



Snohomish County
Planning and Development Services

Aaron Reardon
County Executive

Clay White, Director
3000 Rockefeller Avenue M/S #604
Everett, WA 98201-4046
(425) 388-3311 FAX (425) 388-3832

October 14, 2011

Jeannie Summerhays
NW Regional Director
Department of Ecology
3190 160th Ave SE
Bellevue, WA 98008

Dear Ms. Summerhays:

It was a pleasure meeting with you, Assistant Attorney General Alan Reichman, and Department of Ecology ("DOE" or "Department") staff on September 23rd to discuss the Carpenter-Fisher subbasin closure. As you know, the primary purpose of the meeting was to discuss:

- Responsibility for potable water determinations for current and future building permit and subdivision applications;
- Coordination between DOE and Snohomish County Planning and Development Services ("PDS") on building permit applications that are currently pending within the Carpenter-Fisher subbasin; and
- Future improvements to the DOE Notice of Intent process for permit-exempt wells.

I am writing today to simply follow up on the conversations that took place during the meeting. I think we both agree there are a number of issues on which our departments need to coordinate.

1) Potable water determinations for future building permit and subdivision applications

Since the Washington Supreme Court issued its decision in Department of Ecology v. Campbell & Gwinn L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002), local government and the Department have had differing opinions about whose responsibility it is to determine whether a development application meets the legal requirement for water availability. This is especially true when the applicant states that he will be appropriating waters of the state, either by water right or permit-exempt well.

During our meeting on September 23rd, I believe that we reached a common understanding that each of our respective agencies carries some responsibilities during the development review process. While we were specifically focusing on how this applies to the Carpenter-Fisher subbasin, the general policy issues we discussed certainly extended beyond the subbasin.

RCW 19.27.097(1) requires proof of an adequate water supply prior to approval of a building permit. RCW 58.17.110(1) requires that a local government determine if appropriate provisions are made for potable water supplies prior to approving a subdivision. The question we discussed at some length is the role the Department plays in those processes. As I explained at the meeting, it is my contention that while it is the responsibility of local government to make the determinations required in RCW 19.27.097(1) and RCW 58.17.110(1), DOE must opine on whether the applicant has a legal right to withdraw waters of the state for the purpose described in the application. In other words, our determination that water is legally available is like a box that must be checked in order to issue a permit, similar to a letter from a water system purveyor. It is DOE's responsibility, however, to determine if those waters can be legally withdrawn just like it is a water system purveyor's responsibility to let us know if it will allow a hook-up. This is supported by the recent case, Kittitas County v. Eastern Washington Growth Management Hearings Board, 256 P.3d 1193 (2011).

During the meeting, Mr. Reichman and I seemed to agree on this point and to further agree that local governments do not administer chapters 90.03 or 90.44 RCW and that local governments are not authorized to issue water rights or to regulate exemptions from the permitting process. You stated that you would need to talk to others at DOE and I look forward to having further dialogue on this issue.

2) DOE/PDS coordination on currently pending building permit applications within the Carpenter-Fisher subbasin

As you know, Snohomish County has a small number of pending building permit applications and all but one was submitted prior to the Carpenter-Fisher subbasin closure. We understand that DOE has determined that the permit-exempt wells associated with those permit applications have yet to be put to beneficial use and are therefore not water rights pursuant to RCW 90.44.050. For those applications, PDS had already made a water availability determination pursuant to RCW 19.27.097(1). With that being said, we will not issue those permits that have already been submitted unless the applicants provide PDS with documentation of an alternative water source such as a connection to a public water system or mitigation for their well.

As we discussed during our meeting, PDS has taken a proactive position to alert people inquiring about development within the subbasin to the closure. However, we will be sending applicants to DOE to discuss any issues regarding water issues pursuant to chapters 90.03 or 90.44 RCW. This includes those with pending applications and those inquiring about submitting a building permit. In some cases, PDS will need a letter from DOE prior to accepting future applications stating that the landowner has the legal right to withdraw water from his permit-exempt well.

While PDS will comply with the Department's closure of the Carpenter-Fisher subbasin when reviewing permit applications, I hope that the Department is proactively seeking ways to assist those who are already in the permit process. During our meeting, you indicated that the best way for applicants to move forward is to mitigate for their permit-exempt wells. While this might be an option in the future, the Department also acknowledged that there is no mitigation program that will be available in the foreseeable future.

When the basin was closed in the Upper Kittitas County, an MOU was established to allow those with a vested building permit application to proceed and put their permit-exempt well(s) to beneficial use. See WAC 173-539A-040. While the two basins were closed for different reasons, I would certainly hope that DOE would consider this option. Like the Kittitas closure, many applicants here were allowed to invest in a well, install power to their property, design a septic system, build roads, and design building plans only to be told they could not withdraw the water from their permit-exempt well.

3) The Ecology Notice of Intent process – future improvements to the process

As we discussed during our meeting, it is time that the Department take a serious look at the Notice of Intent process as outlined in chapter 173-160 WAC for permit-exempt wells allowed under RCW 90.44.050. I have personally worked with several Department offices, including headquarters, and the message has been quite clear: the Notice of Intent is not a permit process and DOE staff does not have the time or resources to administer the program. This must change.

In the case of the Carpenter-Fisher subbasin, it appears that there was no oversight of the number of wells being dug within the subbasin while at the same time the Department fully understood that only a limited number of withdrawals under the reservation established in WAC 173-503-073 were going to be allowed. Why would DOE allow a landowner to put in a new well and spend a substantial amount of money investing in infrastructure on their property with no assurance of when or if he would ever be able to use the water? My hope is that DOE will reassess its responsibilities regarding this process.

I look forward to our continued coordination on these issues and hope to hear from you soon.

Sincerely,



Clay White
Director
Snohomish County Planning and Development Services

cc: Alan Reichman, Department of Ecology
Randy Darst, Snohomish Health District
John Moffat, Snohomish County Prosecutors office
Alethea Hart, Snohomish County Prosecutors office
Tom Rowe, Snohomish County PDS Permitting Manager
Howard Knight, Snohomish County PDS Permitting Supervisor
Holly Faller, Snohomish County Permitting Supervisor