

## **Guidance to Counties for Determining Water Availability when Processing Applications for Subdivisions and Building Permits**

This guidance document has been developed to provide counties with information about the Supreme Court decision in the *Kittitas County v. Eastern Washington Growth Management Hearings Board* case, and to provide suggestions on how county land use departments should proceed in making adequacy of water supply determinations under RCW 19.27.097 and RCW 58.17.110 when they process applications for subdivisions and building permits.

In addition to this guidance, we are providing information to local governments and the public regarding water availability in specific watersheds and areas through [Water Availability Focus Sheets](#) for each watershed in the state. Information on pending water right applications and publications regarding water right permitting can be found on the [Water Resources Program](#) website.

### Background

On July 28, 2011, the Washington Supreme Court issued its decision in [Kittitas County v. Eastern Washington Growth Management Hearings Board](#), 172 Wn.2d 144, 256 P.3d 1193 (2011), a case which included a major issue relating to the respective roles of the Department of Ecology (Ecology) and local governments in the management of the state's water resources. This case involved consolidated petitions for judicial review of decisions by the Eastern Washington Growth Management Hearings Board in administrative appeals of a comprehensive plan, and development regulations, adopted by Kittitas County pursuant to the Growth Management Act (GMA).

In its decision, the Court reasoned that there are no provisions in the water statutes that expressly preempt the regulation of water use by local government, as long as the local regulation is consistent with state regulation. In addition, the Court recognized that "several relevant statutes indicate that the County must regulate to some extent to assure that land use is not inconsistent with available water resources." Among these statutes are [RCW 36.70A.070\(1\)](#) and [RCW 36.70A.070\(5\)\(c\)\(iv\)](#), which are provisions of the GMA requiring that the rural and land use elements of a county's comprehensive plan include measures that protect groundwater resources, and [RCW 19.27.097](#) and

[RCW 58.17.110](#), which require counties to obtain proof that adequate water is available before they issue building permits or subdivision application approvals.

The Court concluded that in implementing RCW 19.27.097 and RCW 58.17.110, counties must ascertain that water is *legally* available, and not just *physically* or *factually* available, before they can approve applications for subdivisions and building permits. Under this holding of the Court, counties are not merely required to ascertain that water is physically available, for instance, through hydrogeological data showing that a well can successfully yield water, but must determine that there is an “appropriate provision for potable water supply” to approve a subdivision under RCW 58.17.110.

While Ecology is responsible for appropriation of surface water under [RCW 90.03](#) and groundwater under [RCW 90.44](#), counties are responsible for land use decisions that affect water resources, including subdivision of land. Under the *Kittitas County* decision, counties have responsibilities and obligations under the GMA to protect water resources, and to make their best effort and use their best judgment to determine if appropriate and adequate water is legally and physically available to support the uses proposed under land use applications. To do so, they must consider water resources laws and rules, and take into account available data and other information.

While this decision clarifies what local governments must consider, Ecology also has an important role. The Court pronounced that “Ecology maintains its role, as provided by statute, and ought to assist counties in their land use planning to adequately protect water resources.”

As such, we are providing guidance on what this decision means, and what steps counties should take in evaluating whether there is adequate legal water supply to support subdivisions and building permits.

### Making Water Supply Determinations

The complexity counties will face in making water supply determinations will vary in different areas of the state and in different contexts.

The applicant for a subdivision or building permit must provide evidence of an adequate water supply for the intended use. An applicant can make a showing that adequate water is legally available to support the intended use by providing a letter from a

purveyor stating a commitment to serve water, through evidence that the applicant holds a water right permit, certificate, or statement of water right claim authorizing the water use, or by providing evidence of a lawful permit-exempt source of groundwater. See RCW 19.27.097.

Where a building permit or subdivision applicant intends to rely on a public water system for its water supply, counties should require that an applicant provide "a letter from an approved water purveyor stating the ability to provide water." See RCW 19.27.097. The ability of a water system to provide water includes the technical, managerial and financial capacity to provide safe and reliable drinking water. Counties should consult the Department of Health's website for information on Group A public water systems. By accessing the information on the website, counties can determine if a Group A public water system has been approved and can serve additional connections. Counties can find out the status of Group B public water systems from the local health jurisdiction, or from Group B public water system approval letters that the Department of Health sends to local building and planning departments.

If a County has a question about a public water system's water rights, they should contact Ecology's Water Resources Program if questions arise regarding the adequacy of a system's water rights.

Where an applicant intends to rely on a water right that they hold, counties should ensure that the applicant possesses a water right from Ecology. For this purpose, the applicant can provide evidence that they hold a water right permit, certificate, or statement of water right claim authorizing sufficient water for their proposed subdivision or building. Evidence of an application for a water right (that has not been decided on by Ecology) does not provide proof of an adequate water supply.

Where an applicant intends to rely on a permit exempt well, counties should determine water availability in accordance with state law, regulations, applicable court decisions, and available scientific information related to water availability. When deciding if an applicant has demonstrated qualification for permit-exempt water, counties must determine: (1) whether water is legally available in the area where the proposed subdivision or building is located; and (2) for a subdivision, or for a building permit for a home that is located in a subdivision, whether the applicant qualifies to use groundwater under the single or group domestic exemption from permitting requirements. The first requirement relates to "legal and physical availability" of water.

The second requirement relates to whether the applicant's proposed permit-exempt water supply qualifies as being a lawful single or group domestic use under the groundwater exemption statute. See RCW 90.44.050. If the applicant cannot meet the first requirement, then the county must make a finding that there is not adequate water to support the application, and would not need to consider the second requirement by determining whether the water would be legally available as a single or group domestic use in compliance with RCW 90.44.050 .

1. How Counties Can Determine if Water is Legally Available

When an applicant seeks to show evidence of an adequate water supply through a permit-exempt groundwater use, local governments must use their best judgment to determine whether water is legally and physically available to support the proposed permit-exempt water use. This must include consideration of any water management rules adopted by Ecology for the particular Water Resources Inventory Areas (WRIAS) in which a county is located, and factual information, including the interrelationship between groundwater and surface water

*Areas where water is withdrawn from further appropriation or closed to further appropriation under water management rules adopted by Ecology since 2001*

Since 2001, Ecology has adopted water management rules which explicitly and clearly apply to proposed permit-exempt uses of groundwater (as well as uses of ground and surface water under the water right permitting system). Withdrawal or closure of a basin by rule represents Ecology's determination that water is not available for further appropriations. If waters in a basin are withdrawn from or closed to further appropriations, the applicant or project proponent could demonstrate water availability by proposing appropriate mitigation. Under these rules, in areas where water is withdrawn from further appropriation or closed to further appropriation by rule, the building permit or subdivision applicant must show they have secured mitigation to offset adverse effects on instream flows. Otherwise, the applicant will not be able to demonstrate that there is adequate water supply to support their proposal and the land use application must be denied.

*Areas where water use is regulated under water management rules adopted by Ecology before 2001*

In considering applications for building permits or subdivisions where the applicant proposes to secure water supply through permit-exempt use in a basin governed by rules developed prior to 2001, the rule should be examined to determine whether the applicant's proposed water use would comply with the rule. For example, many rules require that the natural interrelationship of surface and groundwater be fully considered in water allocation decisions to assure compliance with the meaning and intent of the regulations. In some rules a determination must be made as to whether the proposed withdrawal will have a direct, and measurable, impact on stream flows in streams for which closures and instream flows have been adopted, and in other rules the cumulative effect of numerous small diversions must be taken into effect.

*Areas that are not subject to water management rules*

In areas which are not governed by water management rules, local governments should conduct the water availability determination in accordance with state water law, including RCW 90.03 and RCW 90.44, and relevant information from Ecology and other sources. Ecology has developed information regarding water availability in specific watersheds and areas and published [Water Availability Focus Sheets](#) for each watershed in the state. Information regarding water rights and permits and pending water right applications can be found on the [Water Resources Program](#) website or by contacting the Water Resources Program.

2. Qualifying for a Permit-Exempt Single or Group Domestic Use of Groundwater

As explained above, if an applicant proposes to supply water for a proposed subdivision, or a home within a subdivision, from a permit-exempt well, and can demonstrate that water is legally and physically available, the county must then determine if the applicant qualifies for permit-exempt groundwater use under the single or group domestic exemption under RCW 90.44.050.

Counties should deny subdivision or building permit applications where an applicant intends to rely on permit-exempt wells in a manner that is inconsistent with [Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11,43 P.3d 4 \(2002\)](#), and RCW 90.44.050. That decision limited the reliance on permit-exempt wells to one exempt withdrawal per project.

Where an applicant for a subdivision intends to rely on multiple permit-exempt wells which together would withdraw more than 5000 gallons per day, counties should deny the subdivision application as the exemption is not legally available for such a use and the applicant cannot demonstrate that they have adequate legal water supply to support their proposed subdivision.

For an application for a building permit, counties should determine whether the lot is part of a development subject to the permit-exemption restriction using the following factors, and deny the building permit if the lot is part of a development subject to the permit-exempt restriction.

Factors to consider in determining whether a property (either a proposed subdivision, or a lot associated with a building permit application) is part of a common development include determining whether there is common ownership through any type or degree of legal or equitable property interest held by an applicant in any proximate parcels that share a common boundary; or are separated only by roads, easements or parcels in common ownership; or are within five hundred feet of each other at the nearest point. Evidence of common ownership includes a joint development arrangement between an applicant and any owner of a proximate parcel that involves significant voluntary joint activity and cooperation between the applicant and the owner(s) of one or more proximate parcels with respect to the development of parcels in question. Joint activity and cooperation that is customary or required by land use or other legal requirements does not itself constitute a joint development arrangement.

A joint development arrangement may be evidenced by, but is not limited to:

- Agreements for coordinated development and shared use of services or materials for permitting, design, engineering, architecture, plat or legal documents, financing, marketing, environmental review, clearing or preparing land, or construction (including road construction);
- Covenants;
- Agreements for common use of building materials, equipment, structures, facilities, lands, water, sewer, or other infrastructure.

### *Summary*

This guidance describes a basic legal framework for the determination of legal and physical water availability by local governments. We anticipate that as local

governments incorporate the consideration of legal water availability into their planning and permitting activities, questions will arise as to the more procedural and technical aspects of these determinations. Ecology has experience in these matters and welcomes further discussion with local governments to determine what processes or standards are needed to ensure that counties can make these determinations as efficiently and accurately as possible.

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