

February 11, 2019 VIA EMAIL - URGENT

Ms. Mary Verner, Water Resources Program Manager
WA Department of Ecology

Dear Ms. Verner:

I have received the CR-101 on amending the Nooksack Rule (WAC 173-501) and have some concerns about it. The CR-101 says that rule-making will proceed under “the standard for the adoption of rules under the Administrative Procedure Act (Chapter 34.05 RCW)” rather than “negotiated rule-making.” I think this is a mistake which, if left in place, will harm the Land Development interests I represent at the WRIA 1 Planning Unit.¹ Given the abbreviated time now available for rule-making under the Streamflow Restoration Act (SRA, RCW 90.94), I thought it best to communicate these concerns to you immediately.

The scope of work for the WRIA 1 Planning Unit included instream flows. The adopted WRIA 1 Watershed Management Plan (WMP) addresses this topic in Appendix C - Instream Flow Selection and Adoption Plan. RCW 90.82.130(5) states:

“Once a WRIA plan has been approved ... the department may develop and adopt modifications to the plan or obligations imposed by the plan only through a form of negotiated rule making that uses the same processes that applied in that watershed for developing the plan” (emphases added).

Negotiated rule-making is described in RCW 34.05.310(2)(a):

“Negotiated rule making by which representatives of an agency and of the interests that are affected by a subject of rule making, including, where appropriate, county and city representatives, seek to reach consensus on the terms of the proposed rule and an the process by which it is negotiated” (emphasis added).

I take the assurance of negotiated rule-making to constitute an important procedural guarantee to Planning Unit members that their past investment of time and resources² cannot be brushed aside and their interests and opinions ignored. The Watershed Planning Act (WPA, RCW 90.82) was enacted after the Administrative Procedure Act (APA, RCW 34.05) and the SRA did not amend the WPA. That being the case, it seems to me that DOE must now work closely with the Planning Unit to develop consensus on the required amendments to the Nooksack Rule on an expedited basis.

¹ I think other Planning Members may share my concerns, and I am sharing the information in this letter with them. However, the next full meeting of the Planning Unit will not take place until February 27, so I am bringing this up now.

² As I have stated previously, the people in WRIA 1 have been working on watershed planning under the Watershed Planning Act and/or the Watershed Restoration and Enhancement Act for the past 21 years at a cost of tens millions of dollars.

I saw that the Nisqually Planning Unit successfully completed their plan update under the SRA, and congratulations to them. I believe the Nisqually tribe's direct participation in the planning process was probably a critical factor in that achievement. In WRIA 1, as you know, the tribes have opted out of participation in the Planning Unit. In establishing our Planning Unit, the WRIA 1 Initiating Governments decided to set up a separate forum that included the tribes plus some – but not all – members of the Planning Unit. Only one of these entities (the Planning Unit) is statutorily authorized to recommend a watershed plan for adoption by the County and must operate under the Open Public Meetings Act (OPMA, RCW 42.30). The current arrangement has proven cumbersome and may well violate OPMA (because Planning Unit members are thought to talk about Planning Unit issues outside of the Planning Unit).

I argue the best procedure going forward would be for DOE to provide technical support to the WRIA 1 Planning Unit, while participating *ex officio* in Planning Unit decision-making and serving as sole interlocutor between the Planning Unit and the tribes.³ That way, tribal views can be fully represented through confidential government to government dialogue, while ensuring that the public's business is actually conducted in public, with full transparency. I thank you for your careful consideration of these matters and look forward to hearing from you.

Yours Truly,

Dave Onkels
Land Development Caucus

cc WRIA 1 Planning Unit
Whatcom County Councilmembers
Jack Louws, Whatcom County Executive
Annie Sawabini, WA Dept. of Ecology
Kasey Cykler, WA Dept. of Ecology
Perry Eskridge, Whatcom County Association of Realtors,

³ Admittedly, this would change the processes that applied in development of the plan. See the above-cited RCW 90.82.130(5). But if that process is deemed non-compliant with OPMA, I would think you might have to move in this direction.