to Existing Land Use Plans and Populations  
In determining the significance of a proposal's impacts, the SEPA responsible official must consider conflicts with federal and local laws, or requirements protecting the environment. The proposed rule is in conflict with prior agency determinations and multiple laws and requirements, all of which were ignored in issuing the DNS.

**Response:** Ecology respectfully disagrees that this rule amendment is in conflict with federal or local laws, or other requirements protecting the environment. See other responses to more specific Joe Mentor/Skagit County comments.

Comment 221

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Ecology's proposed rule states that Skagit County must carry out its powers consistent with RGW 90.54.090, and this statute in turn requires counties to exercise their regulatory powers consistent with instream flow rules "whenever possible." Skagit County's regulatory duties are implemented through a variety of code provisions, including those relating to building permits, subdivisions, and critical areas. Ecology's SEPA review provides no analysis of the conflicts between the counties regulatory authority and the provisions of the proposed rule.

**Response:** Ecology has no evidence that such conflicts exist between this rule amendment and the county's code provisions. Quantification of available reliable water supplies should aid the county in determining when such water exists when considering applications for building permits, as is required under GMA.

Comment 222

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Impacts on Sensitive Agricultural Lands  
The effective closure of tributary basins creates a potential demand for, farmland redevelopment. Residents will be forced to other locations and to acquire existing water rights in order to accommodate anticipated growth. Redevelopment and the loss of prime farmlands will adversely affect historic and cultural resources central to Skagit County's heritage and identity. Adverse effects to prime farmlands, historic, and cultural resources are all factors Ecology must consider in evaluating the significance of a proposal's impacts. Such impacts were overlooked. Any action which affects agriculture impacts not only the 3,300 plus people employed in agriculture, but all those who depend on government services substantially underwritten by agricultural production. Ignoring these impacts is a disservice to the public and a SEPA violation.

**Response:** GMA requires local jurisdictions to adopt plans and development regulations that protect prime farmland from conversion or redevelopment. (RCW 36.70A.060 and 36.70A.177) If measures in place are insufficient to prevent redevelopment of prime farmland, or if Skagit County chooses to remove protection of such where there is a water availability shortfall (which would require environmental review), redevelopment of farmland in these subbasins is likely if an alternate water supply is not readily available. These elements are within the jurisdiction of the county or are market-based. Use of existing senior rights does not necessarily require development of farmland, however. Changes and transfers, often in conjunction with more efficient irrigation systems, could maintain existing agriculture while providing water for residential development.

In addition, the rule amendment provides water for new agricultural uses that cannot be converted to other uses, thereby supporting Skagit County's heritage and identity as an agricultural community.

Ecology also notes that economic issues are addressed separately from the SEPA process. WAC 197-11-055(6), 232(1)(d), 448(1) and (3)

Comment 223

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Insufficient Analysis of Connected Actions  
Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they: Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

Ecology is undertaking a comprehensive program to regulate instream flows throughout the state and has previously treated individual planning efforts as part of an integrated whole. Ecology recently issued an instream flow rule for the Stillaguamish River basin and is drafting an instream flow rule for the Samish River basin. Water availability restrictions in these three contiguous basins will shift growth towards urban centers and encourage redevelopment of agricultural land. The synergistic effect of these three proposals will change the face of development in north-western Washington, reducing growth throughout the 3,526 square' miles of Whatcom, Skagit, and Snohomish counties covered by these rules. Ecology needs to address the significance of the impacts its proposal will have on these Washington counties.

**Response:** WAC 197-11-060(3)(b) in full states:  
"Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. (Phased review is allowed under subsection (5)). Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:  
(i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or  
(ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation."

The documents cited here are based on general and broad overviews of watershed planning and water management programs and were intended to facilitate subsequent site-specific program development and environmental review. These overviews do not provide the implementation or justification for this rule; justification for the varied rules as well as the implementation is based on WRIA-specific factors. Current rule development and site-specific environmental review has been segregated by WRIA for the most part because of the relationship between main-stem river reaches and tributaries; ESA priorities; recommendations and timing related to ESB 2514; and the benefits of considering site-specific information in individual program development. Each WRIA's instream flow rule is able to proceed without the simultaneous implementation of others (as demonstrated by the varying schedules for proposal of the Stilliguamish, Skagit, and Samish flows).

Since the adoption of Chapter 173-503 WAC, new rural development has been

supported by exempt wells that have the potential of interruption when minimum instream flows are not met. This rule amendment provides reliable water supplies for existing and future rural development to the extent possible while protecting instream resources. This amendment does not create a water shortage, but facilitates planning to address it.

To the extent practical, most rural development that is displaced because of the lack of water availability is likely to be redirected to other nearby rural areas where water is available. This is based on the assumption that people that want to build a home in a rural area would choose an alternate rural area to live in rather than an urban site. Still, some development could also be shifted to urban areas where public water systems are available.

Redevelopment of existing agricultural lands may occur in areas where reservations are depleted and public water service has not been extended if Skagit County planning, and development regulations do not protect agricultural lands. Ecology does not agree that growth will be reduced by this rule amendment in areas served by public water systems or where the amendment creates a domestic water reservation that is sufficient to meet the needs of projected development.

Comment 224

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Ecology recognizes that regional restrictions can have significant cumulative effects when it states: "Should established flows reduce the amount of water available for out-of-stream uses, [setting instream flows by administrative rules] in multiple watersheds could reduce development on a regional or statewide scale." Despite this recognition, the DNS glosses over clearly significant cumulative effects. Ecology's conclusion that the three connected instream rules pose no significant effect directly conflicts with Ecology's own statements. In the face of such conflicts, Ecology should retract its determination of nonsignificance and prepare a comprehensive EIS.

**Response:** This rule amendment does not establish flows. Flows were established in 2001 when chapter 173-503 WAC was first adopted.

See also responses to Skagit County's comments on development impacts.

Ecology disagrees that the cumulative impacts are significant, that the three instream rules must be assessed together in a single document, or that an EIS is required. In areas where the reservations are insufficient to meet projected need, options exist for providing alternate water supplies, or development may be redirected to other areas within the basin where water is available. This rule amendment should have no significant effect on development outside the Skagit River basin.

Comment 225

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** This type of shift in development pattern is the precise type of impact for which SEPA requires analysis:

A proposal's effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions. For example, adoption of a zoning ordinance will encourage or tend to cause particular types projects or extension of sewer line would tend to encourage development of previously unsewered areas.

**Response:** The impact on development shift has been assessed to the extent practical and appropriate for this rule amendment. More detailed analysis is likely to be necessary during future planning processes by the county and local water purveyors and prior to specific utility and development projects. Because Ecology has no authority over these future local decisions, further analysis of any of the myriad of potential options would be purely speculative and meaningless to decisions related to this rule amendment or otherwise within Ecology's purview.

Comment 226

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Furthermore, the rule essentially mandates the extension of water lines into the Nookachamps, Fisher, and Carpenter Creek basins in order for water to be available. The extension of water service is inextricably linked to the adoption of the instream flow rule, and is therefore a connected action. Ecology should, as part of an EIS, evaluate the impacts of extending water lines into these basins and compare those impacts with the impacts of installing individual or group domestic water systems.

**Response:** Other options for alternative water supplies exist beyond the extension of public water systems, including transfer or changes of existing water rights or saved water from the implementation of conservation practices.

If local decisions result in the extension of water lines, additional environmental review will be completed at that time. Alternate routing options and other related decisions are outside Ecology's purview and assessment at this time would be purely speculative and meaningless to the decisions related to this rule amendment.

Comment 227

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Impacts on Housing  
“Environment” under WAC 197-11-444 includes both the natural and built environment. Elements of the “built environment” include land and shoreline use, relationship to existing land use plans and to estimated population, and housing. Thus, impacts on housing availability must be considered in making a SEPA threshold determination. Providing housing is also a fundamental component of the GMA, necessitating that Ecology consider impacts on housing.

**Response:** The SEPA environmental checklist asks how many housing units will be provided or eliminated by the proposal. Although this proposal will not directly provide or eliminate any housing units, Ecology also assessed the potential of the created reservations to support new housing development.

The GMA does not require state agencies such as Ecology to assess impacts on housing.

Comment 228

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** The DNS incorrectly concludes that no housing units would be eliminated by the proposed rule. This conclusion directly contradicts Ecology’s own admission that not all buildable parcels will have access to potable water, significantly impacting Skagit County’s housing supply.

**Response:** No existing housing units will be eliminated by this rule amendment. Ecology has acknowledged where the reservations created in this rule amendment are insufficient to supply all undeveloped buildable lots and alternate water supplies will be needed if full development is to occur.

Under the existing rule, a reliable source of new water does not exist in areas outside the service areas of local water purveyors as all new uses junior to adoption of the existing rule may be shut off when instream flows are not met. This rule amendment creates reliable water sources in much of the basin where currently no such source exists.

Comment 229

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Ecology's Final Environmental Impact Statement for Watershed Planning recognizes that restrictions on exempt well use "may limit the availability of affordable housing by increasing the cost of water for placement of water lines and distribution systems." Despite this recognition, Ecology concludes without analysis that the proposed amendment will have no significant effect. This is simply is not the "hard look" required by SEPA.

**Response:** SEPA does not require the assessment of economic impacts. Economic issues are addressed through other processes. Still, this rule amendment provides reliable water supplies for future development in rural areas that do not have adequate supplies under the existing rule. Where water is or is nearly fully allocated, Ecology acknowledges that alternative water supplies will have to be implemented to serve any new water uses, and that these alternative water sources are expected to be more costly than the use of exempt wells.

Comment 230

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** Counties that plan under GMA must "encourage the availability of affordable housing to all economic segments of the population, promote a variety of residential densities and housing types, and encourage preservation of existing housing stocks." Ecology fails to disclose the significant localized effect on housing and affordable housing in the lower tributary subbasins that will result from the proposed rule amendments.

**Response:** The capacity of each of the reservations is disclosed in Table 1, as an attachment to the environmental checklist. Ecology grants that a sizable number of rural lots may have no identified source of potable water under the rule amendment that establishes new reservations for domestic water use throughout some portion of the Skagit River watershed. Without the reservations created under this rule amendment, that situation would arguably be worse. Without the reservations, all water uses within the subbasin the Skagit River basin established after April 14, 2001 are potentially subject to interruption when minimum stream flows are not met. Ecology recognizes that domestic water needs generally cannot be met where only an interruptible water source is available and so domestic reservations were created to meet identified rural development needs to the extent possible while still protecting the surface water resource.

Comment 233

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** SEPA's full disclosure requirements "should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability." Ecology's proposed amended rule poses likely significant effects on the quality of the built environment. It creates conflicts with existing laws and land use patterns, the environmental impacts of which have not been analyzed. Ecology's rule clearly impacts where that growth will occur in Skagit County and surrounding areas. However, there has been no analysis of alternatives to the rule and they could reduce impacts. Ecology should take advantage of this opportunity to revoke its DNS and begin preparing the required EIS. Preparing an EIS would allow consideration of multiple alternatives, and consideration of impacts to the natural and built environment, throughout the Stillaguamish, Samish, and Skagit basins.

**Response:** Material disclosure is required under SEPA no matter what the threshold determination, as evidenced in WAC 197-11-340(3)(iii) and 600(3)(b)(ii).

Upon basin-specific evaluation, Ecology determined that this rule amendment will have no significant impacts. The amendment creates reliable water supplies in much of the river basin, where currently no such supply exists. The reservations created serve anticipated development needs to the extent possible while maintaining the instream resource protection established in the existing rule. Where water is fully or nearly fully allocated, options exist for alternative water supplies to serve future development.

No significant impact is expected outside the Skagit River basin as a result of this rule amendment. Although related, the instream resource protections rules in the Stillaguamish, Samish, and Skagit Basins (or any of the other basins statewide) contain different elements and address varying conditions. These rules are not reliant on each other for implementation and consideration of the three actions in a single SEPA document is not required.

Comment 566

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology's SEPA checklist and DNS are fatally flawed. A more detailed discussion of SEPA issues is addressed in a separate letter and incorporated herein by reference. In summary, Ecology wrongly concluded the impacts of the proposed rule amendments are insignificant. Ecology's conclusions are in error because:

- Ecology failed to take the requisite hard look at the likely effects of the proposed amendments;
- Ecology's analysis of potential impacts contains major errors resulting in significant understatement of effects;
- Ecology continues to ignore conflicts with state and local laws protecting the environment.

**Response:** Please see Ecology's responses to comments 200, 209, 213 and 215.

Comment 590

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/16/2005

**Comment:** I'm writing to express the Swinomish Tribe's concerns about the inadequacy of you're the Department's Determination of Non-Significance ("DNS") for the proposed amendment to the Skagit Instream Flow Rule. We believe the analysis in the DNS is inadequate for several reasons. Most importantly, we believe it fails to take into account the cumulative effects of the withdrawals allowed under the new rule combined with all the withdrawals that have been previously allowed or tolerated in the Skagit River System, including the tributaries. Such withdrawals include both the withdrawals that were allowed prior to the 2001 adoption of the original instream flow rule and those that have been de facto allowed after that date.

**Response:** Instream flows set in the existing rule are based on the natural physical qualities of the stream and are believed to be protective of instream resources. The minor additional withdrawals allowed through the reservations are not expected to have a significant adverse impacts, and by limiting the proliferation of permit-exempt wells, should be more protective than the existing rule.

Comment 591

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 3/16/2005

**Comment:** Other problems we have identified include inadequate analysis of the potential impacts of septic recharge, especially in terms of water quality; the utilization of a shifting baseline (in terms of the existence or non-existence of the current in stream flow rule); the reliance on the faulty assumption that development would occur unchecked without the proposed rule; the reliance on the assumption that the reservation limits in the proposed rule will be enforced; inadequate assessment of the effects of the stockwatering reservation; inadequate evaluation of the effects of the proposed rule on already severely taxed tributaries; inadequate evaluation of the increased impervious surfaces that will result from the rule; inadequate evaluation of the effects of water permitting (as allowed in the proposed rule) on individual tributaries; inadequate evaluation of the potential to harm tributaries that are not listed in the proposed rule but are nonetheless important salmon-bearing streams; inadequate evaluation of the effect of peak withdrawals upon seasonally low flows (rather than annual average withdrawals and average flows); inadequate evaluation of the impact upon fish populations of the rule by considering only the long-term sustainability of fish populations, and not the health or extent of those populations; and inadequate evaluation of the extent to which the rule's reservations of water (and the reliance upon Overriding Considerations of the Public Interest to justify those reservations) establish a precedent or future reservations that will have, individually or cumulatively, significant adverse environmental impacts.

**Response:** Comment noted. Please see other responses to comments from the Tribe/Ann Tweedy.

**Section - Economic Impact Statement**

Comment 302

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** Did the DOE Economic Impact Statement take into account the devaluing of property when PUD frontage and connecting costs are leveled against properties?

**Response:** The economic assessments prepared for this rule amendment process did examine the costs of connecting to public water supplies. See Small Business Impact Statement, Cost Benefit Analysis, Maximum Net Benefit Analysis and Preliminary Least Burdensome Analysis for Chapter 173-503 WAC.

Comment 303

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** Did the DOE Economic Impact Statement look at the effects that this rule has on the ground water profession?

**Response:** Ecology's economists calculated the financial impacts to businesses as a result of this rule in both the Economic Impact Statement and the Small Business Economic Impact Statement and concluded that the financial impacts to businesses were minimal and that the benefits from the rule outweighed the costs. Further, Ecology determined that this rule will support the projected water demands in WRIA 3 and 4 for 20 years.

**Section - Small Business Economic Impact Statement**

Comment 572

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** The Small Business Economic Impact Statement must address the impact of the initial instream flow rule as well as Ecology's proposed amendments. As with the CBA, the Small Business Economic Impact Statement (SBEIS) is built on a flawed foundation. Ecology states that no SBEIS was conducted for the 2001 rule. Rather than completing an SBEIS that evaluates the combined effect of the original rule and its proposed amendments, Ecology chose to adopt the 2001 rule as the baseline for its analysis. In so doing, Ecology guarantees that neither its assumptions nor prior rulemaking activity will face careful scrutiny.

**Response:** No SBEIS was conducted, nor was one necessary for the adoption of the 2001 rule. Recognizing, however, that evaluating those impacts is less resource intensive than litigating over whether one was necessary. Ecology has chosen to address the effects of the 2001 rule in its SBEIS. This does not change the baseline conditions for analyzing the economic effects of this rule amendment process. The baseline remains the legal framework currently in place, including the 2001 Skagit Instream Flow Rule. Ecology does not think this analysis framework is inconsistent with the APA. See the Small Business Economic Impact Statement for details.

Comment 573

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Additionally, there is no discussion of what proportion of exempt well withdrawals are likely to be regulated under the higher commercial/industrial withdrawal assumptions. It is therefore impossible to estimate how long the proposed reservations may last. All that can be said with certainty is that the proposed reservations will be completely allocated far sooner than Ecology anticipates. While Ecology recognizes that 10 to 13 percent of new business applications will be impacted by the proposed rule amendments, actual impacts will assuredly be higher.

**Response:** Commercial and industrial water uses can vary considerably based on the type of business activities at the operation. Ecology does not make the local land use decisions associated with citing of new industrial/commercial uses and therefore cannot control the number and size of these uses in the future. As a consequence, Ecology can not provide a more accurate estimate of water use for a default water use value than the limitation of the ground water exemption in the rule amendment and the associated economic analyses. However, all commercial/industrial water users accessing the reservations are required to measure and report their water use to Ecology so that we can fairly account for their water use. Ecology has also made opportunities in the final rule proposal to consider deducting an additional quantity if the user can demonstrate that another quantity more accurately represents their actual water use.

Comment 399

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** A fatal flaw in the small business economic analysis is that the 1996 Memorandum of Agreement signed by the three Skagit River Indian Tribes, Skagit PUD, Anacortes, Skagit County, Ecology and WDFW provided for no challenges of PUD or Anacortes water rights on the part of the Tribes for a minimum of 50 years if a an acceptable rule was adopted by Ecology pursuant to the parties' recommendations based upon the IFIM Study, as provided for in the 1996 MOA. The proposed rule amends the rule adopted pursuant to the MOA in ways that are detrimental to the fisheries interests that the Tribes sought to protect in the MOA. If the State of Washington is forced to adjudicate streamflows in the Skagit River to protect Tribal Treaty rights, significant negative impacts to businesses may occur and there could be significant curtailment of water available to meet out of stream uses. Ecology has not evaluated the impact of rule adoption in conflict with agreements set forth in the 1996 MOA.

**Response:** Ecology does not agree that the rule proposal is in conflict with the 1996 MOA. The baseline for Ecology's Cost Benefit Analysis is the existing legal setting, including laws and rules existing at the time of the amendment such as the Skagit Instream Flow Rule and previously acquired water rights. This rule amendment proposal does not and can not impact or affect any senior water rights. Consequently, Ecology believes that it is not appropriate under this rule amendment process to assess any curtailment of water rights senior to the instream flow. Please see comment 568 for more discussion.

Comment 400

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** A second fatal flaw in this analysis is that the analysis is based on impacts to business if a new rule is not adopted. In fact, if a new rule is not adopted, there will be no impact to business. New water will not be available to business under the current rule if instream flows are currently not being met. Therefore, basin closures under the proposed rules will have no additional impact to business over the current baseline. Much of this analysis that Ecology has undertaken focuses on the benefits of the new rule. This analysis should be based on the impacts of the new rule compared to the current condition. This baseline shift is evident on page 3, in the paragraph beginning "This alters." Here Ecology takes no account of the practical reality that the requirements of the old rule are never enforced and rarely if ever adhered to.

**Response:** A water right cannot not be obtained through illegal use and therefore, a lack of legally valid water does represent a real cost for small businesses, even if it has not yet caused an out-of-pocket cost.

Comment 401

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 4, in the "Reduced Flows" paragraph, Ecology severely minimizes the potential impacts to river and fisheries-dependent businesses. (See attached Declaration of Robert Hayman.)

**Response:** Ecology agrees that the discussion of instream resource costs and benefits was qualitative in nature in the economic documents developed for the rule amendment proposal. Ecology has added some quantitative assessments of the costs and benefits to instream resources in our final versions of these documents.

Comment 402

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 8. Ecology appears to be ignoring its prior assumption that businesses and other users are currently in compliance with the 2001 Rule and therefore would have already have purchased (and would be utilizing) storage tanks. Moreover, as documented in the Frerichs report, there is no basis for Ecology's assessment of the extent of new small businesses that are likely to benefit from the Rule.

**Response:** Please see Ecology's response to comment 400.

Comment 403

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 10. Under "Delaying Compliance Tables," it is unclear that any businesses are actually ceasing use during low flows, so this is an illusory benefit.

**Response:** Please see Ecology's response to comment 400.

**Section - Skagit Rule Amendment: Background**

Comment 349

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Based on DOE's assessment, the 15cfs reservation will far exceed even the 50 year demand as proposed by Skagit County, since the County projects that the maximum day demand will be 15.93 cfa, and DOE will be administering the reservations as an average daily water demand. What is the basis for DOE's determination of the appropriateness of a 15cfs reservation? 60 years? 80 years? 100 years?

**Response:** Ecology has documented the process for developing the reservation and the projected time period for which this reserved water will meet estimated growth in supporting background documents to this rule. Under the Skagit County preferred growth rate, water demand forecasts project a water demand shortfall of 10.3 million gallons per day by 2050.

Comment 350

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Further. the analysis does not consider the additional water that will be available due to recharge credits. This would be equivalent to a County request of 30 cfs. How has this been considered in the cost benefit analysis?

**Response:** The recharge credit was not assessed in the cost benefit analysis because the recharge credit may not apply for every new use under the reservation. It is only applicable for on site septic systems, and consequently, it will not necessarily be applicable for every potential user under the reservation, especially as it is logical that sewer systems will expand overtime.

Comment 351

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** We do not concur that Skagit County's estimates "represent the best forecasts that could. be done with the data at hand. H Given the perpetual use of water that will be provided for when the rule is adopted or DOE issues new water rights, and the long term effects that will occur to fisheries resources. DOE should not arbitrarily use a limited analysis done' on the part of a party trying to maximize its estimate for the need of future water use.

**Response:** Please see response to comments 337 and 340 for discussion on the reservation sizing and the role of population forecasts in developing the reservations.

Comment 352

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** DOE has not provided any Independent technical reports in its background information that demonstrates that they have analyzed the adequacy of Skagit County's population estimates to determine that they are the best that can be done with the data at hand. The peer review provided by the County was done by one of its own consultants. Therefore, there has been no independent peer review of the analyses.

**Response:** Ecology looked both to Skagit County and the Office of Financial Management for available population data, which represent the best forecast that could be done with the data at hand. Estimating long-term water demand is difficult and there is uncertainty, such as using population estimates for counties or other geographic boundaries, and distributing this into sub-basins. Further, population forecasts go only 20 years into the future and had to be extrapolated in the long term. There was no independent peer review of the analysis, but as the County has the responsibility to plan for its growth under the Growth Management Act, Ecology believed that their data represented the best data at hand.

Comment 353

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Finally, table 2.1 indicates that' the irrigation season in Western Washington is 180 days, but there is no reference to support this statement.

**Response:** The 180 days is a standard period of potential use that is authorized for new irrigation water rights granted by the Department of Ecology in Western Washington. The actual authorized water quantities would be developed according to the agronomic requirements for water throughout the growing season. Ecology has added some references to agronomic reports in our cost benefit analysis and Background Document on the Reservations, Closures and Hydraulic Continuity.

Comment 354

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Basis for Reservation Quantities. Mainstem Agricultural Irrigation Reservation. It appears from this analysis that Qi is calculated such that all irrigation will be occurring on the same day and at the same time. This inflates the value of the Qi. The amount of water reserved for agriculture should be limited to the shortfall for agriculture that is currently being irrigated without an adequate water right. Table 3 shows that currently there are existing permits and certificates for 11,017 acres of irrigated agriculture. Existing irrigated agriculture is 14,732. This is a difference of about 3700 acres. Unless there are valid claims for these 3700 acres, it appears water is being used illegally. Until DOE evaluates the validity of the current rights, it appears unnecessary to provide additional water to those that may not be currently using water legally. Further, DOE could restrict the Qi available for irrigation needs, therefore resulting of less water being used during anyone day period, and explore requiring of collaboration between farmers and the newly formed irrigation districts to insure that less water is being used than the quantities estimated to be necessary if everyone with a right was irrigating at the same time.

**Response:** The agricultural irrigation reservation is one of many potential tools to meet future irrigation water needs in the Skagit River basin. Ecology is working with the agricultural community in the basin through such efforts as the Skagit CIDMP to assess existing water rights and irrigation demand, and find solutions to meet any gaps. It is very likely that a number of water solutions will need to be used to meet existing and future water needs in the basin.

Comment 355

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Finally, DOE states that interruptible water rights may meet the irrigation needs for certain crops in the Skagit Basin. DOE should specifically determine which crops may be able to exist with interruptible water rights, what months are necessary for non-interruptible uses, and how much water is truly needed to meet agricultural demand.

**Response:** Farmers in the Skagit River basin are able to grow a large number of crops, which have different water needs and growing seasons. Ecology will work with farmers to determine if their water needs can be met by interruptible water rights.

Comment 404

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** C.Skagit Rule Amendment: Background on the Reservations, Closures and Hydraulic Continuity  
Page 3-5 Legal Basis for Reservations: OCPI. As stated previously, OCPI cannot be defensibly used as a general exception to an instream flow rule. It can only be used to justify allowance of a specific water use where there is a pressing need. See Black Diamond Assoc. v. DOE; Auburn School Dist. v. DOE. Another justification, such as additional post-rule economic information should be used. At a minimum, the reservations should be scaled back to what is absolutely necessary, with the focus being on domestic use.

**Response:** Prior to making a determination of OCPI, Ecology must ensure that the appropriation would secure maximum net benefits to the public, be put to a beneficial use pursuant to RCW 90.54.020, and would not harm public, economic, or environmental interests. In making our determination to include an OCPI provision in the rule, Ecology sought public interest and received comments from the public and stakeholders and found a significant interest in OCPI. Ecology also added language in section 173-503-073 that indicates that additional out-of-stream uses would create actual significant negative impacts to try to protect instream flows.

Comment 405

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 6 states that water in those (WRIA 4 unidentified tributaries) will have a maximum use allowed of 25,851 gallons per day, but this limitation is not a reservation. It is unclear whether, once these tributary quantities are used up, the tributaries will be closed on a tributary-by-tributary basis. We believe that this is necessary to insure that no additional impacts to fisheries occur

**Response:** Ecology has not chosen to administratively close the tributaries in WRIA 4 identified in Figure 5 of WAC 173-503-120. If cumulative uses in a particular tributary subbasin total 25,851 gallons of water per day, the basins will be closed to new year-round consumptive water uses. However, a non-consumptive water right, an interruptible water right, or a water right that is obtained through submittal and approval of an adequate mitigation plan may be obtained consistent with WAC 173-503-060(1). Ecology believes that these conditions are protective of fisheries or other instream resources.

Comment 406

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 9 states that a small reduction on habitat would have little impact on the fish population. This appears to be the sum total of Ecology's environmental analysis associated with the additional out of stream withdrawals from streams that may already be over appropriated. The assertion is unsupported and unsupported. Studies have shown that summer stream flows are often the single factor most limiting coho salmon production. Therefore, there can be disproportionately large impacts on some salmon species with a 2% reduction in flow. Further, significant reductions in fisheries harvests can occur with only small reductions in fish production. This is true because the current fisheries management strategy employs an exploitation rate approach to establishing harvest seasons and harvest amounts. Small projected reductions in fish returns result may result in significant changes in the rates of harvest, as demonstrated and explained in the attached declaration of Bob Hayman.

**Response:** It would not be reasonable to characterize the loss of habitat as 2% all the time.

The impact on the fish most of the time such as in a normal year (median monthly flow) would be approximately half or less of the effect as would occur during a low flow year. The impact in a normal year would be on the order of 0.05% to 1% loss of habitat, but only during the lowest flow month of September and much less during the other months. In most of the months the effect on fish would be closer to zero percent.

The 2% loss of habitat occurs once every several years and only during the lowest flow month of September.

Biologists from Ecology, in consultation with the Department of Fish and Wildlife, determined that the reservation withdrawals would have little impact on the fish population.

Note that most of the reservations are flow quantities of a few hundredths or even thousandths of a cfs. These quantities are so small that they cannot be measured by a standard streamflow measuring device.

Ecology's assumptions regarding impacts to instream resources is stated and supported in our document, "Skagit Rule Amendment Background on the Reservations, Closures, and Hydraulic Continuity" dated May, 2006.

Comment 407

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 11: The tributary reservations as proposed are inappropriate in that not only has there been no analysis of the impact of these flows on fish populations and those dependent on this fish, but no cumulative effects analysis was undertaken to determine how much flow reduction has already occurred as a result of additional permits and certificates issued by Ecology. Finally, there is no long-term evaluation of the impacts of climate change on streamflows. The rule as proposed allows for these reduction in streams to occur independent of changes in streamflows as a result of changes in climatic conditions. Further, although the basis for analysis that Ecology used is a 10 year low flow parameter (7Q10), Ecology ignores the fact that in drought years greater than a 10 year event, the entire stream flow may be diverted, resulting in a loss of 100% of the available habitat. Further, it appears arbitrary to us that Ecology would use as a minimum a 20-year growth projection to determine demand, but only used a 10 frequency interval for scaling streamflow reductions. It is more appropriate to use a 7Q20 to be consistent with the 20-year growth projections.

**Response:** The impact on the fish most of the time such as in a normal year (median monthly flow) would be approximately half or less of the effect as would occur during a low flow year. The impact in a normal year would be on the order of 0.05% to 1% loss of habitat, but only during the lowest flow month of September and much less during the other months. In most of the months the effect on fish would be closer to zero percent.

Biologists from Ecology, in consultation with the Department of Fish and Wildlife, determined that the reservation withdrawals would have little impact on the fish population.

Note that most of the reservations are flow quantities of a few hundredths or even thousandths of a cfs. These quantities are so small that they cannot be measured by a standard streamflow measuring device.

Ecology's assumptions regarding impacts to instream resources is stated and supported in our document, "Skagit Rule Amendment Background on the Reservations, Closures, and Hydraulic Continuity" dated May, 2006.

Ecology has proposed adding a climatologist to our staff to assist in evaluating the long term effects of climate change on streamflows. The effect on future streamflows by climate change is unknown, however many speculate that rain-fed streams will have increased late summer streamflows but snow-fed streams will have decreased late summer streamflows. But at this time there is no certainty on future streamflow effects.

As to the possibility of 100% loss of habitat based on our reservations, we don't believe that has any possibility. A 7Q10 flow is a low flow. When streams are fed from groundwater in late summer the variation between a once in 10 year or 20 year or 50 year flow is not much when compared to the reserves Ecology is

proposing on the small streams which are only one-fiftieth of an already very low 7Q10 flow.

For example: at the E.F. Nookachamps near Clear Lake gage in the Skagit River basin the once in 10 year low flow is 2.0 cfs, the once in 20 year low flow is 1.6 cfs, and the once in 100 year low flow is 1.2 cfs. Calculating 2% of 2.0 cfs is 0.04 cfs. Taking 0.04 cfs from 1.6 cfs is 2.5% and taking 0.04 cfs from 1.2 cfs is 3.3%. So even at a once in 100 year low flow the loss of flow would only be 3.3%, not 100%.

Comment 408

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 12: The Tribe again refers Ecology to Dr. Frerichs' report for its objections to these population forecasts. Furthermore, based on Ecology's assessment, the 15cfs reservation will far exceed even the 50-year demand as proposed by Skagit County, since the County projects that the maximum day demand will be 15.93 cfs, and Ecology will be administering the reservations as a average daily water demand. What then is the basis for Ecology's determination of the appropriateness of a 15 cfs reservation? Sixty years? Eighty years? One hundred years?

**Response:** Ecology has sized the reservation primarily on the biological impact of consumptive withdrawals on the basin. We did look to future water demand forecasts as well as input from stakeholders to develop the reservations. The reservations were sized to minimize the impact to fisheries and other instream resources. We assessed the impacts of a reservation allowing a consumptive withdrawal of 9,370,208 gallons per day and determined that withdrawing that amount will not significantly impact the long term sustainability of fish resources in the basin. Ecology has also placed a lot of conditions on uses obtained under the reservation such as limiting withdrawals to ground water only in tributaries and measuring water use to further limit the impact of the withdrawals.

Comment 409

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Further, the expected water use claimed necessary by Skagit County is based on a zero recharge credit. This means the consumptive use is 100%. Yet Ecology is providing for 15cfs with a 50% recharge credit. This would be equivalent to a County request of 22.5 cfs. How has this been considered in the cost benefit analysis? Additionally, the Tribe is concerned that not looking at maximum day demand will result in disproportionate harm to fisheries. To take an extreme example, if the stream is dried up by the demand on one day, it won't matter to the fish that died on that day how much water was in the stream on the day before and the day after.

**Response:** Please see Ecology's response to comment 408.

Comment 410

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Finally, the Tribe rejects the estimation of use based on average daily use. For diversions located next to streams with relatively shallow wells or high transmissivity, instream flows can be instantaneously impacted. It is therefore the cumulative maximum Qi that will be having an impact on streamflows, and not the monthly average flows. Current metering capability provides for electronic storage of data that provides for minute-by-minute analysis of water use. Ecology should be totaling the daily maximum use of all metered post-2001 water users in each tributary to calculate the debits towards the reservations. The approach that Ecology has utilized absolutely minimizes and understates the impacts to instream flows.

**Response:** Please see the implementation plan for more details on implementation of the metering provisions of this rule amendment.

Comment 411

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 12: We do not concur that Skagit County's estimates "represent the best forecasts that could be done with the data at hand." (See Frerichs' report.) Given the perpetual use of water that will be provided for when the rule is adopted or Ecology issues new water rights, and the long term effects that will occur to fisheries resources, Ecology should not arbitrarily use a limited analysis done on the part of a litigation adversary trying to maximize its estimate of the need for future water use. Ecology has not provided any independent technical reports in its background information that demonstrate that they have analyzed the adequacy of Skagit County's population estimates to determine that they are the best that can be done with the data at hand. The peer review provided by the County was done by one of its own consultants, and is not provided in the record. Therefore, the claim of peer review is essentially meaningless.

**Response:** Please see responses to comment 337 and 340 for more information about population growth estimates and the relationship to the development of the reservation.

Comment 412

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 13 states that the irrigation season in Western Washington is 180 days, but we find no reference to support this statement, and it is inconsistent with our observations in Skagit County.

**Response:** Please see comment 336 for more information on the irrigation season and the relationship to water rights authorization. See also the Background Document on Reservations, Closures and Hydraulic Continuity.

Comment 413

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 14 shows water duty varying from 1.14 to 1.58. The basis for these numbers is unclear. If in fact the water duty is 1.14, then .44 acre/ft/acre should be relinquished from each of the existing permits and certificates because clearly it is not being put to beneficial use.

**Response:** These figures are used for illustrative purposes or to determine the quantity to be allocated for permitting. Beneficial use is the measurement of a water right.

Comment 414

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Finally, it appears from this analysis that Qi is calculated such that all irrigation will be occurring on the same day and at the same time. This inflates the value of the Qi. The amount of water reserved for agriculture should be limited to the shortfall for agriculture that is currently being irrigated without an adequate water right. Table 3 shows that currently there are existing permits and certificates for 11,017 acres of irrigated agriculture. Existing irrigated agriculture is 14,732. This is a difference of about 3700 acres. Unless there are valid claims for these 3700 acres, clearly water is being illegally used. Until Ecology evaluates the validity of the current rights, it appears capricious to provide even additional water to those that may be currently illegally using water. Further, Ecology could restrict the Qi available for irrigation needs, therefore resulting in less water being used during anyone day period, and could require collaboration between farmers and the newly formed irrigation districts to insure that less water is being used than the quantities estimated to be necessary if everyone with a right was irrigating at the same time.

**Response:** Only a court can confirm water rights through the adjudication process. Therefore it would be inappropriate to evaluate the validity of irrigation water rights in the entire Skagit River basin. However, all users of the agricultural irrigation reservation will be required to obtain a water right permit from Ecology. During the permitting process, Ecology will assess whether the requested water use is currently met through existing water rights. Ecology has also amended the language in WAC 173-503-073(2) relating to use of the agricultural irrigation reservation to clarify the quantity of water allocated under the reservation and also has added conditions of use under the reservation that will require withdrawals minimize the instantaneous impact on instream flows. Ecology also anticipates working with the irrigation districts, as they become functioning entities, to employ water efficiency measures such as irrigation scheduling and improving the efficiency of conveyance and irrigation methods.

Comment 415

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Also, Ecology states that interruptible water rights may meet the irrigation needs for certain crops in the Skagit Basin. Before Ecology provides for this agricultural reservation, it should determine which crops may be able to exist with interruptible water rights, what months are necessary for non-interruptible uses, and how much water is truly needed to meet agricultural demand.

**Response:** Ecology will work with farmers when they apply for water rights to determine if their water needs can be met with an interruptible water right.

Comment 416

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 15 claims that Ecology has deferred to local definitions of timely and reasonable availability of service as determined in a coordinated water system plan. Since these plans are not appealable, changes to this definition can be made without the ability for public input and challenge. Therefore, Ecology should adopt its own objective definition.

**Response:** Please see Ecology's response to comment 150.

Comment 417

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** We believe that the method of quantification of water is not an appropriate measure of the true withdrawal rates and underestimates the Qi that actually will take place. There are meters available that have data capabilities to measure the daily maximum use. For each reservation the maximum daily use per well should be summed within each tributary to calculate the daily maximum use. This is the number that should be debited from the reservations.

**Response:** Please see Ecology's response to comment 410.

Comment 418

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** We doubt the scientific validity of giving recharge credit, especially under the framework developed in this proposed rule. Please refer to Dr. Massmann's report on septic recharge for further detail. However, if recharge credit is given at all, the amount of recharge credit given must be an across-the-board number incorporated into the overall reservations and the amount should be lowered as explained below.

--Given that recharge will be the lowest when water use is the highest (because of outdoor lawn watering), the amount of recharge credit should be lowered to no more than 20%. This is because the recharge number must reflect peak use periods, which are the same periods that the streams are at their most vulnerable.

--As reflected in several PCHB decisions such as Manke Lumber, Cedar River Water & Sewer Dist.; Oetken & Blackerby, recharge credit is generally inappropriate because of uncertainty issues related to timing, amount, and quality, and because of the potential for future sewer service.

--Moreover, calculating the recharge on an individual basis leaves the determination open to challenge by individuals and therefore makes the reservation caps less definite and certain.

**Response:** Thank you for your comment and for providing Dr. Massmann's analysis regarding estimates of aquifer recharge from septic systems. Ecology acknowledges that there is uncertainty regarding water returned from septic systems and that the simple assumptions in the proposed rule will underestimate return flows for some water users and overestimate return flows for others. We also agree that most of the water consumption is likely related to outdoor water use during the drier time of the year and that use of 50% return is intended to represent an annual average. Although the higher consumptive use will occur when streams are more likely to be experiencing low flow conditions, the proposed rule is based on the general assumption that there will be a lag time between withdrawal of ground water and impacts to surface water bodies. Obviously, the timing of affects will be dependent on site-specific conditions and it is likely there will be some wells that capture and consume water in a relatively short time frame. Ecology anticipates that additional studies, data collection, and metering, as well as the proposed ground water model will help us reduce some of the uncertainty regarding return flows from septic systems. Ecology also anticipates that results of these future investigations will help us develop a system to manage the reservation in a way that better represents actual site conditions in WRIA's 3 and 4. Please also see Ecology's response to comment 587.

Comment 419

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 17 closures should be extended not only to the listed tributaries, but also to un-named tributaries that have exceeded their maximum withdrawal allowances. Furthermore, Ecology should take cumulative effects and existing degradation into account in analyzing effects on fisheries.

**Response:** Thank you for your comment. Comment noted.

Comment 420

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 18 Table 4 does not include mainstem Nookachamps Creek. This stream experiences extreme low flows. It should not be excluded from the list of streams subject to closure. It has been on the SWSL list since 1944 yet there has been no restrictions on exempt wells in this basin that we are aware of.

**Response:** Nookachamps Creek is subject to closure under the rule amendment and will be closed when the reservations are fully allocated permit or exempt use.

Comment 421

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Table 5. There is no Cool Creek that we are aware of. We assume this is Coal Creek.

**Response:** According to the Surface Water Surface Limitations files, the stream is Cool Creek which may also have been referred to as Cold Creek and is located in the Lower Skagit WRIA (3). A low flow recommendation was proposed by the Washington State Department of Fish and Wildlife, or its predecessor's agency on May 9, 1956. Ecology has not been able to obtain the original letter and has not been able to verify the location on standard topographical maps. Consequently, Ecology assumes, as you do, that it represents a creek that is known under another name.

**Section - Environmental Checklist**

Comment 422

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 4, subsection g. The impervious surface analysis is disingenuous. The rule amendment facilitates growth and will result in a great deal of impervious surface, especially in the case of commercial/industrial users that would previously have been unable to obtain a water right.

**Response:** Ecology recognizes that additional impervious surfaces could result from new development. Commercial and industrial developments that can be served by the exempt well restriction are likely to be small or moderate in size and are equivalent under the reservation (regarding water use) to approximately 14 new homes. Additionally, these developments have not previously required a water right, as these wells are specifically exempt from the water right process. Under the current rule, prior to the amendment, these uses would be subject to the instream flows set and could be forced to curtail use during low-flow events. Please see Ecology's response to comment 523.

Comment 423

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 6. In subsection b. I., Ecology could do a much better job of quantifying the number of houses or other buildings that could potentially be built under the Rule and that will are not likely to be hooked up to sewer. In subsection c. I, Ecology minimizes the quite significant run-off effects of the Rule.

**Response:** This comment provides no information on how Ecology could better quantify the number of houses or other buildings that could potentially be built under this rule amendment. The reservations have been quantified and information on typical water use in Skagit County was used to determine average consumption per household. It is assumed that most if not all users of the reservation would not be hooked to sewer. These assumptions were used to estimate the maximum number of households that could be developed relying on the reservations for water supply. Actual metered use will be used to support these assumptions or modify them if needed.

Please also see Ecology's response to comment 422.

Comment 424

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 8. Under subsections, there is an erroneous reference to WRIA 5. Under S.d, Ecology should admit that the existing rule is not enforced.

**Response:** Thank you. The reference should read WRIAs 3 and 4.

Enforcement of the existing rule has been difficult in part because it would entail shutting off even some in-house domestic uses during low flow events. This rule amendment has been designed to eliminate that situation. It does so by providing reliable water sources for both the existing junior water users and for growth to the extent possible to allow for the identification and implementation of alternative water supplies, while limiting the proliferation of exempt wells to a quantity that will not cause a significant adverse impact to instream resources.

Comment 425

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 9. The expected diminution in water quality as a result of the Rule should be discussed under subsection 7, "Environmental Health."

**Response:** The diminution in water quality was discussed in section B.3. Water and in D.1 of the Supplemental Sheet for Nonproject Actions. B.7. Environmental Health asks about toxic chemicals, fire or explosion risks, spills, hazardous waste and noise but doesn't discuss surface run-off or water quality.

Comment 426

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 10. Under j, it is misleading to suggest that the proposed rule will not affect existing water rights. Instream rights will obviously be affected, as could prior interruptible rights and senior Tribal water rights. The indirect impact alluded to would already be occurring if the current rule were enforced, and the Tribe fears that the new rule may not be enforced either.

**Response:** The rule will allow users of prior interruptible rights to obtain a reliable water source under the reservation. It should have no effect on senior tribal water rights or any other water rights that are senior to the existing rule.

The question asked "Approximately how many people would the completed project displace?" The response in the checklist was intended to reflect that no current residents would be displaced, while recognizing that some development could be redirected once reservations are fully allocated until alternative water supplies can be developed.

Comment 427

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 11. Under 9.a, again, lack of enforcement of the current rule calls into question the purported benefit.

**Response:** The purported benefit in the response to B.9.a on page 11 of the checklist is the number of new residences that could be provided a reliable water source from the reservations created in this rule amendment. The rule amendment allows existing water users to gain certainty of their water supply, allows for new growth to the extent that the system can allow and still maintain protection of instream resources, and closes subbasins to further consumptive uses once the associated reservations are fully allotted.

Comment 428

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 12. Under 12.b, the impacts to instream flows are inappropriately minimized. Under 12.c., Ecology does not factor lack of enforcement of the current rule into its analysis.

**Response:** Modeling of the change in flows with the enactment of the rule amendment showed no measurable change in stream temperature. The one to two percent drop in flows during low flow events is not expected to have a significant impact on fish and wildlife. It is expected to have no discernible impact on existing recreational uses, as addressed in section B.12.b of the environmental checklist.

Under B.12.c there is specific discussion on the current difficulty with enforcing the existing rule. The second paragraph reads "Without the limited reservation and closures, the development and use of permit-exempt wells may have continued unchecked. There would also be continued technical and political difficulties in interrupting these new withdrawals when instream flows are not met. This would result in greater impacts to stream flows than allowed under the proposed rule amendment which limits the amount of cumulative withdrawals from new permit-exempt wells."

Comment 429

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 16. Under D.1, the potential water quality impacts off ailing septic systems are ignored. Under D.2, "occasional" should be deleted from the third line. In the second-to-last paragraph on the page, "minimize" should be changed to "limit" in the third line. Lack of enforcement of the current rule should be addressed in the final paragraph on the page, to explain Ecology's belief that the new rule will be better for the environment than the more protective current rule.

**Response:** Under D.1., this rule amendment has no effect on development that occurred prior to adoption of the existing rule. Septic systems installed after the adoption of the current rule are no more than five years old and are likely to be functioning effectively. Ecology does acknowledge that at some point in the future, septic systems could fail and in some cases this discharge may reach surface or ground water.

Under D.2., The reservations were designed to have a small impact to low flow events that occur on average during only one year in ten. During high-flow years, the allowed water use from the reservations are expected to have a slight benefit to habitat conditions. The impacts to aquatic resources therefore will not be constant.

The current difficulties in enforcing the current rule are addressed in the final paragraph on page 16 of the checklist.

Comment 430

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 17. Under 7, Ecology should address the new rule's potential conflict with the Endangered Species Act, in that it could very well result in an unauthorized take of listed species.

**Response:** Comment noted. Ecology has consulted with Washington State Department of Fish and Wildlife in determining allowable limits on the created reservations. Both agencies are aware of the importance in protecting listed species.

**Section - Least Burdensome Alternative Analysis**

Comment 574

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** The Least Burdensome Alternative Analysis must address the impact of the initial instream flow rule as well as Ecology's proposed amendments. Ecology's Least Burdensome Alternative Analysis (LBAA) is less than a page in length. The analysis is limited to creation of the proposed reservation, ignoring the impact of establishing minimum flows and closures. As noted above, this is inappropriate because the proposed amendments are in part responsive to inadequate analysis for the initial rule. To proceed using the initial rule as a baseline guarantees that neither the initial rule nor the entire rule package will ever undergo a complete analysis.

**Response:** Ecology did perform a Least Burdensome Analysis as part of the original Skagit River instream flow rule-making effort. Consequently, Ecology respectfully disagrees that it is necessary to include the original rule in our baseline for our analysis. Please see response to comment 568 for more discussion about determining the baseline. Ecology has amended the Least Burdensome Analysis for this rule amendment proposal. Please see the final Least Burdensome Analysis for more specific information.

Comment 575

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** An adequate LBAA must consider the goals of the regulatory program – to provide water for instream and out-of-stream uses – and evaluate whether the instream flows, closures, and proposed reservation are the most efficient means of reaching those ends. In doing so, an adequate analysis must consider a reasonable range of alternatives to reaching that end. It is impossible to evaluate what may constitute an appropriate range of alternatives when plans for municipal water service are unknown or undisclosed.

**Response:** Ecology has updated the Least Burdensome Analysis to incorporate alternative methods to the decisions proposed in our rule-making to achieve the regulatory goals the rule amendment seeks to meet. Please see the final Least Burdensome Analysis for our assessment.

**Section - Cost Benefit Analysis**

Comment 333

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Generally, the basic premise of the analysis is flawed because rather than undertaking an analysis that looks at the cumulative effects of water withdrawals, past, present and future, DOE only examined the incremental increases in future water withdrawals. A more thorough evaluation would have considered the ongoing impacts associated with DOE's previous over-allocations of water. The very fact that instream flows are frequently not met during every month of the year is in part due to past permitting decisions and is a clear indication that instream flow conditions that currently exist are less than optimal. An analysis of these past decisions should have formed a basis for this cost benefit analysis.

**Response:** The purpose of a Cost Benefit Analysis is to examine the expected economic changes as a result of rulemaking. Thus the baseline for Ecology's Cost Benefit Analysis includes previously-permitted withdrawals, whether over-allocated or not, and evaluates the economics of proceeding with the proposed rule. The rule as proposed does not modify these previously authorized water rights and therefore the evaluation of them in the Cost Benefit Analysis is properly limited.

Comment 335

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Introduction. The statement that this "proposed rule amendment is a result of negotiations that took place after that challenge" is a misrepresentation of actual events. While elements in the rule may have been discussed during negotiations between the Tribes and other interested parties, the rule in no way reflects any agreement made by the Tribe. We are concerned that DOE attempts to make this rule appear as is a reflection of a consensus between the major stakeholders.

**Response:** We agree that this language could have been construed to mean that negotiation parties are endorsing the rule proposal. Ecology has modified the text in this section. Please see the final Cost Benefit Analysis.

Comment 336

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** The table indicates that in May and June, there is a 0 probability of future needs not being met, and only a .03 probability in July. If this is the case, and DOE believes that irrigation supplies are necessary from April to October (although we have seen no data to support this length of irrigation season) why does the reservation for irrigation water include a non-interruptible supply for May, June and July? We believe the reservation (Qa) should be reduced to recognize the availability of water without the need for additional impacts to fisheries.

**Response:** The probabilities of a water right being interrupted in any given month are based on monthly average stream flows. As averages and probabilities, the actual conditions can, and will, deviate from year to year. Thus, there may be several days in May, June and July where the instream flows are not being met and junior water users would not be able to use water. To illustrate this point, Ecology has included some daily flow statistics from the past five years in our final Cost Benefit Analysis to show the daily fluctuation in the flow of the Skagit River. For instance, in 2001, there were 192 days in the year where instream flows were not met. In contrast, in 2004, there were only 39 days where instream flows were not met. Thus, depending upon the climatic conditions and the crop grown, an interruptible water right may not be able to support agricultural water demand. For this reason, Ecology has decided to create a limited water reservation for agricultural irrigation that is uninterruptible.

Ecology typically limits the authorized period of use for a water right to the irrigation season, which is usually limited to April to October in Western Washington. The quantity of water authorized under the water right is based on the crop irrigation requirements needed to grow the crop over the growing season identified in Washington State agronomic reports such as the Washington State Irrigation Guide. The Background Document on Reservations, Closures and Hydraulic Continuity contains specific references for these reports. A broader period of use for an irrigation water right does not mean that water would necessarily be used throughout that period or would be used continuously. Ecology typically provides irrigation water users a flexible period of use so that farmers can irrigate in years when irrigation needs fall outside of typical patterns for precipitation and temperature. Finally, Ecology recognizes that farmers often need water when stream flows are naturally low. Ecology will work with irrigation applicants to minimize the instantaneous impacts of the withdrawal on instream flows. See section 173-503-073(2).

Comment 337

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** The document states that the reservations should be adequate to fulfill future water needs for at least 20 years, except perhaps for Nookachamps, Fisher, Carpenter, or Hansen Creeks. However, DOE has completed no independent analysis regarding what it believes future growth will be, or what amount of growth is being provided for. The only analysis available is that provided by Skagit County, which predicts three levels of growth. DOE has not stated which growth rate it is utilizing to forecast benefits or costs. DOE should have undertaken an independent analysis to project population growth and future water needs

**Response:** Ecology has updated the final CBA with more specific information on the population forecast rates used to determine benefits and costs. Ecology is using the OFM High Forecast and the Skagit County Preferred Growth Rate to represent the high and low range of population growth in our estimation of costs and benefits. Ecology did rely upon the water demand estimates prepared for Skagit County which were conducted for a variety of population growth forecasts. Those forecasts used population forecasts prepared by the Washington State Office of Financial Management (OFM) and extrapolated the population estimates from 20 year growth estimates to 50 year growth estimates, which represented the County's preferred water planning horizon. Please see also the final CBA for more detail and Ecology's Background Document on Reservations, Closures and Hydraulic Continuity for more information. Ecology has no demographer on staff to conduct independent analyses of the estimates. Please see also the final CBA for more detail. Please see Ecology's response to comment 114.

Comment 338

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 1.D. DOE's determination that the proposed rule amendment would have negligible impacts on fish cannot be substantiated if evaluated in the context of the cumulative effects of past decision making.

**Response:** The baseline for Ecology's Cost Benefit Analysis is the proposed changes that this rule amendment would create, given the existing legal setting. Ecology recognizes that past water right decisions impact water resources in the basin. However, this rule proposal does not and can not impact or affect any previously authorized water rights. Therefore assessing the conditions resulting from these decisions are not appropriate under this rule amendment process.

Comment 339

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 2.1 The Preliminary Cost Benefit Analysis. We are concerned by DOE's vague analysis that no rules will last forever. It is likely that this rule will receive additional amendments in the future. The expected life time of this rule is 20 years, though it may be much shorter or longer." One can only conclude that this rule provides little real protection for instream resources. Since under State law senior water rights cannot be adversely affected by a new instream flow rule, the only possible outcome of a new rule is to allow for additional water withdrawals. Since DOE states that this rule will provide for out of stream uses adequate to meet a 20 year planning horizon, there will be no reduction in growth in the next 20 years, and no reduction in associated instream diversions. After 20 years, when the water supplies might be used up, DOE seems to indicate that rule amendments to provide for additional growth are likely. Therefore, this rule only provides an illusion of permanent instream resource protection.

**Response:** The twenty year time horizon discussed and used in the Cost Benefit Analysis was used only as a timeframe from which to assess costs and benefits of the rule amendment. It is not Ecology's prediction of how long the rule will stay in place nor is it a guarantee that growth will occur as projected.

A rule is in place until it is rescinded or amended by the agency, invalidated by a court, or altered through the legislature. This may be longer or shorter than 20 years for any given rule. For purposes of assessing the particular costs and benefits, both economic and environmental, of this proposed rule amendment Ecology selected a 20 year horizon. Limiting the time horizon in the rule to 20 years does not diminish the instream resource protection offered by the rule.

Comment 340

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Rural Public Water System and Exempt Well. The underlying data used to support this benefit cost analysis is missing, thereby calling into question the validity of the entire analysis. The document ,states that .81 cfs is necessary to meet individual exempt well domestic needs, .69 cfs is necessary to meet public water system needs and 1 cfs in necessary to meet stock water needs. This results in a total quantified need of 2.5 cfs, yet the reservation provides for 1.5 cfs for non-agricultural withdrawals. This leads to the following questions: How did DOE arrive at a need of 15 cfs to meet future growth? What analysis is DOE using for a projected 20 year need for non-exempt public, domestic, commercial and industrial needs? What time horizon is DOE planning on? What are expected' economic benefits associated with providing for this level of growth? The analysis only looks at the costs associated with a complete elimination of new growth, which is an extreme view. Absent a quantitative answer to these questions, it would be impossible for DOE to make a meaningful benefits determination. An avoided cost analysis does not adequately reflect the true costs and benefits to all. Finally, the analysis regarding the economic losses associated from conversion of irrigated to non-irrigated farmland is questionable. In fact, one could assume that given the tax revenue, increased population growth and revenues associated with spending and business associated with supporting this growth, the economic benefit to the Skagit community would be much larger that the current revenues associated with fanning. This is the appropriate analysis to be done when considering the transfer of water rights.

**Response:** Ecology developed the reservations based on the biological consequences of withdrawals, on water demand forecasts, and on input from stakeholders. The reservation of 9,370,208 gallons per day, according to some forecasts, can meet the projected water needs for the basin until 2050. Under a more aggressive growth scenario, the reserved water would be used up sooner. Ecology used a time horizon of 20 years for our analysis of costs and benefits in the Cost Benefit Analysis. The reservations provided in the rule amendment are likely to be able to meet growth beyond 20 years. Ecology chose to select a longer time horizon for water supply planning for several reasons. First, Skagit County's Coordinated Water System Plan conducts water supply planning for 50 years. Thus, a 20 year water supply time horizon would be inconsistent with the period that the CWSP used. Second, a Department of Ecology administrative rule on Procedures relating to the reservation of water for future public water supply requires that petitioners submit growth estimates for 10, 25 and 50 years in the future. Therefore, there was precedence for sizing reservations to meet more long term growth needs. Finally, and most importantly, Ecology could provide for water supplies to meet growth needs longer than those needs projected for 20 years because withdrawal of these quantities remain below the biological thresholds (2% of the low flow seen every 10 years) that Ecology believes is unlikely to significantly impact the long term sustainability of fish populations. Ecology evaluated water demand outlined in the economic documents in this shortened time period because it is easier to more accurately predict costs and benefits of the rule amendment. Additionally, this time horizon represents the

period that agency economists typically use when preparing economic assessments. Ecology agrees that it may be confusing to readers to see two different timeframes referenced in the rule making effort.

Regarding your comment concerning the elimination of growth, the reason Ecology looked at growth is that existing water rights will be unaffected. New growth may not be eliminated but there is a difference between the value of residential platted land with water and dry land agricultural land that persists over time. Given the uncertainty as to the share of growth that would be eliminated in absence of the rule amendment, a Monte Carlo analysis was performed. This computational method is often employed in situations with uncertainty, as the method conducts statistical sampling on a range of numbers. Concerning your comment about avoided costs, the avoided cost only includes the market price of a shift. It does not include any foregone consumer or producer surplus. One would have to assume the supply curves were parallel and passing through the y axis for the values to be identical. Given this situation, the property value gains estimated may be low. On the other hand if a water market developed, the value estimated might be high. However, we don't know the shapes of the demand and supply functions. Further, the development of water markets has been slow all across the country. Consequently, a range of values was generated using a Monte Carlo. Regarding your comment about the conversion of irrigated land to non-irrigated land, the direction of your comment is unclear. One measure of the value of water is a derived demand based on production net of other costs. This is true whether it is being used for a developer to get a building permit or for crop production. This is what the avoided cost analysis used. We assume that you would like us to have included the change in the size or shape of the dead weight loss from taxation. This would require the assumption that the product generated through taxation more than covers the current per unit costs of necessities and amenities generated by government and that there are no amenity losses associated with population driven growth.

Comment 341

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Large Public Water Purveyors. No data is provided to show how it has been determined that large purveyors would be able to appropriate at least 5.5 cfs. Where did this number come from, what is the upper limit of available uninterrupted withdrawals, and what is the basis for the documented need?

**Response:** The upper limit on uninterrupted withdrawals under the reservations for domestic and municipal purposes is limited to 9,370,208 gallons per day as proposed in this rule amendment. Water rights senior to the 2001 Skagit Instream Flow Rule may authorize additional uninterrupted withdrawals than those that could potentially be obtained under the reservation. The 5.5 cfs demand contained in the Preliminary CBA was based on information from water demand information supplied by Skagit County. The CBA has been updated to reflect future water demand for different uses considering a range of population growth forecasts. See response 337 for more discussion on the population growth forecasts used to predict benefits and costs. See also the final CBA.

Comment 343

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 3.3 Agricultural Uses. It is unrealistic to posit that there will be an additional 2,260 acres of new irrigated farmland. Currently, there has been a steady and long-term decline in farmland in the Skagit Valley. As stated, previously, no reservation is necessary during the months of May and June, with only a 3% probability of curtailment in July, yet the reservation ignores this fact.

**Response:** The agricultural irrigation reservation, if fully used, would be able to meet irrigation needs for crops typically grown in the Skagit Basin based upon an average water duty of 1.5 acre feet/acre. Crop duties may vary from the average and economic market conditions may change or alter the use of agricultural lands. This figure was included to provide an illustration to the public of what demand the reservation may be able to serve. The actual amount may be considerably less and the water may be used on existing farm land, for instance to allow a more water-intensive crop to be grown.

Comment 344

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** We also have not seen any independent data that would suggest that there is a six month continuous irrigation season in the Skagit valley. There is no basis for the projections of irrigation demand based on the simplistic trend analysis provided by Skagit County and adopted by DOE without independent review. The reservation provides for 50,000 additional cows and horses in the Skagit Basin, while there are currently only 41,000 head of cattle, most of which are part of dairy operations which are not dependant on exempt wells. Dairies and total agriculture is declining in the Skagit Valley. No data is provided to support the stock watering requirements as proposed.

**Response:** Please see answer to comment 336 for discussion on the agricultural irrigation demand. Regarding your question concerning stock water use, Ecology did not consider dairies alone. Other types of stock are raised in the region and the cumulative number of stock has been increasing, according to information available to Ecology. Consequently, in the rule amendment proposal available for public review, future stock water users could potentially access the 15 cfs of water reserved for domestic, municipal, commercial/industrial and stock watering uses. Ecology understands that the arrangement of adding the reserved water for people and for livestock together is confusing and could have lead to a conclusion that if all of the reservation was used for stock watering purposes, the number of stock could significantly increase. For these reasons, Ecology has created a separate reservation for more intensive stock water uses. See WAC 173-503-075. For small scale stock operations, if a household owned a single horse or perhaps kept a few goats, they would be able to use their domestic water well to also provide water for these animals under the final rule amendment. See WAC 173-503-025. See also the final CBA for more assessment on the costs and benefits of stockwatering.

Comment 345

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Finally, assigning a real value of water of \$65 acre-foot is not based on any reality that exists in the Skagit Valley. There currently is no water market for the agricultural community to purchase from, other than the cost of water to be purchased from the PUD or Anacortes. If water is to be purchased, it is unclear as to whether the current quantity of water that is being applied would continue.

**Response:** Because there is no water market currently in place for the Skagit River basin, Ecology had to estimate the value of water based on other research. The estimated value of \$65 per acre-foot was developed from values published in the economic research documents, which are referenced in the CBA. Ecology agrees that the best scenario would be to use real figures specific to the basin, but since these data do not exist, we had to rely upon the best estimated values.

Comment 346

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Finally, we are unaware of a single enforcement action on the part of DOE regarding the illegal use of water, therefore, the true cost for not having a non-interruptible water supply to the farm community can currently be considered to be zero. Further, as described by Skagit County, current water rights exceed current irrigation demand, yet no relinquishment has taken place on the part of DOE.

**Response:** Ecology acknowledges that enforcement of unauthorized water use is not commonplace. However, lack of adequate enforcement in the past does not mean that Ecology will not enforce against such uses in the future. A water right cannot not be obtained through illegal use and therefore, a lack of legally valid water does represent a cost to farmers and other users.

Comment 347

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** 4.4 Ecological Costs. Many salmon species are limited by the availability of rearing habitat during the summer months. A 2% reduction in habitat will reduce the number of fish ultimately produced from streams where stream flows are diminished as a result of this rule. It is remarkable that given the fundamental changes proposed in this rule, and the lack of any independent analysis on out of stream needs, that DOE's analysis associated with estimates of environmental and fisheries consequences of this rule is limited to two paragraphs. There is virtually no documentation regarding the assumptions underlying the conclusions drawn by DOE regarding impacts to instream resources. DOE's unwillingness to try to assess the actual ecological impacts and impacts on fish populations associated with a 2% loss of habitat based on the difficulty of prediction is arbitrary.

**Response:** It would not be reasonable to characterize the loss of habitat as 2% all the time.

The impact on the fish most of the time such as in a normal year (median monthly flow) would be approximately half or less of the effect as would occur during a low flow year. The impact in a normal year would be on the order of 0.05% to 1% loss of habitat, but only during the lowest flow month of September and much less during the other months. In most of the months the effect on fish would be closer to zero percent rather than 2%.

Biologists from Ecology, in consultation with the Department of Fish and Wildlife, determined that the reservation withdrawals would have little impact on the fish population.

Ecology's assumptions regarding impacts to instream resources is available in our document, "Skagit Rule Amendment Background on the Reservations, Closures, and Hydraulic Continuity" dated January, 2006. Note pages 5,9, and 10.

Comment 348

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Additionally, we believe DOE has arbitrarily chosen different standards regarding its ability to evaluate the relative costs and benefits for instream and out of stream uses of water. DOE overstates the uncertainty related to the costs to instream resources ("flows, temperature, water quality, location of snags, ocean predation, climatic cycles, commercial fishing, etc.") and ignores, the uncertainties related to agriculture returns, such as winter and summertime temperature, global markets, labor costs, incidence of disease, etc.) and related to economic returns on commercial and industrial development, such as the cost of water, global market influences, the rise and fall of the value of the American dollar, the capability of business executives, interest rates, etc. DOE felt unconstrained in undertaking a benefits analysis related to out of stream uses for commercial and industrial purposes and should apply this same standard for instream resources.

**Response:** Ecology agrees that the discussion of instream resource costs and benefits was qualitative in nature in the economic documents developed for the rule amendment proposal. Ecology has added some quantitative assessments of the costs and benefits to instream resources in our final versions of these documents. The uncertainty associated with agricultural returns certainly would affect willingness to pay for agricultural water if a water market existed, therefore the values used do not rely on the high end value for agricultural water.

Comment 208

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/20/2006

**Comment:** In its Preliminary Cost Benefit Analysis, Preliminary Maximum Net Benefit Analysis & Preliminary Least Burdensome Analysis, Ecology used subbasin population forecasts compiled by HydroLogic Services Company. This analysis compares three different population projections for regions of Skagit County. Within the lower tributary subbasins, the population will grow by 5,927 to 12,343 people. Within the lower tributary subbasin, there is only 'sufficient reservation for 38 exempt wells in the two subbasins that have not already exceeded existing use. Based on 2.6 persons per residence, this means that there is sufficient additional water within the reservation to serve an additional 122 people. The represents less than two-percent of the population that will require potable water under even the most optimistic scenario. This is simply unacceptable given that State's obligation under the Water Code's to supply water in sufficient quantity to "provide sufficient water for residential, commercial, and industrial needs," and the legislature's direction that "adequate and safe supplies of water shall be preserved and protected in potable conditions to satisfy human domestic needs."

**Response:** RCW 90.54.005 delineates the importance meeting water needs for people and agriculture while protecting instream resources and fish. It also encourages conservation and use of water systems that serve the general public. Ecology believes that the rule amendment meets the intent of the legislation by providing for out-of-stream uses while maintaining protections in place for instream resources.

Comment 567

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology's Cost-Benefit Analysis ignores conflicts with state law and is premised on an incorrect baseline. The APA requires an agency's cost benefit analysis: "Determine that the rule does not require those to whom it applies to take an action that violates requirements of [state law]." Skagit County has raised a number of instances in which the rule is inconsistent with its land use authority, but Ecology has not addressed this issue as required by the APA. Additionally, Ecology has not prepared an implementation plan as required by RCW 34.05.328(3).

**Response:** This rule does not affect Skagit County's land use authority because the rule or reservations created do not limit or facilitate growth. The purpose of the reserve is to provide water for development approved by the counties consistent with the counties land use plans and development regulations. The rule does not change the local jurisdictions obligation under the Growth Management Act.

Ecology has prepared an implementation plan which is available to the public.

Comment 568

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** The rule-making record must contain sufficient evidence that the benefit-cost analysis justifies the determinations made. On page 6 of its October 2005 Preliminary Cost Benefit Analysis, Preliminary Maximum net Benefit Analysis & Preliminary Least Burdensome Analysis (CBA), Ecology limits its analysis to the "existing legal setting," stating that the "current legal structure is defined by the 2001 Skagit watershed management rule and other applicable administrative rules and laws." Ecology's approach is highly problematic because Ecology failed to conduct an adequate CBA for its 2001 rule. The new CBA does not overcome the failure to disclose the impact resulting from the prior rule-making. This omission can be made consistent with the APA rule-making procedures only by withdrawing and reissuing the original rule.

**Response:** Ecology conducted a Cost Benefit Analysis consistent with the APA requirements, for the 2001 rule. Similarly, for this rule amendment, Ecology has conducted a CBA. Without articulating the alleged inadequacies, Ecology cannot respond to your comment by making adjustments in the CBA, if warranted. The two Cost Benefit Analyses that you reference follow the standard procedure, consistent with the APA, of using the legal framework in existence at the time of the proposal as the baseline conditions for analyzing the economic effects of the rule. For this proposal, the existing regulatory framework includes the existing Skagit Instream Flow Rule.

Comment 569

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology repeatedly states that the domestic water reservation is sufficient to meet domestic needs for “at least 20 years.” The analysis that underpins this conclusion is inconsistent with the proposed rule amendments. Ecology’s analysis assumes daily withdrawal of 350 gpd while the rule assumes residential exempt wells withdraw 800 gpd and commercial/industrial exempt wells will withdraw 5,000 gpd. These inconsistent assumptions result in misleading conclusions. If growth occurs at projected rates, the domestic reservation will be used up far sooner than anticipated, significantly changing the CBA’s conclusions.

**Response:** Please see Ecology's response to comment 241.

Comment 570

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** The CBA is also flawed because it is premised on the assumption that Skagit County PUD or other public water suppliers can and will extend service into areas with inadequate groundwater reservations. The analysis fails to discuss when such extensions may occur, or whether extensions will provide service to those in need. Absent an understanding of when and where water may be made available, there can be no meaningful balancing of the costs and benefits of this regulation.

**Response:** The economic assessments prepared for this rule amendment process did examine the costs of connecting to public water supplies. Ecology could not predict when extensions would occur and where any such extensions would provide service. To do so for the purposes of this analysis would amount to speculation. Consequently, Ecology reported a range of costs associated with connecting to public water supplies. Ecology also acknowledges that additional costs can occur to potential water users from the lost opportunity costs of delaying their activities until the water supplies can be delivered.

Comment 571

**Commenter:** Joe Mentor, Mentor Law Group, PLLC representing Skagit County

**Type:** Letter, 1/31/2006

**Comment:** Ecology similarly overlooked the impacts it placed on use of water from the agricultural reservation. Under the proposed rule amendments, the agricultural reservation is available only in the lower, middle, or upper Skagit River subbasin management units. Ecology says nothing about potential economic costs of limiting the geographic availability of the agricultural reservation.

**Response:** In preparing the rule amendment, Ecology consulted local zoning maps and determined that most currently zoned agricultural land is in the mainstem areas and therefore would be able to access the reservations. Additionally, the data at hand for agricultural irrigation needs are for the Skagit Basin as a whole. Consequently, Ecology could not do a detailed assessment of potential demand for agricultural irrigation in the tributary basins. For instance, Ecology did not have information indicating whether agriculturally-zoned lands in the tributary basins already have water supplies that predate the instream flow, and would need additional water supplies under the reservations or not. Finally, it is important to highlight that the agricultural irrigation reservation is one of many means to potentially meet future water demands in tributary subbasins, which also includes water sources from outside the tributaries could be brought in, transfers to existing water rights, water rights leases or purchasing water from water utilities.

Comment 356

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Our first comment in this regard is to register a concern that this cost benefit analysis is designated a preliminary analysis. In order to determine the adequacy of underlying assumptions and assessments, a final cost benefit analysis should have been provided for review. It is impossible for us to know how the final version will deviate from this preliminary document.

**Response:** The final Cost Benefit Analysis is still being researched and written and will be available for review and comment at the time of adoption.

Comment 357

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Next, we believe that the statement that "this proposed rule amendment is a result of negotiations that took place after that challenge" (page 2) is a misrepresentation of actual events. While elements in the rule may have been discussed during negotiations between the Tribes and other interested parties, this rule in no way reflects any agreements or purported agreements made by the Tribe. We are extremely disappointed that Ecology attempts to make this rule appear to have been the product of a consensus decision-making process. This rule is the result of Ecology unilaterally deciding which elements of protracted and unsuccessful negotiating process it would incorporate in an attempt to resolve pending litigation filed by Skagit County against Ecology. The rule amendments as currently written do not reflect agreement on the part of the Tribe regarding any specific element at this time.

**Response:** We agree that this language could be construed to mean that negotiation parties are endorsing the rule proposal. Ecology has modified the text in this section. Please see the final Cost Benefit Analysis.

Comment 358

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** It is also our view that this basic analysis is flawed because, rather than undertaking an analysis that looks at the cumulative effects of water withdrawals, past, present and future, Ecology only examined the incremental increases in future water withdrawals in isolation. A more thorough evaluation would have considered the ongoing impacts associated with Ecology's previous over-allocations of water. The very fact that instream flows are frequently not met during every month of the year is in part due to past permitting decisions and is a clear indication that instream flow conditions that currently exist are less than optimum. An analysis of these past decisions should have formed a basis for this cost benefit analysis.

**Response:** Please see response to comment 333.

Comment 359

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** We also believe that it would be appropriate to analyze both in this document and the small business economic impact statement the impacts associated with the proposed rule change on the agreements reached pursuant to the 1996 MOA. This agreement provided for long term stability between Skagit Basin Indian Tribes and other governmental entities regarding use of water in the Skagit River Basin without requiring the Tribes to assert their federally protected rights. The MOA provided that the local Tribes would not challenge for fifty years PUD or Anacortes water rights procured pursuant to the 1996 MOA if an agreeable instream flow rule was adopted based on the IFIM study that the parties funded and based on the joint recommendation of the parties at the conclusion of that study. Adoption of this new rule, which amends the agreed upon rule to the detriment of fisheries, threatens the stability of these established municipal water rights. Further, if the Tribe were to assert its federally based Tribal rights, the process could lead to a smaller amount of water available to the PUD and Anacortes for use within the Basin. Thus both adoption of the new rule and a potential assertion of tribal water rights have the potential for significant economic impacts. There has been no analysis of the effects of the adoption of this rule upon the legal certainties procured through the MOA and the implications for Basin water users should additional water disputes ensue.

**Response:** Ecology does not share the Tribe's confidence that the 1996 MOA created stability. While Ecology adopted the instream flows determined by the IFIM study as promised, that rule was immediately challenged by local and Tribal governments. Years of negotiation since then have failed to resolve the concerns. Ecology recognizes that the Swinomish Tribe does have a senior water right to most, if not all, other the rights in the basin. Since the tribe's water right is not quantified, we would not know to the extent to which the water rights of the City of Anacortes and the Skagit PUD could be reduced until the rights are adjudicated. Similarly, to assess that impact, we would have know the priority of all users in the basin and the legal limits of the quantities authorized under the water rights. Thus, for Ecology to evaluate those concerns in the level of detail you suggest would amount to speculation at this point.

Comment 360

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Ecology Misrepresents the Practical Reality that Exists for Current Users. While, on the bottom of the first paragraph (which carries over from page two), Ecology says that users must now choose between public water, on-site storage, or other non-interruptible sources, Ecology ignores the current reality: that virtually everyone simply uses an exempt well on a year-round basis, albeit illegally. Because of the utter lack of enforcement by Ecology, such users face no prospect of repercussions and this situation could presumably continue indefinitely.

**Response:** Please see response to comment 346.

Comment 361

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Ecology Misrepresents Storage as the Only Viable Alternative.

In the second full paragraph on page 3, we disagree with Ecology's analysis that "considering the water use patterns of domestic, commercial and agricultural uses, [sic and we have not found this consideration anywhere documented, particularly for domestic and commercial uses] without costly storage, this 200 cfs cannot be a reliable water source for various water users." This analysis would indicate that storage is the only alternative to securing a dependable water supply. There is no analysis of the feasibility of water transfers, efficiency measures associated with ongoing uses, alternative sources such as catchment, or the use of mitigation strategies. This leap to a storage alternative appears to be an attempt to maximize if not overstate the costs of implementation of the current rule, while minimizing the benefits to protection of currently over-allocated instream resources.

**Response:** Ecology has described in the Cost Benefit Analysis that many uses require a continuous water supply (e.g., domestic and commercial use) or require water when stream flows are not met (e.g., many irrigation uses). Ecology agrees with your statement that there are many alternatives to providing continuous water supply than just storage. The Preliminary Cost Benefit Analysis did assess the value of water supply to determine costs of water right transfers, and mentions costs associated with abandoning the land, in addition to outlining the costs of storage. Ecology emphasized the storage costs because those costs are more accurately projected. Mitigation and water right transfers are more variable and consequently more problematic to calculate because the proposals can be very complex, and the conditions and circumstances vary considerably from proposal to proposal. For these reasons, Ecology did not have enough time to assemble cost estimates for these other options. However, Ecology has assembled economic information on other options for the final CBA. Please see the final CBA for more cost estimates on water supply alternatives.

Comment 362

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Ecology Has Done No Analysis of Where Growth Will Occur.  
In the third full paragraph, the document also states that the reservations should be adequate to fulfill future water needs for at least 20 years, except perhaps for Nookachamps, Fisher, Carpenter, or Hansen Creeks. However, Ecology has completed no independent analysis regarding what it believes future growth will be, or what amount of growth is being provided for. The only analysis available is that provided by Skagit County, which predicts three levels of growth. Ecology has not stated which growth rate it is utilizing to forecast benefits or costs. Ecology should have undertaken an independent analysis to project population growth and future water needs, rather than depending upon an analysis provided by Skagit County.

**Response:** Ecology looked both to Skagit County and the Office of Financial Management for available population data, which represent the best forecast that could be done with the data at hand. Please see the response to comment 337 for more information on what population forecasts were used in the Cost Benefit Analysis to predict benefits and costs.

Comment 363

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** The Agricultural Reservation Should Be Conditioned to Protect Existing Flows.

Table 1 demonstrates that in May and June, there is a 0 probability of future needs not being met, and only a .03 probability in July. If this is the case, and Ecology believes that irrigation supplies are necessary from April to October (although we have seen no data to support this length of irrigation season) why does the reservation for irrigation water include a non-interruptible supply for May, June and July? We believe the reservation (Qa) should be reduced to recognize the availability of water without the need for additional impacts to fisheries. What is the OCPI basis to provide an uninterrupted water supply in excess of current needs?

**Response:**

Please see response to comment 336 regarding the probability of interruption during the irrigation season. Based on the likelihood of interruption during the agricultural irrigation season, Ecology has determined that is necessary to provide a water reservation of 3,564 acre feet annually to partially meet future agricultural irrigation needs in the Skagit River Basin. Ecology currently has fifty eight pending agricultural irrigation applications for a total of 5,405 acres. Assuming a water duty of 1.58 acre feet/acre the annual volume for these applications is 8,540 acre feet. (Source; Current and Projected Future Water Demands for Skagit County's Irrigated Agriculture -Greenberg and Welch - January 2006). The agricultural irrigation reservation combined with the other reservations falls below the 1-2% stream depletion threshold for the mainstem Skagit River that Ecology judges to be a very small impact on the long term sustainability of the fish population and is very protective of fish while also providing for out-of-stream water uses. Ecology has determined that it is in the public interest to provide reliable water supplies for agricultural irrigation and other out-of-stream uses and that the public interest of protecting instream flows is not significantly impacted when use of water under the reservation is limited. Therefore, Ecology finds that there is a clear showing of overriding consideration of public interest under RCW 90.54.020(3)(a).

Comment 364

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** In the middle of page 4, in bold, Ecology states that "Those with existing water rights will not be effected by these closures". By making this statement, Ecology must believe either (1) The tribes have no existing water rights, or (2) The tribes' senior water rights will not be affected. If it is the latter, we believe an analysis that discusses the tribes' rights is warranted, and how additional diversions are consistent with the tribes' rights.

**Response:** The instream flow right created by the rule adopted in 2001 has a priority date of April 14, 2001, the date of the original rule adoption. Tribal water rights likely predate the instream flow rights, although until the rights are adjudicated this cannot be known with absolute certainty. What is known is that any rights senior to the 2001 instream flows will not be affected by the setting of the instream flows.

Comment 365

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Furthermore, it is clear that these reservations will affect existing senior water rights, including interruptible rights and PUD/Anacortes' rights. Further, Ecology's analysis shows a 2% loss of habitat. The tribes' senior water rights will be affected by these closures because they will not be put into place until after harm is done to the senior Tribal rights. Many salmon species are limited by the availability of rearing habitat during the summer months. A 2% reduction in habitat will reduce the number of fish ultimately produced from streams where streamflows are diminished as a result of this rule. This reduction will have a disproportionately larger impact upon fisheries harvests, including tribal harvests. (See Declaration of Robert Hayman.) Given the fundamental changes proposed in this rule, its potential to upset to the stability that could have been achieved by genuine implementation of the 1996 MOA, and Ecology's lack of any independent analysis on out of stream needs, it is remarkable that Ecology's analysis associated with estimates of environmental and fisheries consequences of this rule is limited to two paragraphs. There is virtually no documentation regarding the assumptions underlying the conclusions drawn by Ecology regarding impacts to instream resources.

**Response:** The reservations were designed to minimize potential impacts on fish and river ecosystem functions. The size of each of the reservations has been limited to amounts that Ecology and WDFW fish biologists believe are unlikely to significantly impact the long term sustainability of the fish population. See response to comment 347 for more discussion on the impact to fisheries. While Ecology does not believe that the reservations will impact senior water rights, under the current priority system governing water rights, if senior water right holders are impaired by users accessing the reservation, those senior water rights have priority and could require the junior users to curtail their use .

Finally, Ecology agrees that the discussion of instream resource costs and benefits was qualitative in nature in the preliminary economic documents developed for the rule amendment proposal. Ecology has added some quantitative assessments of the costs and benefits to instream resources in our final versions of these documents.

Comment 366

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Ecology states that it will identify those areas where Skagit County's critical areas require connections to public water systems as part of the final Cost Benefit Analysis. Two questions arise: (1) When will the final cost benefit analysis be available for review and comment, and (2) What are the implications if the County chooses to amend its critical areas ordinance to eliminate this requirement in the future? Will this require a Ecology rule change, and does the rule require that use of the reservations be suspended if Skagit County changes its ordinance or refuses to implement them as adopted?

**Response:** The final Cost Benefit Analysis will be available for review and comment at rule adoption. The County's Critical Areas Ordinance was used to determine the baseline conditions, which is the regulatory framework in place at the time of our rule amendment. The present Skagit County CAO requires measures similar to that which our rule amendment proposes, such as connections to public water supply under certain conditions. If the County were to amend or change their CAO, it will not affect the regulatory structure of our rule. Ecology, not local governments, has the authority to amend or repeal Ecology's administrative rules. Additionally, all local governments are required to share in the administration and enforcement of the rule proposal. See WAC 173-403-072

Comment 367

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** In the last sentence of the second paragraph under C., Ecology's statement that most post-2001 users can be expected to already have storage or have connected to public water supply is disingenuous, given that it is common knowledge that most such users are simply using water illegally during low flow periods.

**Response:** See response to comment 360 on discussion of the status of post 2001 water users.

Comment 368

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** In the first paragraph under D., "indirectly" should be deleted from the third line, as the effects described cannot reasonably be calculated as "indirect." Moreover, "very minor" should be deleted from the second-to-last line. Ecology has simply not adequately analyzed these impacts and cannot get around this problem by an off-the-cuff characterization of them as "very minor." Furthermore, there has been no account given to the fact that global warming will surely exacerbate such effects.

**Response:** Ecology agrees that the discussion of instream resource costs and benefits was qualitative in nature in the economic documents developed for the rule amendment proposal. Ecology has added some quantitative assessments of the costs and benefits to instream resources in our final versions of these documents.

Comment 369

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** As stated above, Ecology's determination (in the first two lines on page 5) that the proposed rule amendment would have negligible impacts on fish is not substantiated, and indeed it cannot be substantiated. (See Declaration of Robert Hayman; Dr. Massmann's report on exempt well use.) This conclusion is only reinforced by evaluation of the proposed amendment in the context of the cumulative effects of past decision making.

**Response:** Ecology has assessed the impacts to fisheries in the rule amendment documents. See response to comment 347 for more discussion on the impacts to fisheries. The regulatory baseline that was used for this assessment includes the regulatory framework in existence at the time Ecology proposes the rule amendment. Consequently, previously authorized water rights are included in this baseline. See response to comment 333 for more information on the regulatory baseline. Ecology agrees that the discussion of instream resource costs and benefits was qualitative in nature in the economic documents developed for the rule amendment proposal. Ecology has added some quantitative assessments of the costs and benefits to instream resources in our final versions of these documents. See the final CBA.

Comment 370

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** In the second-to-last sentence of the first paragraph under E., it is unclear what costs and what entities Ecology is referring to. If it is future well users, their costs in terms of required metering are surely outweighed by the benefit of their ability to now have a legal well.

**Response:** Ecology was referring to future small business water users accessing the reservations. We agree that the benefits of having a legally secure water supply outweigh the costs of installing and maintaining a water meter.

Comment 371

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** We are very concerned with Ecology's analysis of Time Horizons. The document states "no rules will last forever. It is likely that this rule will receive additional amendments in the future. The expected life time of this rule is 20 years, though it may be much shorter or longer." One can only conclude that this rule provides little real protection for instream resources. We come to this conclusion for the following reasons. Since under State law senior water rights cannot be adversely affected by a new instream flow rule, the only outcome of a new rule is to allow for additional water withdrawals. Since Ecology states that this rule will provide for out of stream uses adequate to meet a 20-year planning horizon, there will be no reduction in growth in the next 20 years, and no reduction in associated instream diversions. After 20 years, when the water supplies might be used up, Ecology seems to indicate that rule amendments to provide for additional growth are likely. Therefore, this rule only provides an illusion of instream resource protection, rather than actually insuring that instream resources are met. It is for this reason that the Tribe views the proposed amendments as demonstrating Ecology's disregard of the 50-year commitments made in the 1996 MOA.

**Response:** See response to comment 339 for discussion on the time horizon.

Comment 372

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Midway through the first full paragraph, in the sentence beginning "As shown in table 1, "will" between "users" and "stop" should be changed to "would" and "if the Rule were enforced" should be added to the end of that sentence. In the following sentence, which begins with "Under," "were knowledgeable about the law and desired to voluntarily comply with it" should be added between "who" and "need." These changes will make the analysis a more accurate reflection of the current reality.

**Response:** Thank you for your comment.

Comment 373

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Bullet 3 states that an alternative to meeting domestic water supplies is through the use of transfers and purchase of irrigation water supplies. We are unclear how Ecology can unilaterally determine this may be a viable alternative across the board. This would require not only a change in purpose of use, but also a change in place of use, and most likely a change in point of diversion. Essentially, 3 of the 4 determinants of a water right would be changed to accommodate a new need. Rather than potentially create a misunderstanding that irrigation rights may be transferred to domestic uses without regard to the statutory prerequisites for such a transfer, Ecology should allude to the requirements for transfer.

**Response:** Any proposed transfer or exchange of an existing water right must meet the statutory requirements for changes and transfers (RCW 90.03.380 and 90.44.100). When listing it as a potential water source for new public water supply, it was meant to be a possible water source. You are correct in highlighting that any transfer would be contingent upon meeting the statutory requirements and would need approval by Ecology.

Comment 374

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** There are numerous problems with the Greenberg reports, which Ecology cites and relies on. A short summary of the problems related to her population projections is contained in the attached report by Dr. Ben Frerichs, the Findings and Conclusions section of which is quoted below:  
"The water demand projections used to support the rule amendment:  
•Misinterpret the OFM population forecasts as alternative forecasts not a range of potential extremes; the OFM intermediate long term forecast is the most likely  
•Do not take into account the complexity and uncertainty inherent in extremely long population forecasts  
•Select a brief five-year period (2020-2025) as the basis for the extrapolation of population years beyond 2025 until 2055 without an obvious basis and argument to support the use of that rate of population growth  
•Are not consistent with Skagit County's preferred and target population forecasts  
•Assume that atypically high rates of population growth will continue without a basis or rationale for that assumption  
•Apparently use population growth as a key variable in forecasting commercial and industrial water use without an explicit recognition for potential long term changes in the local economy, including changes in agricultural water demand  
•Do not use the same time horizon as the Department of Ecology's benefit-cost analysis."

**Response:** Ecology collects the best information available when preparing our economic and environmental assessments for the rule amendment development process. Ecology used the reports referenced in your comment in preparing the economic assessment. The Greenberg reports provide water use estimates based upon OFM population projections in addition to the Skagit County preferred growth forecast. You are correct that OFM and Skagit County's preferred growth forecast had to be extrapolated from 2025 to 2050 or 2055. Ecology's Background Document on Reservations, Closures and Hydraulic Continuity provides additional discussion on why the population forecasts were extended beyond 20 years as does the response to comment 337.

Population growth estimates are just estimates of growth. Actual growth can deviate based on a lot of factors, such as regional economic conditions, birth and death rates. Correlating water use for households is fairly easy, as per capita residential water use is pretty uniform. You are correct that predicting commercial and industrial water use is more problematic. Skagit County's work assumed a certain increase in commercial use correlated to population growth, based on the assumption that there would need to be an increase in business to both employ and provide services to the increased population. Ecology has looked at both the high growth scenario and Skagit County's preferred growth scenario to capture a range of potential costs and benefits resulting from water use under the reservation. If the growth rate is not high both the benefits and the costs will accrue at a later point in time, and the higher valued uses will not be precluded by the structure of the allocation. If all the forecasts are wrong and

growth does not occur then the water will retain its instream value. If and only if the difference in present value, between instream use and agricultural use, was greater than the present value of the difference between growth related uses and instream uses, then the allocation would be an error economically. See responses to comments 337 and 340 for more discussion on the time horizon chosen for the calculation of costs and benefits.

Comment 375

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Moreover, the underlying data used to support this benefit cost analysis is not provided, thereby making the entire analysis impossible to evaluate and therefore useless. At the end of the first full paragraph on page 8, the document states that .81 cfs is necessary to meet individual exempt well domestic needs, .69 cfs is necessary to meet public water system needs and 1 cfs is necessary to meet stock water needs. This results in a total quantified need of 2.5 cfs, yet the reservation provides for 15 cfs for nonagricultural withdrawals. This leads to the following questions;

**Response:** Ecology developed the preliminary water demand estimate referenced in your comment using referenced reports in the Cost Benefit Analysis, see specifically Table 3 in Current and Project Demands-Skagit County Domestic, Commercial, and Industrial Sectors (Greenberg 2005). See also response to comment 337 for additional discussion.

Comment 376

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** How did Ecology arrive at a need of 15 cfs to meet future growth?

**Response:** Please see response to comment 340

Comment 377

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** What is Ecology using for a projected 20-year need for non-exempt public, domestic, commercial and industrial needs?

**Response:** Please see response to comment 340.

Comment 378

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** What time horizon is Ecology utilizing?

**Response:** Please see response to comment 339 for discussion on the time horizon.

Comment 379

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** What are expected economic benefits associated with providing for this level of growth? The analysis only looks at the costs associated with a complete elimination of new growth, which is clearly an extreme view. As stated above, growth can be accommodated by additional use of PUD and Anacortes water supplies, appropriate mitigation strategies, use of alternative sources and transfer of existing rights if they don't effect other rights.

**Response:** Ecology agrees with your statement that there are many alternatives to providing a continuous water supply . The Cost Benefit Analysis does assess the value of water supply to determine costs of water right transfers, mentions costs associated with abandoning the land, in addition to outlining the costs of storage.

Comment 380

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** How much of this water is expected to be utilized by Skagit PUD # I and the City of Anacortes?

**Response:** In the final CBA, the City of Anacortes and Skagit PUD are predicted to need 5.5 cfs of water for the next 20 years, which is derived from information in the Greenberg memo dated March 2005, table 1 - data for 2025. Skagit PUD was estimated to use 3.8 cfs.

Comment 381

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** How much expansion does Ecology expect to occur within cities and towns, thereby allowing for an expansion of water uses pursuant to HB 1338 ("the muni bill") and to what extent and how will this additional use be accounted for in the reservations?

**Response:** Ecology did not assess how much expansion of existing public water supplies could meet future water needs. Such expansions are dependent upon a lot of factors such as infrastructure needs, source capacities, water system financing and water right authorizations. Consequently, Ecology was unable to predict the expansion of public water systems in our Cost Benefit Analysis. Ecology did look at existing water service areas in the Cost Benefit Analysis, but was not able to project how many of these systems would potentially expand.

Comment 382

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Absent a quantitative answer to these questions, it is impossible for Ecology to make a meaningful cost-benefits determination. The analysis regarding the economic losses associated with conversion of irrigated to non-irrigated farmland is questionable and depends on many situation-specific factors which are not yet known. This analysis must be done each time the transfer of an individual water right is considered.

**Response:** Ecology agrees with your comment that there are a variety of factors that influence the conversion of irrigated land to non-irrigated land. However, Ecology respectively disagrees with your comment that an economic assessment must occur at the time any proposed transfer of an individual water right is considered by the agency. RCW 90.03.380 sets forth the requirements for changing a water right and economic evaluations are not a part of those requirements.

Comment 383

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Finally, and as previously stated, this analysis is based on the view that either year round exempt well use will occur, or there will be no growth whatsoever. No other alternatives are considered in this analysis. Moreover, the baseline utilized by Ecology (i.e., whether the existing unenforced rule is considered to in force and operating effectively or absent altogether) is shifted in the analysis whenever it appears that the shift will operate in favor of the proposed rule.

**Response:** Ecology agrees with your statement that there are many alternatives to providing continuous water supply . The Cost Benefit Analysis does assess the value of water supply to determine costs of water right transfers, and mentions costs associated with abandoning the land, in addition to outlining the costs of storage.

Comment 384

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Beyond all of these flaws, the cost benefit analysis does not consider the many costs of the growth that is being accommodated through amendment of the Rule. The analysis erroneously assumes that this growth will only have beneficial consequences.

**Response:** Ecology did evaluate and consider the negative consequences of growth in our assessment of costs and benefits generated by the rule amendment. These findings were documented in the final Cost Benefit Analysis, SEPA Environmental Checklist and Background Document. Ecology has added some quantitative assessments of the costs and benefits to instream resources, including fish, recreation and navigational values in our final versions of these documents.

Comment 385

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Subsection 3.2: Large Water Purveyors.  
No data is provided to show how it has been determined that large purveyors would be able to appropriate at least 5.5 cfs. Where did this number come from, what is the upper limit of available uninterrupted withdrawals, and what is the basis for the documented need? In addition the 1996 MOA (to which Ecology is a signatory) provides for a limited uninterrupted water supply to the PUD and Anacortes, which has already been secured. Other water rights will be interruptible, pursuant to that agreement. What is the basis for Ecology's policy to allocate water in direct conflict with a working agreement between numerous parties? This allocation truly calls into question the benefits to Tribal communities of entering into watershed management agreements with local governments, utilities, and the State of Washington, if these agreements will be so easily disregarded by the very parties themselves. Further, it only more clearly demonstrates that Tribes will be unable to gain the certainty they need in negotiated state-based processes.

**Response:** Comment 341 for discussion on predicted large water purveyor demand. See 349 for discussion on adjudication issues.

Comment 386

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Subsection 3.3: Agricultural Uses  
The manifold flaws in the Greenberg report on which Ecology relies for its agricultural projections are documented in the attached Wassell and Hedrick report. Further comments are provided below.  
It is preposterous to consider that there will be an additional 2, 260 acres of new irrigated farmland. Currently, there has been a steady and long-term decline in farmland in the Skagit Valley. As stated previously, no reservation is necessary during the months of May and June, and there is only a 3% probability of curtailment in July. However, the reservation ignores these facts. We also have not seen any independent data that would suggest that there is a 6-month continuous irrigation season in the Skagit valley. There is no basis for the projections of irrigation demand based on the simplistic trend analysis provided by Skagit County and adopted by Ecology without independent review.

**Response:** The agricultural irrigation reservation, if fully used, would be able to meet irrigation needs for crops typically grown in the Skagit Basin based upon an average water duty of 1.5 acre feet/acre. Crop duties may vary from the average and economic market conditions may change or alter the use of agricultural lands. This figure was included to provide an illustration to the public of what demand the reservation may be able to serve. Please see the response to comment 336 on the probabilities of interruption and more information on determining irrigation water authorizations.

Comment 387

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Finally, assigning a value of water of \$65 acre/foot is not based on any reality that exists in the Skagit valley. There currently is no water market for the agricultural community, other than the cost of water to be purchased from the PUD or Anacortes. If water is to be purchased, it is unclear as to whether the current quantity of water that is being applied would continue. Finally, we are unaware of a single enforcement action on the part of Ecology regarding the illegal use of water. Therefore, the true cost of not having an un-interruptible water supply to the farm community can currently be considered to be zero.

**Response:** See response to comment 345.

Comment 388

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** The same can be said of domestic exempt well users. Despite the 200 I rule adoption that provides for protection of instream flows, and Ecology's admission that these flows are often not met, no enforcement actions against users of exempt wells constructed after April 2001 has taken place. The economic cost to these current users as a result of the existing rule has been zero. Further, as described by Skagit County, current water rights exceed current irrigation demand, yet Ecology has not any initiated relinquishment action.

**Response:** Please see response to comment 360.

Comment 389

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** We would also like to point out that the Greenberg reports and Ecology's limited analysis ignore the fact that the Rule is incentivising agriculture by providing free water. Certainly, if a rule creates a situation where an activity that was previously very costly or impossible is facilitated at a very low cost, more of that activity will occur. However, this begs the question of the amount of agricultural activity that would occur absent such incentives.

**Response:** Ecology respectfully disagrees. Most irrigation uses need to go through the permit process and there are costs required with the application, metering and other infrastructure needs.

Comment 390

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Subsection 3:4: Stockwatering  
This reservation provides for 50,000 additional cows and horses in the Skagit Basin, while there are currently only 41,000 head of cattle, most of which are part of dairy operations that are not dependent on exempt wells. Dairies and total agriculture are declining in the Skagit Valley. What is the basis for determining that the number of cattle in the Skagit Basin will be doubled at a minimum, and that we are likely to experience a four or five fold increase in the number of cattle that will be dependent on exempt wells? No data is provided to support the stock watering requirements as proposed.

**Response:** Please see the response to comment 344.

Comment 391

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Ecology's lack of willingness to try to assess the ecological impacts and impacts on fish populations associated with a 2% loss of habitat based on the difficulty of prediction is arbitrary and capricious. Ecology claims that populations depend on "flows, temperature, water quality, location of snags, ocean predation, climatic cycles, commercial fishing, etc." Because of these other factors, no prediction is made. Agriculture returns are a function of available water supply, winter and summertime temperature, global markets, labor, transportation and input costs, incidence of disease, etc. However, Ecology disregarded these factors in determining the benefits of this rule, when water alone may be an insignificant factor in the overall economics of Skagit Valley farming. Similarly, economic returns on commercial and industrial development are the result of the cost of water, global market influences, the rise and fall of the value of the American dollar, the capability of business executives, interest rates, etc. Similarly, Ecology felt unconstrained in undertaking a benefits analysis related to out of stream uses for commercial and industrial purposes. We believe Ecology has arbitrarily chosen different standards when evaluating cost and benefits for instream and out of stream uses of water.

Under subsection 4.4, the following changes should be made, at a minimum, to make Ecology's analysis more truthful:

"There are ecological costs associated with the proposed rule amendment. The reservations will likely result in less water in rivers and streams. Cross off: "Theoretically, a" and add: "The" reduction of instream flow in rivers and streams add: "will" cross off "could"--yield a loss in habitat for fish, add: "and will result in" other ecological impacts, and a reduction in the river's ability to assimilate waste. This could be an economic cost for entities relying on the river for waste assimilation, as well as a social cost to property owners adjacent to streams and rivers.

**Response:** Ecology's prediction on the effect on fish is found in Ecology's document, "Skagit Rule Amendment Background on the Reservations, Closures, and Hydraulic Continuity" dated January, 2006. Note pages 5,9, and 10.

The impact on the fish most of the time such as in a normal year (median monthly flow) would be approximately half or less of the effect that would occur during a low flow year. The impact in a normal year would be on the order of 0.05% to 1% loss of habitat, but only during the lowest flow month of September and much less during the other months. In most of the months the effect on fish would be closer to zero percent.

The 2% loss of habitat occurs once every several years and only during the lowest flow month of September.

Biologists from Ecology, in consultation with the Department of Fish and Wildlife, determined that the reservation withdrawals would have little impact on the fish population.

Comment 392

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** The most significant possible cost of the proposed rule amendment is the cost of flow reduction on salmon species present in the WRIA 3 and 4. Fish stocks present in the basin include Chinook, Coho, Chum, Pink and Sockeye salmon, steelhead, bull trout and Sea-run Cutthroat Trout. Chinook salmon is listed as threatened under the Endangered Species Act (ESA) add: "and steelhead is likely to be listed shortly."

**Response:** Ecology agrees that the discussion of instream resource costs and benefits was qualitative in nature in the economic documents developed for the rule amendment proposal. Ecology has added some quantitative assessments of the costs and benefits to instream resources in our final versions of these documents.

Comment 393

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** A reduction in flow will likely reduce the habitat for both spawning and rearing. It may sometimes also cause further degradation of temperature, reduce downstream movement of fine sediment during high flows, and reduce salmon passage. The rivers and streams also provide habitat for other fish, birds that prey on aquatic life, and other aquatic creatures.

**Response:** Please see Ecology's response to comment 392.

Comment 394

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** In general, it is very difficult add: "and expensive" given current modeling techniques to quantify the impact to fish populations from a marginal reduction of instream flows. There are many factors that affect fish populations of which stream flows are only one. Fish survival depends on flows, temperature, water quality, location of snags, ocean predation, climatic cycles, commercial fishing, etc. Most of these factors are difficult to predict with a sufficient degree of confidence. Therefore, add: "given expense issues," Ecology has not attempted to quantify the costs of the .... "

**Response:** Please see Ecology's response to comment 392.

Comment 395

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Page 14  
i. Bottom of the Second Full Paragraph.  
Add "except to those visiting flow-impaired tributaries" to the end of this paragraph.

**Response:** Thank you for your comment.

Comment 396

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Subsection 4.7: Non-Use Costs  
Delete "Theoretically" from the last sentence of this paragraph.

**Response:** Thank you for your comment.

Comment 397

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** Section 5: Conclusion  
We agree with Ecology that "the proposed rule amendment was developed quickly under court order." Unfortunately, due to Ecology's rush to propose a new rule, fatal flaws regarding the protection of instream flows and the ability to adequately assess impacts from new withdrawals are apparent.

**Response:** Ecology has collected additional information since the Preliminary Cost Benefit Analysis was published. Ecology has made many updates in the final Cost Benefit Analysis to fill gaps in our original assessments based on this new information. Please see the final Cost Benefit Analysis for more detail.

Comment 398

**Commenter:** Ann Tweedy representing Swinomish Tribal Community

**Type:** Letter, 1/30/2006

**Comment:** We disagree with Ecology's statement associated with stockwatering that "animals have a legal right to drink from the stream," and we do not believe that any animal has legal standing to assert such a right. We are unaware of any rights given to or retained by cows, sheep or horses. Owners of stock may have a right to allow their animals to drink from a stream, but only so far as their use of water does not impact senior water right holders. The idea that stockwatering is not subject to a maximum net benefit test is not supported by the arguments provided.

**Response:** Ecology has amended the referenced section in the final Cost Benefit Analysis document to accurately document stock watering law.

**Section - 1996 MOA and Subsequent Negotiations**

Comment 272

**Commenter:** Timothy Bates, Mayor representing Town of Hamilton

**Type:** Letter, 1/27/2006

**Comment:** While we have had no involvement in the negotiations for the 1996 agreement, we would like to participate in future negotiations if any. There is a valid concern that if the proposed agreement is in conflict with what the Tribes believe is necessary to meet their needs, it is possible that they will assert their water rights. It is our understanding that the agreement in 1996 was supposed to provide stability in the Skagit Basin with the hope of avoiding these types of conflicts. The rule seems to us to be very different from what we understand to have been agreed upon at that time.

**Response:** Ecology, like most parties in the Skagit River basin, is frustrated about the lack of resolution on instream flow issues since the signing of the 1996 MOA. Ecology has been trying to work with the signatories of the MOA to develop a resolution to Skagit County's legal challenge of the rule and the outstanding water management issues in the basin. Because a consensus solution could not be developed, Ecology has moved forward with this rule amendment in hopes that a compromise solution can be reached.

Comment 144

**Commenter:** Joseph Brogan, Foster Pepper, PLLC representing City of Anacortes

**Type:** Letter and Email, 1/31/2006

**Comment:** The City and Skagit PUD are the only major water purveyors in Skagit County. The City has been engaged in negotiations concerning instream resources in the Skagit Basin since before the signing of the 1996 Memorandum of Agreement Concerning Utilization Of Skagit River Basin Water Resources For Instream And Out Of Stream Purposes ("1996 MOA"). In the 1996 MOA, the City made significant commitments concerning the management and exercise of its water rights. The parties to the MOA, including Skagit County, jointly committed to planning to protect future instream and out-of-stream resources. See Exhibit A, 1996 MOA, Section IV(G)(1). However, since the adoption of the Skagit Instream Flow Rule ("the Rule"), the City has found it necessary to allocate a considerable amount of time and resources to negotiating and litigating matters concerning the 1996 MOA and Rule in order to protect the interests of its residential, commercial and industrial customers.

**Response:** Ecology shares your frustration about the lack of resolution on instream flow issues since the signing of the 1996 MOA. Ecology has been trying to work with the signatories of the MOA to develop a resolution to Skagit County's legal challenge of the rule and the outstanding water management issues in the basin. Because a consensus solution could not be developed, Ecology has moved forward with this rule amendment in hopes that a compromise solution can be reached. We appreciate the City of Anacortes involvement in the negotiation process and recognize that negotiation process has required a considerable amount of time and resources from all parties involved in the process.

Comment 145

**Commenter:** Joseph Brogan, Foster Pepper, PLLC representing City of Anacortes

**Type:** Letter and Email, 1/31/2006

**Comment:** The current Proposal introduces a number of issues that were not negotiated by the MOA signatories and are not part of 1996 MOA. Specifically, requests for specific reservations of water for future domestic, municipal, commercial/industrial, agriculture and stock watering supply were not discussed by the signatories in the time period leading up to the 1996 MOA and such needs were not clearly articulated by any party until years after the Rule was adopted.

**Response:** Ecology acknowledges that many of the elements contained in the rule amendment were not discussed during the development of the original rule. Ecology has been trying to work with the signatories of the MOA to develop a resolution to Skagit County's legal challenge of the rule and the outstanding water management issues in the basin. Because a consensus solution could not be developed, Ecology has moved forward with this rule amendment in hopes that a compromise solution can be reached. It is Ecology's understanding that there would be little hope of resolving the issues with the existing rule without some mechanism to meet future water needs in the basin.

Comment 146

**Commenter:** Joseph Brogan, Foster Pepper, PLLC representing City of Anacortes

**Type:** Letter and Email, 1/31/2006

**Comment:** Section V of the 1996 MOA provides a specific process for making amendments to the MOA. Amendments are only effective upon mutual written agreement of all signatories. Exhibit A, 1996 MOA, Section YeA). Neither the City nor the PUD has sought the reservations for domestic or municipal supply that are included in the current Proposal. The introduction of these specific reservations and the quantities of those reservations have also not been discussed in detail with other signatories, including the Swinomish Indian Tribal Community and Sauk-Suiattle Indian Tribe. As a result, it is unclear whether there will be consensus among the MOA signatories and other stakeholders.

**Response:** In light of the legal challenges of the existing rule, it is Ecology's opinion that the consensus that once existed on the Skagit Instream flow rule no longer holds true. Ecology has been trying to work with the signatories of the MOA to develop a resolution to Skagit County's legal challenge of the rule and the outstanding water management issues in the basin. Since we could not come to a consensus resolution of the issues with the existing instream flow rule, Ecology has proposed this rule amendment in hopes of developing a compromise solution.

Comment 148

**Commenter:** Joseph Brogan, Foster Pepper, PLLC representing City of Anacortes

**Type:** Letter and Email, 1/31/2006

**Comment:** The failure of the signatories to work cooperatively to address reservations and future needs such as future agricultural water supply may result in a less efficient set of solutions to the management of limited water resources in the Skagit Basin. For example, the City has communicated to Skagit County that it is willing to explore the possibility of serving the unmet needs of the agricultural community through possible changes in the management of their water rights, e.g., by expanding service to agricultural users, where feasible. Despite the possibility of crafting an agreement along these lines, the County has elected to independently seek a new reservation for future agricultural needs.

**Response:** Ecology appreciates the willingness of the City of Anacortes to be part of the solution to meet future agricultural water needs in the Skagit River basin. The proposed agricultural reservation may not be able to meet future agricultural irrigation needs and therefore, other solutions such as obtaining water from public water suppliers, may need to be used to meet the future agricultural irrigation needs.

Comment 318

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Letter, 3/14/2005

**Comment:** In the original MOA the exempt well was exempt from all restrictions.

**Response:** In the 1996 MOA there is brief mention of the management of permit exempt wells under the Skagit instream flow rule, but the language in the MOA does not state that exempt wells are exempt from all restrictions. There is disagreement on the meaning of this language between the signatories of the MOA and the parties attempted to resolve the exempt well issue through negotiations. Because a consensus solution could not be developed, Ecology has moved forward with this rule amendment in hopes that a compromise solution can be reached.

Comment 457

**Commenter:** Scott Fowler representing Dahlman Pump & Well Drilling, Inc.

**Type:** Oral, Mt. Vernon on 1/11/2006

**Comment:** So we would not be having this discussion now if the Department of Ecology had agreed that the exempt well MOA is exempt from this whole process.  
And when the first MOA was first done and signed off the county had a program we could live with and since then it has turned into a big lawsuit. And I support the county 100 percent.

**Response:** In the 1996 MOA there is brief mention of the management of permit exempt wells under the Skagit instream flow rule, but the language in the MOA does not state that exempt wells are exempt from the instream flow. There is disagreement on the meaning of this language between the signatories of the MOA and the parties attempting to resolve the exempt well issue through negotiations. Because a consensus solution could not be developed, Ecology has moved forward with this rule amendment in hopes that a compromise solution can be reached.

Comment 334

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** Finally, it would also be appropriate to analyze the impacts associated with the proposed rule change on the agreements reached pursuant to the 1996 MOA.

**Response:** Please see Ecology's response to comment 145.

Comment 342

**Commenter:** Gloria Green representing Sauk-Suiattle Indian Tribe

**Type:** Letter, 1/31/2006

**Comment:** In addition the 1996 MOD (of which DOE is a signatory) provides for a limited uninterruptible water supply to the PUD and Anacortes. Other water rights will be interruptible, pursuant to that agreement. Why is the basis for DOE's policy to allocate water in direct conflict to a working agreement between numerous parties? This allocation truly calls into question the benefits to Tribal communities to enter into watershed management agreements with local governments, utilities, and the State of Washington if these agreements will be so easily disregarded.

**Response:** Please see Ecology's response to comment 145.



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