



WATER—WATER RIGHTS—WELLS—INTERLOCAL COOPERATION ACT—Interpretation of statutes exempting certain withdrawals of groundwater from permitting requirements, and authorizing the Department of Ecology to withdraw waters from appropriation

1. The statutory exemption from the permitting requirement for use in watering lawns and noncommercial gardens is not included within the exemption for domestic use.
2. The Department of Ecology lacks the authority to impose lower or different limits on exempt withdrawals of groundwater than are provided in statute by “partially withdrawing” the waters from additional appropriation.
3. The authority of the Department of Ecology to withdraw waters from new appropriations applies to both permitted and permit-exempt uses of groundwater.
4. The Interlocal Cooperation Act is not an independent source of agency authority.

September 21, 2009

The Honorable Gregory L. Zempel
Kittitas County Prosecutor
205 West Fifth, Room 213
Ellensburg, WA 98926-3129

**Cite As:
AGO 2009 No. 6**

Jay J. Manning, Director
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Dear Prosecutor Zempel and Director Manning:

By two letters previously acknowledged, you both have requested our opinion on several questions related to groundwater. Prosecutor Zempel initiated this request by asking for our opinion on four questions. Director Manning subsequently posed three additional, but related, questions. Combining your questions into a single list, very slightly paraphrasing them, and placing them into the order in which we respond, your questions are:

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1. Does RCW 90.44.050 restrict groundwater withdrawals without a permit for lawn and noncommercial gardening purposes to a subpart of the 5,000 gallons per day allocated to single or group domestic use, and thus also limit those domestic uses of the exemption to a remainder?
2. If RCW 90.44.050 does not limit groundwater withdrawals for lawn and noncommercial gardening purposes to a subpart of the 5,000 gallon-per-day limit imposed upon single or group domestic use, may the Department of Ecology implement a rule imposing such a limit by permanently adopting the third version of WAC 173-539A, the Upper Kittitas Groundwater Rule?
3. Does the Department of Ecology have authority under RCW 90.54.050(2) and related statutes to withdraw groundwater of the state from new appropriations for permitted uses and permit-exempt uses under RCW 90.44.050, but allow an exception for new appropriations that are mitigated in an equal or greater amount by existing trust water rights?
4. If the answer to question 3 is "yes," does the Department of Ecology have authority, under RCW 90.54.050(2) and related statutes, to withdraw groundwater from new permit-exempt appropriations under a condition that withdraws water for new exempt uses above a certain quantity from appropriation, unless the amount of use above this quantity is mitigated in equal or greater amount by a trust water right?
5. Does RCW 90.44 preempt the local legislative authority of a county from setting a numeric gallon-per-day limit or group-use limit upon the lawn and noncommercial gardening exemption from permitting?
6. Does RCW 90.44.050 preempt a county from using its available authority to limit new residential uses of groundwater (including both permitted and permit-exempt uses) proposed as part of a subdivision or building application to a specified quantity, unless the consumptive amount of use above this quantity is mitigated in an equal or greater amount? For purposes of this question, consumptive use is the amount of water by which the withdrawal would reduce flows or levels of any surface water.
7. Could the Department of Ecology and a county impose such a limit by entering into an agreement?

Prosecutor Zempel posed questions 1, 2, 5, and 7 above, while Director Manning posed questions 3, 4, and 6.

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BRIEF ANSWER

State law allows for certain withdrawals of groundwater that are exempt from its general permitting requirement. These “exempt withdrawals” can be used for certain limited purposes, including water for lawns and noncommercial gardens not exceeding one-half acre, and for single or group domestic uses not exceeding 5,000 gallons per day. State law also provides the Department of Ecology with the authority to withdraw water from further appropriation if the department lacks sufficient information upon which to make sound decisions. Based upon these provisions of state law, we conclude:

1. In response to your first question, the use for watering lawns and noncommercial gardens is not included within the 5,000 gallon-per-day limit for single or group domestic uses.
2. In response to both your second and fourth questions, we conclude that the Department of Ecology lacks the authority to impose lower or different limits on exempt withdrawals by “partially withdrawing” the waters of the applicable area from additional appropriations.
3. We also conclude, in response to your third question, that the authority of the Department of Ecology to withdraw water from new appropriation applies to both permitted and permit-exempt uses. This means that the withdrawal of water from further appropriation has the effect of precluding new exempt withdrawals, except that new appropriations that are mitigated for any consumptive use in equal or greater amount by existing trust water rights may be authorized.
4. We are unable to respond to your fifth and sixth questions because they inquire about an issue pending in litigation.
5. Finally, in response to your seventh question, we conclude that the Interlocal Cooperation Act is not an independent source of agency authority, and that therefore the authority for Ecology and the county to enter into an agreement is limited based upon their statutory authority.

BACKGROUND

As a general rule, anybody who wants to use public groundwater must receive a permit from the Department of Ecology (Ecology) before drilling or digging a well or withdrawing water. RCW 90.44.050. The statute imposing this requirement also recognizes an exception for certain withdrawals of water that are exempt from this permitting requirement. A second statute allows Ecology to “withdraw various waters of the state from additional appropriations” based

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upon Ecology's conclusion that it lacks sufficient information and data to make sound decisions. RCW 90.54.050(2). That is, Ecology may determine that no new appropriations of water rights may occur until it acquires sufficient information to support its decision-making process. RCW 90.54.050(2). Your questions relate to both of these statutes.

You both pose your questions with regard to groundwater in an area referred to as "Upper Kittitas County," an area that includes Cle Elem, Roslyn, and the surrounding area on the east slope of the Cascades to the King County line. This region forms a part of the headwaters of the Yakima River Basin, in which an action seeking a general adjudication of surface water rights has been proceeding for over thirty years. *Dep't of Ecology v. Acquavella*, 100 Wn.2d 651, 652-53, 674 P.2d 160 (1983). Although that litigation concerns surface water, Ecology has also had an administrative moratorium on the issuance of any groundwater permits in effect throughout the Yakima basin for a number of years. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 6, 43 P.3d 4 (2002). We understand that this moratorium remains in effect, and that Ecology has not issued any new groundwater permits in the Yakima River Basin since 1993. *See id.* Until recently, that moratorium was not applied to withdrawals that are exempt from the general permit requirement. RCW 90.44.050. Such exempt withdrawals¹ were, accordingly, the only method available for obtaining a new appropriation of groundwater in the Upper Kittitas.

Several years ago a private organization petitioned Ecology to preclude the drilling of any new exempt wells. The petition asked Ecology to withdraw the waters of the Upper Kittitas from further appropriation, citing insufficient information regarding the availability of groundwater in the area. Ecology rejected this proposal, and instead agreed with Kittitas County to a series of interim measures, short of withdrawing the basin from all new appropriations. Under that agreement, new residential construction could continue to take place, obtaining water using exempt withdrawals. Those withdrawals, in some cases, would be restricted to using less water than the 5,000 gallons per day that are exempted from permitting under RCW 90.44.050.

Ecology and the county entered into a Memorandum of Understanding describing these interim measures. To implement that agreement, Ecology adopted WAC 173-539A as an emergency rule. Wash. St. Reg. 08-15-020 (July 8, 2008; adopting first version of WAC 173-539A as an emergency rule). An administrative rule adopted on an emergency basis is valid for only 120 days, and expires at the end of that period. RCW 34.05.350(2). When the first set of rules expired, Ecology adopted a second set of emergency rules on the same subject, also denominated as WAC 173-539A. Wash. St. Reg. 08-23-012 (Nov. 6, 2008; adopting second

¹ Our discussion of necessity uses forms of the word "withdraw" in very different ways. The word can be used to mean the act of removing groundwater through a well; however, RCW 90.54.050(2) authorizes Ecology to "withdraw various waters of the state from additional appropriations" using the word in the sense of making water no longer available for appropriation. In order to respond to your questions, we must discuss both withdrawal of water from the ground, and withdrawal of groundwater from availability for appropriation. Context makes the differing uses of the word clear.

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version of WAC 173-539A as an emergency rule). When those rules, in turn, expired at the end of 120 days, Ecology adopted a third version of WAC 173-539A, also as an emergency rule. Wash. St. Reg. 09-07-068 (Mar. 13, 2009; adopting third version of WAC 173-539A as an emergency rule). Like the first two versions, the third version of WAC 173-539A restricted, but did not prohibit, the use of water from new exempt withdrawals for residential purposes. WAC 173-539A-055.

At the time Prosecutor Zempel posed his questions, the third version of WAC 173-539A, was in effect. Prosecutor Zempel attached copies of them to his opinion request, and his questions specifically reference the approach to groundwater in the Upper Kittitas set forth in those rules.

Director Manning's questions are based on changed circumstances. After Prosecutor Zempel posed his questions, the third version of the emergency rules expired. Ecology adopted a fourth version of WAC 173-539A, which was dramatically different than the prior three. Wash. St. Reg. 09-15-107 (July 16, 2009; adopting fourth version of WAC 174-539A as an emergency rule). The fourth version states: "Beginning on the effective date of this rule, all public groundwaters within the upper Kittitas County are withdrawn from appropriation." WAC 173-539A-040 (fourth version, adopted July 16, 2009). Rather than continuing to authorize new exempt withdrawals under certain restrictions, as provided in the first three versions of WAC 173-539A, the fourth version withdraws the groundwater of the basin from new appropriation. This rule thus sets forth a moratorium against new exempt withdrawals within the Upper Kittitas for the duration of the fourth version of the emergency rules. "No new appropriation or withdrawal of groundwater shall be allowed, *including those exempt from permitting . . .*" WAC 173-539A-040 (emphasis added). The fourth version of the rule provides an exception to the prohibition against new uses for "water budget neutral projects" using a "trust water right program to offset the consumptive use associated with the proposed new use of groundwater." WAC 173-539A-050(2) (fourth version, adopted July 16, 2009). Like the earlier versions, however, the fourth version of WAC 173-539A is also an emergency rule, and we understand that consideration of permanent options continues. Director Manning's questions assume the fourth version of the rule as background, but ask about other options that might be considered.²

Accordingly, we consider both sets of questions together, because they seek our views regarding the legal options open to both Ecology and the county. Our role in providing this opinion is to address the legal issues you have asked about, but not attempt to resolve a specific dispute or comment on particular facts. We understand that your discussion of available options has continued while we have considered your opinion requests. The full range of legal options

² On July 31, 2009, Ecology adopted a fifth version of the rule that maintained the provisions of the fourth version discussed in this opinion, but added definitions and a clarification regarding the applicability of the rule. Wash. St. Reg. 09-16-075 (July 31, 2009).

you ask about remain appropriate for our consideration, even though the approach Ecology has taken in temporarily adopting emergency rules has evolved.³

ANALYSIS

- 1. Does RCW 90.44.050 restrict groundwater withdrawals without a permit for lawn and noncommercial gardening purposes to a subpart of the 5,000 gallons per day allocated to single or group domestic use, and thus also limit those domestic uses of the exemption to a remainder?**

No. RCW 90.44.050 provides four different purposes for which groundwater may be withdrawn without a permit. Each of those purposes is a separate exemption from the permit requirement. Use of water for lawns and noncommercial gardens not exceeding a half-acre in area does not count against the 5,000 gallon-per-day limit for single or group domestic use.

Prosecutor Zempel posed this question based on the third version of Ecology's administrative rules. That version included a provision that limited the amount of water that could be used for both domestic uses, and lawn and noncommercial garden use, to 5,000 gallons per day. WAC 173-539A-050(3) (third version).

Water law in Washington is premised upon the doctrine of "prior appropriation." *Campbell & Gwinn*, 146 Wn.2d at 7-8. "Under the prior appropriation doctrine, a water right may be acquired where available public water is appropriated for beneficial use, subject to existing rights." *Id.* at 8 (citing RCW 90.03.010). This is true of both surface water and groundwater. *Id.* "Subject to existing rights, all natural ground waters of the state . . . are hereby declared to be public ground waters and to belong to the public and to be subject to appropriation for beneficial use under the terms of this chapter and not otherwise." *Id.* (quoting RCW 90.44.040).

Statutes governing rights to groundwater date from legislation enacted in 1945. In part, those statutes extend prior law governing rights to surface water to the appropriation and beneficial use of groundwater. RCW 90.44.020. Applications for permits for rights to groundwater are accordingly governed by the same principles as applications for rights to surface water. "Thus, before a groundwater permit may be issued to a private party seeking to appropriate groundwater, Ecology must investigate and affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights or (4) be detrimental to the public welfare." *Campbell & Gwinn*, 146 Wn.2d at 8 (citing RCW 90.03.290).

³ Because both the third and the fourth versions of WAC 173-539A are relevant to different questions, we attach both versions for ease of reference, and indicate which version we cite in our analysis below.

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Your questions relate to a statutory exception to this requirement for a permit to withdraw groundwater:

After June 6, 1945, no withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: *EXCEPT, HOWEVER*, That any withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter: *PROVIDED, HOWEVER*, That the department from time to time may require the person or agency making any such small withdrawal to furnish information as to the means for and the quantity of that withdrawal: *PROVIDED, FURTHER*, That at the option of the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.

RCW 90.44.050.⁴

Under this statute, exempt withdrawals can be used for four different purposes. As explained in a recent appellate decision:

The overall scheme of [RCW 90.44.050] is to require a permit except for certain “small withdrawals.” The 1945 legislature defined a “small withdrawal” as (1) any amount of water for livestock, (2) any amount of water for a lawn or for a noncommercial garden of a half acre or less, (3) not more than five thousand

⁴ We recently summarized this statute as stating four points:

(1) a general rule requiring a water right permit for any withdrawal of public groundwater; (2) a proviso excepting identified categories of withdrawals from the general rule—i.e., allowing them without a permit; (3) a second proviso allowing Ecology to require persons making withdrawals excepted from the permit requirement to provide information about the means and amounts of such withdrawals; and (4) a third proviso giving persons, authorized by the statute to withdraw less than 5,000 gallons a day without a permit, the option to obtain a water right through the generally applicable permit process.

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gallons per day for domestic use, and (4) not more than five thousand gallons per day “for an industrial purpose.”

Kim v. Pollution Control Hearings Bd., 115 Wn. App. 157, 160, 61 P.3d 1211 (2003).

In his first question, Prosecutor Zempel asks whether withdrawals of water for the second listed purpose, “the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area,” are included within the 5,000 gallon-per-day limit for the third listed purpose, “single or group domestic uses.” RCW 90.44.050. The Court of Appeals’ explanation of the statute in *Kim*, quoted above, would seem to answer this question in the negative. As the court explained, the statute allows four separate exempt uses, and the use for watering lawns or noncommercial gardens is not limited by volume. *Kim*, 115 Wn. App. at 160.

Kim involved using water from an exempt withdrawal for purposes of a commercial nursery. *Id.* at 158. The question before the court was whether this constituted “an industrial purpose” within the meaning of the fourth-listed purpose in the statute. *Id.* at 160. We therefore do not rest our answer to the first question on *Kim* alone, since the quoted passage from that case is not the court’s holding.

It does, however, correctly reflect the ordinary language of the statute. As we explained in an earlier opinion, of the four categories of exempt withdrawals, “the third (single or group domestic use) and the fourth (industrial use) are expressly limited to withdrawals of less than 5,000 gallons a day.” AGO 2005 No. 17, at 4. We contrasted this phrasing with the statutory description of the exemption for stock watering, noting the absence of any language limiting the amount of water. AGO 2005 No. 17, at 4. The same is true for the exemption for watering lawns and noncommercial gardens. RCW 90.44.050. Our earlier conclusion that the 5,000 gallon-per-day limitation for domestic and industrial uses does not apply to stock watering would accordingly apply equally as well to the watering of lawns and noncommercial gardens. AGO 2005 No. 17, at 4.

Prosecutor Zempel’s question raises a slightly different issue, however.⁵ It asks not merely whether the 5,000 gallon-per-day limitation could be applied to the watering of lawns and gardens, but whether one exempt use is a subset of another exempt use. Prosecutor Zempel asks whether the use for watering lawns and noncommercial gardens comes within the exemption for domestic use, such that it would count toward the 5,000 gallon-per-day domestic limit. From a certain perspective, it would make sense to think of the watering of a lawn or garden as a type of domestic use of water. The word “domestic” can be used to mean, “connected with the supply,

⁵ We note that the question of whether the 5,000 gallon-per-day limit does or does not apply to stock watering is currently at issue in a pending case. “The attorney general has, since statehood, consistently declined to issue opinions on questions already in litigation before the courts, or where litigation is imminent, believing that in such a case the proper tribunal to resolve the question is the court itself.” AGLO 1971 No. 129, at 2. As noted in text, however, your question is subtly, but significantly, different than the question of whether the 5,000 gallon-per-day limit applies to stock watering. Not only do you ask about a different exemption, but you ask whether one exemption is subsumed within another.

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service, and activities of households and private residences,” a concept that could include watering the lawn or garden. *Webster’s Third New International Dictionary* 671 (2002). The Legislature listed lawn and garden watering as a separate exemption from domestic uses, however, and so we cannot reasonably conclude that one is included within the other. To do so would render the exemption for lawn and garden watering meaningless, and the Legislature is presumed not to include unnecessary language within a statute. *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). We therefore conclude that the exempt use for watering lawns and gardens is not limited to some portion of the 5,000 gallons per day that are allowed for domestic use.

This does not mean that the exemption for watering lawns and noncommercial gardens is unlimited. While the statute does not limit the volume of an exempt withdrawal of waters for this purpose, it does limit the acreage to which the water can be applied. The statute permits the use of an exempt withdrawal “for the watering of a lawn or of a noncommercial garden *not exceeding one-half acre in area.*” RCW 90.44.050 (emphasis added).

2. **If RCW 90.44.050 does not limit groundwater withdrawals for lawn and non-commercial gardening purposes to a subpart of the 5,000 gallon-per-day limit imposed upon single or group domestic use, may the Department of Ecology implement a rule imposing such a limit by permanently adopting the third version of WAC 173-539A, the Upper Kittitas Groundwater Rule?**

No. Prosecutor Zempel asks question 2 in the context of the third version of Ecology’s administrative rules. This question requires us to determine whether RCW 90.54.050(2) gives Ecology the authority to impose lower or different limits on the amount of exempt withdrawals of groundwater, rather than precluding new exempt withdrawals entirely. RCW 90.54.050(2) gives Ecology the authority to withdraw waters from availability for further appropriation, and not the authority to modify the statutory provisions addressing exempt withdrawals set forth by the Legislature in RCW 90.44.050.

The third version of the rule continued to allow new exempt withdrawals, but restricted the use of water differently than does RCW 90.44.050. As described in response to the first question, RCW 90.44.050 makes four types of uses of groundwater exempt from permitting requirements, limiting two of those types of uses to not more than 5,000 gallons of water per day and limiting a third based on acreage. *Kim*, 115 Wn. App. at 160. The third version of the rules restricted exempt withdrawals differently, including counting the use of water for purposes of lawns and noncommercial gardens within an overall limit on all domestic residential water use at a particular parcel. WAC 173-539A-050(3) (third version).

Ecology relied upon RCW 90.54.050(2) as its authority to restrict new exempt withdrawals without banning completely all new exempt withdrawals. WAC 173-539A-020 (third version). Prosecutor Zempel asks whether Ecology had the authority to do this.

The statute reads:

In conjunction with the programs provided for in RCW 90.54.040(1), whenever it appears necessary to the director in carrying out the policy of this chapter, the *department may by rule* adopted pursuant to chapter 34.05 RCW:

(1) Reserve and set aside waters for beneficial utilization in the future, and

(2) *When sufficient information and data are lacking to allow for the making of sound decisions, withdraw various waters of the state from additional appropriations until such data and information are available.* Before proposing the adoption of rules to withdraw waters of the state from additional appropriation, the department shall consult with the standing committees of the house of representatives and the senate having jurisdiction over water resource management issues.

Prior to the adoption of a rule under this section, the department shall conduct a public hearing in each county in which waters relating to the rule are located. The public hearing shall be preceded by a notice placed in a newspaper of general circulation published within each of said counties. Rules adopted hereunder shall be subject to review in accordance with the provisions of RCW 34.05.240.

RCW 90.54.050 (emphasis added).⁶

Ecology described its action in the third version of the rules as a “partial withdrawal” of the basin from new appropriations. WAC 173-539A-010(2) (third version); *see also* WAC 173-539A-020 (third version). However, the import of RCW 90.54.050 is that some water that was available for appropriation before Ecology acts will no longer be available after Ecology acts. RCW 90.54.050(2) (authorizing Ecology to withdraw water from “additional appropriations,” not to restrict the size of appropriations). This is not what happened under Ecology’s “partial withdrawal” approach. Both before and after Ecology adopted the third version of its rule, characterized as “partially withdrawing” the Upper Kittitas basin, new exempt withdrawals could commence. The only difference was how many wells it would take, and how many parcels would need to be developed, to pump the same amount of water. *See* AGO 1997 No. 6, at 6–7 (“Applying the permit requirement should not turn on an artificial choice of drilling several holes in the ground rather than one, where the withdrawal is for a single purpose.”). Ecology’s “partial withdrawal” did not “withdraw” the waters from availability for appropriation at all; it merely changed the amount of water available for particular parcels, potentially dividing the water among more parcels. All else being equal, it may be that Ecology’s approach would result

⁶ The statute cross-referenced in RCW 90.54.050 directs Ecology to adopt administrative rules to, among other things, “develop and implement . . . a comprehensive state water resources program which will provide a process for making decisions on future water resource allocation and use.” RCW 90.54.040(1).

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in a reduction in the overall amount of new groundwater uses in an area. However, RCW 90.54.050(2) does not give Ecology the authority to reduce groundwater use by whatever means it determines; rather, the statute provides to Ecology the authority to withdraw groundwater from appropriation.

This is not to say that exempt withdrawals are exempt from regulation. As discussed more fully in the context of your third question, RCW 90.44.050 merely exempts certain uses of groundwater from the *permitting* requirement. RCW 90.44.050 (merely exempting such uses from “this section”). Exempt withdrawals are not exempt from other regulatory authority found elsewhere in the water code. This principle, however, should not obscure the distinction between withdrawing water from new appropriations, on the one hand, and regulating the allocation of water among users, on the other. A water right obtained through a permitting process or by way of exempt use are equivalent. RCW 90.44.050 (right obtained through exempt use is “a right equal to that established by a permit”). We do not address Ecology’s regulatory authority applicable to all such rights after a water right is acquired, but we do conclude that Ecology lacks the authority to regulate the volume of a water right that may be obtained through the use of exempt withdrawals.

The “partial withdrawal” concept is also inconsistent with RCW 90.54.050 in that the statute authorizes the withdrawal of groundwater “*when sufficient information and data are lacking to allow for the making of sound decisions.*” RCW 90.54.050(2) (emphasis added). The lack of available information to make sound decisions relates to the decision-making process in which Ecology would ordinarily engage when evaluating applications for water rights, or in deciding to permanently close the basin. Other than in the context of exempt withdrawals, for which no permit is required, Ecology would ordinarily evaluate the availability of water and the potential for a new appropriation to impair an existing right, among other factors. *Campbell & Gwinn*, 146 Wn.2d at 8. The Legislature would not likely have intended to authorize Ecology to regulate the amount of water that may be withdrawn based upon a *lack* of information relevant to the subject, when the Legislature has exempted those withdrawals from the permitting process in the first place. RCW 90.44.050; *see also State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995) (the court’s fundamental objective in construing a statute is to ascertain and carry out the intent of the Legislature).

Ecology’s approach of “partially withdrawing” waters from availability for appropriation might be defended based upon an argument that its authority to “withdraw various waters of the state from additional appropriations” (RCW 90.54.050(2)) necessarily includes the lesser authority to restrict those withdrawals. *See Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 637, 201 P.3d 346 (2009) (concluding that a trial court’s authority under CR 41(d) to stay all proceedings included the lesser power to stay part of the proceedings); *see also State ex rel. Bowen v. Kruegel*, 67 Wn.2d 673, 680, 409 P.2d 458 (1965) (“because the greater includes the lesser” the state’s constitutional authority to classify cities and enlarge their limits by annexation includes the power to delegate annexation decisions to cities). The “partial withdrawal” contemplated by the third version of Ecology’s rules—that is, establishing lower limits on exempt withdrawals than those set forth in RCW 90.44.050—is not something lesser than, but

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included in, a complete withdrawal. Here, the third version of WAC 173-539A did not close the area in question to further appropriation, fully or partially. The rules merely limited the amounts of exempt withdrawals without any limit on the total amount of water withdrawn.

Finally, our task is not merely to construe RCW 90.54.050 in isolation; we must harmonize it with RCW 90.44.050. "The construction of two statutes shall be made with the assumption that the Legislature does not intend to create an inconsistency. Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme . . . which maintains the integrity of the respective statutes." *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (alteration in original) (citation and internal quotation marks omitted). RCW 90.54.050 and RCW 90.44.050 are best harmonized by concluding that RCW 90.54.050 authorizes Ecology to "withdraw various waters from the state from additional appropriations" (RCW 90.54.050(2)), but does not imply the authority to impose different limits upon exempt withdrawals than are stated in RCW 90.44.050.

3. **Does the Department of Ecology have authority under RCW 90.54.050(2) and related statutes to withdraw groundwater of the state from new appropriations for permitted uses and permit-exempt uses under RCW 90.44.050, but allow an exception for new appropriations that are mitigated in an equal or greater amount by existing trust water rights?**

Yes. Ecology has the statutory authority to withdraw groundwater in an area entirely from appropriation if it lacks sufficient information and data to allow for the making of sound decisions regarding water rights. This includes both new permitted and permit-exempt uses. Ecology may, at the same time, issue permits for new water rights or authorize new exempt withdrawals where the new appropriations of water are mitigated by existing trust water rights.

Director Manning asks about Ecology's authority to withdraw the Upper Kittitas from further appropriation of groundwater under RCW 90.54.050(2).⁷ This statute authorizes Ecology to withdraw water from availability for further appropriation when it lacks sufficient information and data upon which to make sound decisions. RCW 90.54.050(2).

Director Manning asks whether the withdrawal of water from new appropriations would apply to exempt uses, in addition to permitted uses of groundwater. It is readily apparent that if Ecology withdraws water from new appropriation under RCW 90.54.050(2), no new permits can be issued authorizing new appropriations. RCW 90.54.050(2) (referring to withdrawing waters from further appropriation). As discussed above, however, RCW 90.44.050 exempts certain uses of groundwater from the permitting requirement, and so we must consider whether the withdrawal of waters from appropriations applies to new exempt withdrawals.

⁷ RCW 90.54.050 is set forth in full in response to your second question.

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The plain language of RCW 90.44.050 makes clear that the withdrawal of water from further appropriation under RCW 90.54.050(2) applies to new exempt uses.⁸ RCW 90.44.050 begins by requiring a permit from Ecology before anybody can use groundwater, or drill or dig a well. The statutory provision for exempt uses is stated as an exception to that rule. RCW 90.44.050. The statute, however, exempts the exempt withdrawals only from “the provisions of *this section*.” RCW 90.44.050 (emphasis added). That is, exempt withdrawals are only exempted from the requirement of obtaining a permit; they are not made exempt from other laws governing groundwater rights. RCW 90.44.050. Furthermore, if Ecology exercises its authority under RCW 90.54.050, the water is withdrawn “from additional appropriations.” RCW 90.54.050(2). The right to an exempt withdrawal of groundwater is a water right equivalent to a right obtained through a permit. RCW 90.44.050; *see also Campbell & Gwinn*, 146 Wn.2d at 9 (referring to party making an exempt withdrawal as an “appropriator” of a water right). Since RCW 90.44.050 treats an exempt use as an “appropriation” of water, we therefore conclude that Ecology’s exercise of its authority to withdraw water from additional appropriation under RCW 90.54.050(2) affects future exempt wells in the same way as it affects other future appropriations of water rights.

Director Manning also asks whether a rule that withdraws water from further appropriation could also authorize new exempt withdrawals if the new withdrawals are mitigated in an equal or greater amount by existing trust water rights. This aspect of the question addresses the fourth version of Ecology’s rules for the Upper Kittitas. They provide that even though the waters of the basin have been withdrawn from availability for further appropriations, certain “water budget neutral” appropriations may still be made if the amount of consumptive use is offset by mitigation from trust water rights. WAC 173-539A-050 (fourth version).

Ecology is authorized by statute to acquire water rights by various means, other than condemnation, and apply them to a “trust water rights” program. RCW 90.38.020. The purpose of the program is to use the waters of the Yakima basin more efficiently, “to better satisfy both present and future needs for water in the Yakima river basin.” RCW 90.38.005(1)(c). The program makes water available for new uses by encouraging more efficient use of water by the holders of existing water rights. A “trust water right” is statutorily defined to mean “that portion of an existing water right, constituting net water savings, that is no longer required to be diverted for beneficial use due to the installation of a water conservation project that improves an existing system.” RCW 90.38.010(3). The term also includes any other water right acquired by Ecology under the authority of RCW 90.38 for the management of a trust water rights program in the Yakima River Basin.⁹ RCW 90.38.010(3). Trust water rights can be exercised if Ecology determines that “no existing water rights, junior or senior in priority, will be impaired[.]” RCW 90.38.040(5)(a).

⁸ RCW 90.44.050 is set forth in full in the course of our response to the first question.

⁹ RCW 90.38 is limited in its application to the Yakima River Basin. RCW 90.38.005(3).

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The rule provides that a person desiring to use groundwater shall either apply to Ecology for a permit, or if seeking to commence a permit-exempt use, submit a request for a determination that the proposed exempt use would be "water budget neutral." WAC 173-539A-050 (fourth version). In either case, the applicant would need to identify one or more water rights that would be placed into the water right trust program in order to offset the consumptive use that would result from the proposed new use of water, or show that the state already holds a suitable trust water right that has been designated for the proposed use. WAC 173-539A-050 (fourth version); *see also* WAC 173-539A-060 (fourth version) (describing expedited process of trust water rights applications). In other words, the fourth version of the rule contemplates new uses of water, either through a permit or through an exempt well, if that new use is fully mitigated by an applicable trust water right.

Application of the trust water rights program is not inconsistent with Ecology's decision to withdraw the waters from availability for new appropriation under RCW 90.54.050(2). The use of a trust water right to compensate for the effect of a new use of water, either based upon a permit or using an exempt withdrawal, results in no net impact or effect on appropriated water rights. It is therefore consistent with the purpose of the withdrawal authority in RCW 90.54.050(2) to preserve the status quo when insufficient information exists to make sound decisions. We, accordingly, answer this portion of Director Manning's question by concluding that Ecology may authorize new permitted or permit-exempt uses of water that are fully mitigated for consumptive use by trust water rights, even if Ecology has withdrawn the applicable area's waters from new appropriation under RCW 90.54.050(2).

- 4. If the answer to question 3 is "yes," does the Department of Ecology have authority, under RCW 90.54.050(2) and related statutes, to withdraw groundwater from new permit-exempt appropriations under a condition that withdraws water for new exempt uses above a certain quantity from appropriation, unless the amount of use above this quantity is mitigated in equal or greater amount by a trust water right?**

Our response to the fourth question is dictated by our answer to the second question. Director Manning poses the fourth question with reference to the fourth version of the rules, but otherwise focuses upon the same core issue as the second question. As we concluded above, Ecology's authority to withdraw water from new appropriations does not extend to imposing lower or different limits on the uses of water using new exempt withdrawals. This question assumes the authority to establish lower limits by requiring that any amount above such a limit be mitigated.

Director Manning asks not only about authority derived from RCW 90.54.050(2), but directs our attention generally to "related statutes" as well. For example, RCW 90.54.050(1) authorizes Ecology to "[r]eserve and set aside waters for beneficial utilization in the future[.]" RCW 90.54.040(1) authorizes Ecology to implement a comprehensive state water resources program, in order to make decisions on water resource allocation and use. We have identified nothing in these statutes that would alter our analysis and conclusions.

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5. **Does RCW 90.44 preempt the local legislative authority of a county from setting a numeric gallon-per-day limit or group-use limit upon the lawn and noncommercial gardening exemption from permitting?**
6. **Does RCW 90.44.050 preempt a county from using its available authority to limit new residential uses of groundwater (including both permitted and permit-exempt uses) proposed as part of a subdivision or building application to a specified quantity, unless the consumptive amount of use above this quantity is mitigated in an equal or greater amount? For purposes of this question, consumptive use is the amount of water by which the withdrawal would reduce flows or levels of any surface water.**

We must respectfully decline to respond to your fifth and sixth questions, because they raise an issue currently pending in litigation. It is the longstanding policy of this office to decline to provide opinions on matters that are the subject of litigation. *See supra* note 5.

Both questions ask whether counties are preempted from imposing limits on water usage. Prosecutor Zempel poses question 5 narrowly, focusing on whether a county may impose a numeric limit on the number of gallons per day that may be withdrawn for purposes of watering a lawn or noncommercial garden. Director Manning frames question 6 more broadly, asking whether a county may limit new residential uses of groundwater, both permitted and permit-exempt, under its general police powers or under its Growth Management Act or other authorities, such as the authority to act upon subdivision or building applications. The essential issue raised by both questions is whether state law precludes counties from regulating water usage by assigning to Ecology the authority to regulate water rights and by exempting certain withdrawals from the permitting process. In this regard, Director Manning calls our attention to, among other principles, the Growth Management Act, including a provision under which county comprehensive plans are to address the protection of surface water and groundwater resources. RCW 36.70A.070(5)(c)(iv).

This issue is raised in a case currently pending before Division III of the Washington Court of Appeals, in which the county is a party. *Kittitas County v. Kittitas County Conserv.*, No. 271234 (Wash. Ct. App. Div. III May 16, 2008). That case is before the court on review of a decision of the Growth Management Hearings Board for Eastern Washington. *Kittitas County Conservation Ridge v. Kittitas County*, No. 07-1-0015 (Final Decision And Order, Mar. 21, 2008). The board, in that case, found that the Growth Management Act provides counties with, not only the authority, but the responsibility to protect the quality and quantity of water. It concluded that the county's development regulations failed to adequately protect water quality and quantity, regarding the way in which it allowed exempt withdrawals to be used in new development. According to the board, the county did not comply with the Growth Management Act for this reason. *Id.* at 30. The county has appealed from the board's decision, arguing that its authority to regulate the use of water is preempted by state law. Opening Brief Of Kittitas County, at 29-30, *Kittitas County*, No. 271234 (Apr. 3, 2009) (citing RCW 90.44.050); *see also* Kittitas County Farm Bureau's Brief, at 2-3, *Kittitas County*, No. 271234 (June 25, 2009)

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(arguing that Ecology has the exclusive authority to regulate water rights); Opening Brief Of BIAW, at 28–29, *Kittitas County*, No. 271234 (Apr. 23, 2009) (same). In response, the opposing parties contend that statutes governing Ecology’s authority to regulate water rights, including RCW 90.44.050 governing exempt wells, can be harmonized with the Growth Management Act and the authority it grants to counties to protect water resources. Brief Of Respondents Kittitas County Conservation, Ridge, and Futurewise, at 29-33, *Kittitas County*, No. 271234. They argue that the county not only had the authority, but the duty, to preclude excessive withdrawals of groundwater through exempt withdrawals. *Id.* at 32-33.

Questions five and six thus present an issue that is already pending before the Court of Appeals. For this reason, we respectfully decline to address these questions.

7. Could the Department of Ecology and a county impose such a limit by entering into an agreement?

The Interlocal Cooperation Act authorizes state and local agencies to enter into agreements to jointly perform any function that those agencies have the authority to perform. RCW 39.34.030(1), .080. Such agreements, however, are not a new source of authority, but merely provide a method of exercising authority that both contracting parties already have by operation of law. As we have observed: “A crucial prerequisite to an interlocal agreement is that each party must independently have the authority to enter into the services which are the subject of the agreement” AGO 2004 No. 2, at 4 n.9. As our analysis regarding questions 2 and 4 demonstrates, Ecology lacks the authority to establish different limits on exempt withdrawals than those set forth in RCW 90.44.050. Whether the county has the authority to establish such limits independently is a matter presently in litigation. *See* Questions 5, 6 *supra*.

We trust that the foregoing will be useful to you.



ROB MCKENNA
Attorney General

A handwritten signature in cursive script that reads "Jeffrey T. Even".

JEFFREY T. EVEN
Deputy Solicitor General
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wros
enclosure

WSR 09-15-107**EMERGENCY RULES****DEPARTMENT OF ECOLOGY**

[Order 09-07 -- Filed July 16, 2009, 8:31 a.m. , effective July 16, 2009, 8:31 a.m.]

Effective Date of Rule: Immediately.

Purpose: This fourth emergency rule establishes a partial withdrawal of ground water within a portion of WRIA 39 in Kittitas County, Washington. The partial withdrawal and restrictions are designed to prevent new uses of water that negatively affect flows in the Yakima River and its tributaries. The withdrawal allows for continued development using the ground water exemption or new permits when the new consumptive use is mitigated by one or more pre-1905 water rights held by ecology in the trust water right program of equal or greater consumptive quantity.

Statutory Authority for Adoption: RCW 90.54.050.

Other Authority: Chapter 43.27A RCW.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: The Yakima Basin is one of the state's most water-short areas. Water rights with priority dates as old as 1905 were shut off during the 2001 and 2005 droughts, and during 2004 when USBR prorated May 10, 1905, water rights. The town of Roslyn's municipal supply and another one hundred thirty-three single domestic, group domestic, and municipal water systems throughout the basin are subject to curtailment when USBR prorates the May 10, 1905, water rights. Water supply in the Yakima Basin is limited and overappropriated. Western portions of Kittitas County are experiencing rapid growth and this growth is being largely served by exempt wells. Exempt wells in this area may negatively affect the flow of the Yakima River or its tributaries.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0;

Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: July 16, 2009.

Jay J. Manning

Director

OTS-2512.2

Chapter 173-539A WAC

UPPER KITTITAS EMERGENCY GROUND WATER RULE

NEW SECTION

WAC 173-539A-010 Purpose. The purpose of this rule is to withdraw from appropriation all unappropriated ground water within upper Kittitas County during the pendency of a ground water study. New ground water withdrawals will be limited to those that are water budget neutral, as defined in this rule.

□

NEW SECTION

WAC 173-539A-020 Authority. RCW 90.54.050 provides that when lacking enough information to support sound decisions, ecology may withdraw waters of the state from new appropriations until sufficient information is available. Before withdrawing waters of the state, ecology must consult with standing committees of the legislature on water management. Further, RCW 90.44.050 authorizes ecology to establish metering requirements for exempt wells where needed.

In 1999, ecology imposed an administrative moratorium on issuing any ground water permits for new consumptive uses in the Yakima basin, which includes Kittitas County. That moratorium did not apply to exempt withdrawals. In 2007, ecology received a petition seeking unconditional withdrawal of all unappropriated ground water in Kittitas County until enough is known about potential effects from new exempt wells on senior water rights and stream flows. Ecology consulted with standing committees of the Washington state legislature on the petition and proposed withdrawal. Ecology rejected the proposed unconditional withdrawal, and instead signed a memorandum of agreement (MOA) with Kittitas County. Ecology later invoked the dispute resolution process under the MOA. The MOA was terminated by ecology on July 1, 2009.

□

NEW SECTION

WAC 173-539A-030 Definitions. The definitions provided below are intended to be used only for this chapter.

"Ecology" means the department of ecology.

"Exemption" or "ground water exemption" means the exemption from the permit requirement for a withdrawal of ground water provided under RCW 90.44.050.

"Total water supply available" means the amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

"Upper Kittitas County" is the area of Kittitas County delineated in WAC 173-539A-990.

"Water budget neutral project" means an appropriation or project where withdrawals of ground water of the state are proposed in exchange for discharge of at least an equivalent amount of water from other water rights that are placed into the trust water right program.

□

NEW SECTION

WAC 173-539A-040 Withdrawal of unappropriated water in upper Kittitas County. Beginning on the effective date of this rule, all public ground waters within the upper Kittitas County are withdrawn from appropriation. No new appropriation or withdrawal of ground water shall be allowed, including those exempt from permitting, except as provided in the following sections.

□

NEW SECTION

WAC 173-539A-050 Water budget neutral projects. (1) Persons proposing to use ground water shall apply to ecology for a permit to appropriate public ground water or, if seeking to use the ground water exemption, shall submit to ecology a request for determination that the proposed exempt use would be water budget neutral.

(2) As part of a permit application to appropriate public ground water or a request for a determination of water budget neutrality, applicants shall identify one or more water rights that would be placed into the trust water right program to offset the consumptive use associated with the proposed new use of ground water.

(3) Applications for public ground water or requests for a determination of water budget neutrality will be processed concurrent with trust water right applications necessary to achieve water budget neutrality, unless:

(a) A suitable trust water right is already held by the state in the trust water right program; and

(b) The applicant or requestor has executed an agreement to designate a portion of the trust water right for mitigation of the applicant's proposed use.

(4) No new exempt withdrawal under RCW 90.44.050 may be commenced unless ecology has approved a request for determination that the proposed exempt use would be water budget neutral. Such a request must comply with subsections (2) and (3) of this section.

□

NEW SECTION

WAC 173-539A-060 Expedited processing of trust water applications, and new water right applications or requests for a determination of water budget neutrality associated with trust water rights. (1) RCW 90.38.040 authorizes ecology to use the trust water right program for water banking purposes within the Yakima River Basin.

(2) Ecology may expedite the processing of an application for a new surface water right, a request for a determination of water budget neutrality, or a ground water right hydraulically related to the Yakima River, under Water Resources Program Procedures PRO-1000, Chapter One, including any amendments thereof, if the following requirements are met:

(a) The application or request must identify an existing trust water right or pending application to place a water right in trust, and that such trust water right would have an equal or greater contribution to flow during the irrigation season, as measured on the Yakima River at Parker that would serve to mitigate the proposed use. This trust water right must have priority earlier than May 10, 1905, and be eligible to be used for instream flow protection and mitigation of out-of-priority uses.

(b) The proposed use on the new application or request must be for domestic, group domestic, lawn or noncommercial garden, municipal water supply, stock watering, or industrial purposes of use within the Yakima River Basin. The proposed use must be consistent with any agreement governing the use of the trust water right.

(3) If an application for a new water right or a request for a determination of water budget neutrality is eligible for expedited processing under subsection (2) of this section and is based upon one or more pending applications to place one or more water rights in trust, processing of the pending trust water right application(s) shall also be expedited.

(4) Upon determining that the application or request is eligible for expedited processing, ecology will do the following:

(a) Review the application or request to withdraw ground water to ensure that ground water is available from the aquifer without detriment or injury to existing rights, considering the mitigation offered.

(b) Condition the permit or determination to ensure that existing water rights, including instream flow water rights, are not impaired if the trust water right is from a different source or located downstream of the proposed diversion or withdrawal. The applicant or requestor also has the option to change their application to prevent the impairment. If impairment cannot be prevented, ecology must deny the permit or determination.

(c) Condition each permit or determination to ensure that the tie to the trust water right is clear, and that any constraints in the trust water right are accurately reflected.

(d) Condition or otherwise require that the trust water right will serve as mitigation for impacts to "total water supply available."

□

NEW SECTION

WAC 173-539A-070 Educational information, technical assistance and enforcement. (1) To help the public comply with this chapter, ecology may prepare and distribute technical and educational information on the scope and requirements of this chapter.

(2) When ecology finds that a violation of this rule has occurred, we shall first attempt to achieve voluntary compliance. One approach is to offer information and technical assistance to the person, in writing, identifying one or more means to legally carry out the person's purposes.

(3) To obtain compliance and enforce this chapter, ecology may impose such sanctions as suitable, including, but not limited to, issuing regulatory orders under RCW 43.27A.190 and imposing civil penalties under RCW 90.03.600.

□

NEW SECTION

WAC 173-539A-080 Appeals. All of ecology's final written decisions pertaining to permits, regulatory orders, and other related decisions made under this chapter are subject to review by the pollution control hearings board in accordance with chapter 43.21B RCW.

□

NEW SECTION

WAC 173-539A-090 Repeal. If ecology intends to lift the administrative moratorium on issuing any ground water permits for new consumptive uses in the Yakima basin, it shall prior to doing so issue a notice repealing this chapter.

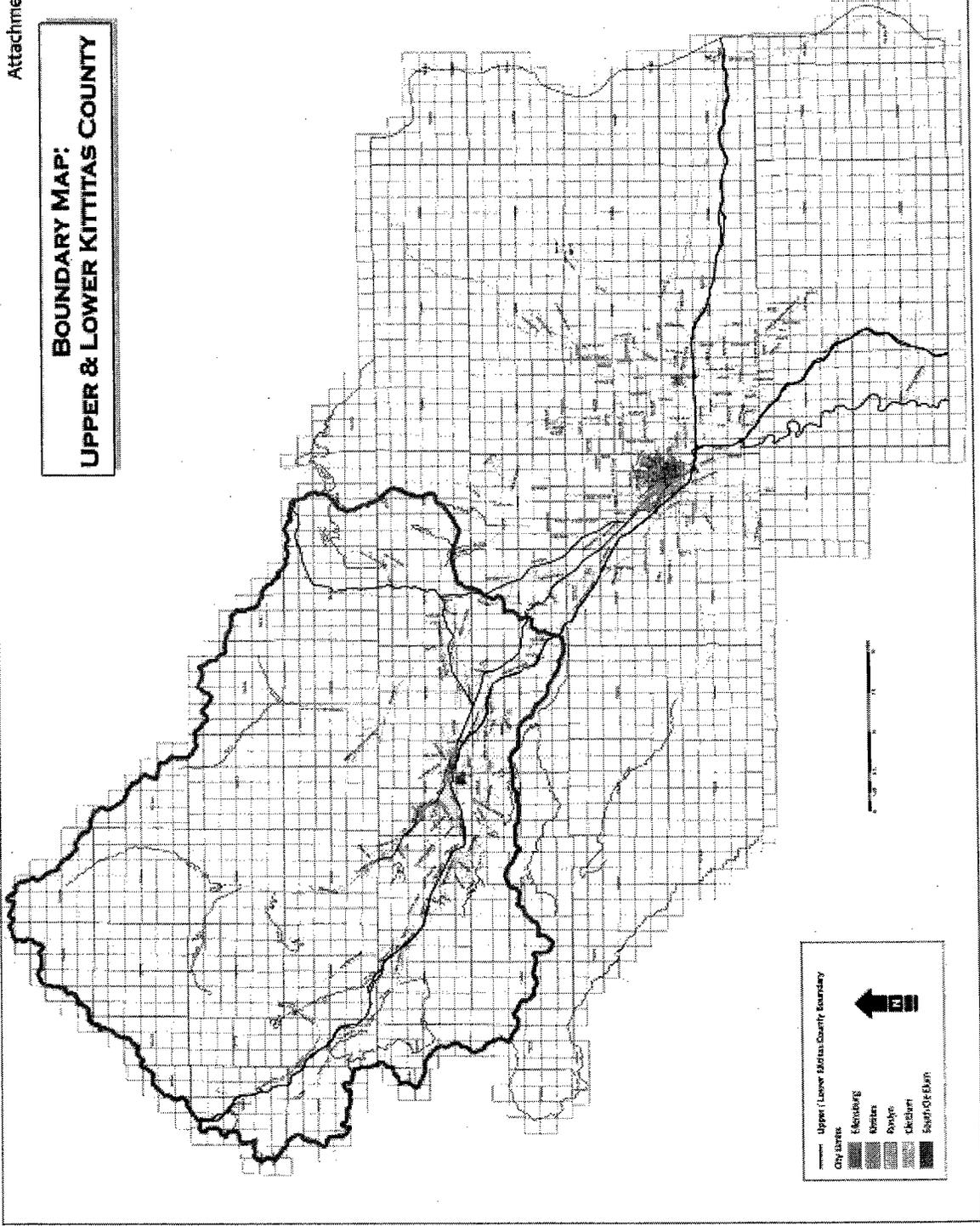
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NEW SECTION

WAC 173-539A-990 Appendix 1 -- Map of upper Kittitas County boundaries.

Attachment 1

**BOUNDARY MAP:
UPPER & LOWER KITITAS COUNTY**



□

WSR 09-07-068**EMERGENCY RULES****DEPARTMENT OF ECOLOGY**

[Order 08-11 -- Filed March 13, 2009, 8:57 a.m. , effective March 13, 2009, 8:57 a.m.]

Effective Date of Rule: Immediately.

Purpose: This third emergency rule establishes a partial withdrawal of ground water within a portion of WRIA 39 in Kittitas County, Washington for the purpose of implementing a memorandum of agreement (MOA) entered into with Kittitas County on April 7, 2008. The partial withdrawal and restrictions are designed to minimize the potential for a new use of water that negatively affect flows in the Yakima River and its tributaries and does this in a way that minimizes effects on economic development.

Statutory Authority for Adoption: RCW 90.54.050.

Other Authority: Chapter 43.27A RCW.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: The Yakima Basin is one of the state's most water-short areas. Water rights with priority dates as old as 1905 were shut off during the 2001 and 2005 droughts, including the town of Roslyn's municipal supply. Water supply in the Yakima Basin is limited and over-appropriated. Western portions of Kittitas County are experiencing rapid growth and this growth is being largely served by exempt wells. Exempt wells in this area may negatively affect the flow of the Yakima River or its tributaries.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 12, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: March 13, 2009.

Jay J. Manning

Director

OTS-2053.3

Chapter 173-539A WAC

UPPER KITTITAS GROUND WATER RULE

NEW SECTION

WAC 173-539A-010 Purpose. (1) This chapter implements the exempt well management measures identified in the memorandum of agreement between Kittitas County and the department of ecology (ecology) by creating a partial withdrawal of ground water within upper Kittitas County that limits the use of the ground water exemption (RCW 90.44.050) for residential purposes. This chapter also requires measuring of new uses for residential purposes of ground water under the exemption within all of Kittitas County.

(2) Ecology designed the partial withdrawal and related requirements to minimize the adverse effects on flows in the Yakima River and its tributaries, while minimizing adverse effects on the local economy.

(3) Based on technical research, Kittitas County may consider the potential for impairment of existing water rights, along with any other environmental impacts, during review of certain land use applications. The county may require mitigation or other ways to manage risks to reduce or eliminate impacts.

(4) The requirements in this chapter do not apply to areas outside of Kittitas County. Other than the metering requirement of WAC 173-539A-070, the requirements of this chapter apply only in Upper Kittitas County.

□

NEW SECTION

WAC 173-539A-020 Authority. RCW 90.54.050 provides that when lacking enough information to support sound decisions, ecology may withdraw waters of the state from new appropriations until sufficient information is available. Before withdrawing waters of the state, ecology must consult with standing committees of the legislature on water management. Further, RCW 90.44.050 authorizes ecology to establish metering requirements for exempt wells where needed.

In 2007, ecology received a petition seeking unconditional withdrawal of all unappropriated ground water in Kittitas County until enough is known about potential effects from new exempt wells on senior water rights and stream flows. Ecology consulted with standing committees of the Washington state legislature on the petition and proposed withdrawal. Ecology then rejected the proposed unconditional withdrawal, and instead signed a memorandum of agreement (MOA) with Kittitas County, which this chapter implements by establishing a partial withdrawal and other requirements.

□

NEW SECTION

WAC 173-539A-030 Definitions. The definitions provided below are intended to be used only for this chapter.

"Applicant" as used herein includes the owner(s) of the parcels that are the subject of the application.

"Application" as used in WAC 173-539A-050 and 173-539A-055 means a land use application to Kittitas County requesting:

- A subdivision;
- Short subdivision;
- Large lot subdivision;
- Administrative or exempt segregation;
- Binding site plan; or
- Performance based cluster plat.

"Common ownership" means any type or degree of legal or equitable property interest held by an applicant in any proximate parcel. Common ownership also includes a joint development arrangement between the applicant and any owner of a proximate parcel. A joint development arrangement must involve 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 the 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, and construction (include road construction), and agreements for common use of structures, facilities, lands, water, sewer and other infrastructure, covenants, building materials, or equipment.

"Ecology" means the department of ecology.

"Exemption" or **"ground water exemption"** means the exemption from the permit requirement for a withdrawal of ground water provided under RCW 90.44.050.

"Group use" means use of the ground water exemption for two or more parcels. A group use includes use of the exemption for all parcels of a proposed development and all parcels that are proximate and held in common ownership with the proposed new residential development where use of the exemption commenced or will commence within five years of the date the current application was filed.

"Hydrogeologic assessment" means the report prepared by a licensed hydrogeologist and/or others approved by Kittitas County in consultation with ecology addressing the elements identified in WAC 173-539A-060.

"Lands" refers to both singular "land" and plural "lands."

"MOA" or "Memorandum of Agreement" means the "Memorandum of Agreement between Kittitas County and the State of Washington, Department of Ecology Regarding Management of Exempt Ground Water Wells in Kittitas County" of April 7, 2008.

"New residential development" means any division of land involving an application that vested after July 8, 2008.

"New use of the ground water exemption" means a use begun on or after July 8, 2008.

"New use for residential purposes" means any new use of the ground water exemption for a new or additional residential purpose associated with an existing or new structure.

"Parcel" means any parcel, land, tract or other unit of land.

"Proximate" means all parcels that either:

- Have any common boundary;
- Are separated only by roads, easements, or parcels in common ownership; or
- Are within five hundred feet at the nearest point.

"Residential purposes" means all domestic use and/or lawn and noncommercial garden use of water on the parcel(s) in question under the ground water exemption. A dwelling unit is not required for a residential purpose to be present. Domestic use is a separate and distinct purpose of use from lawn and noncommercial garden use. Each use may have a different commencement date under the exemption. For purposes of this chapter all use limits refer to combined domestic and lawn and noncommercial garden use. All use of the lawn and noncommercial garden use may not exceed a one-half acre as required in RCW 90.44.050 whether such use is in connection with a group domestic use or a single domestic use.

"Total water supply available" means the amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

"Upper Kittitas County" is the area of Kittitas County delineated in WAC 173-539A-990.

"Vested" means that under the applicable land use laws an application is considered complete such that the application shall generally be reviewed under laws existing at the time of vesting, unless a special exception may apply. All applications for plat approvals including preliminary plat approvals which were approved by Kittitas County prior to July 8, 2008, are considered to be vested.

□

NEW SECTION

WAC 173-539A-050 New use of the exemption for new residential developments in upper Kittitas County. (1) This section applies only to applications for residential developments that vest or vested on or after July 8, 2008.

(2) Any new residential development within upper Kittitas County must not use more than 5,000 gallons per day (gpd) from the ground water exemption for residential purposes. When filing an application for a new residential development, the applicant must file a sworn statement with ecology and Kittitas County that:

(a) Identifies all parcels that are part of the residential development;

(b) Identifies all joint development arrangements with respect to proximate parcels; and

(c) States that to the best of the applicant's knowledge and belief all such parcels and arrangements have been identified. If the application is approved, such statement shall be recorded against all such parcels in which the applicant holds a legal or equitable property interest. The residential development includes all parcels that are the subject of the application or a larger group use.

(3) For use of the 5,000 gpd exemption limit for a new residential development, ecology and the county will assume each parcel will use 1,250 gpd for residential purposes, unless a condition is recorded as a covenant to use a lesser amount of the group withdrawal. If no exempt lawn or noncommercial garden watering will occur, and a covenant so restricting such use is placed on the parcel, ecology and the county will assume each parcel will use a maximum of 350 gpd unless a condition is recorded as a covenant to use a lesser amount of the group withdrawal.

□

NEW SECTION

WAC 173-539A-055 New uses of the exemption for residential purposes in upper Kittitas County. (1) **New uses for residential purposes on parcels created after March 28, 2002, in upper Kittitas County:**

(a) **Parcels less than ten acres** created after March 28, 2002, may use water under the ground water exemption for residential purposes in an amount that does not exceed the lowest amount below:

(i) The amount stated in conditions or covenants on water use placed on the plat that created the parcel;

(ii) The amount stated in conditions on water use specified in the permit/approval of the public water system that is intended to serve the parcel; or

(iii) 1,250 gpd.

(b) **Parcels ten acres and greater** created after March 28, 2002, may use water under the ground water exemption for residential purposes in an amount that does not exceed the lowest amount below:

(i) The amount stated in conditions or covenants on water use placed on the plat that created the parcel;

(ii) The amount stated in conditions on water use specified in the permit/approval of the public water system that is intended to serve the parcel; or

(iii) An average rate of use of 125 gpd per acre up to a maximum of 5,000 gpd.

(c) This section does not restrict an owner from using more water through other legal permitted water rights.

(2) New uses for residential purposes on parcels created on or before March 28, 2002, in upper Kittitas County:

(a) Parcels created on or before March 28, 2002, must use no more than 5,000 gpd for all residential purposes.

(b) Such use may be further restricted by covenants or conditions on water use set forth in the plat, a land use approval, or a public water system approval, or by any other legal restriction that applies to such use.

□

NEW SECTION

WAC 173-539A-060 Hydrogeologic assessment. (1) If Kittitas County requires a hydrogeologic assessment, the hydrogeologic assessment must be:

(a) Submitted to Kittitas County and ecology in the form of a written report, signed by a licensed hydrogeologist and/or others approved by Kittitas County in consultation with ecology; and

(b) Available as part of the project review under the State Environmental Policy Act.

(2) The hydrogeologic assessment may be based on available existing information or other new information as required by Kittitas County.

(3) The required elements of the report are as follows:

(a) Scope of the proposal including all of the following:

- The location;
- Proposed water source(s);
- Water use amounts; and
- The timing of the proposed use.

(b) General description including all of the following:

- The local geologic, hydrogeologic, and hydrologic setting;
- Identification of surface water and ground water features;

- Water sources;
- Recharge/discharge characteristics; and
- Surface water and ground water interactions.

(c) Site-specific description.

(d) Inventory and description of all of the following:

- All state issued surface water and ground water rights;
- All state issued surface water and ground water claims; and
- Wells located within a one-year and five-year area of pumping influence.

(e) Identification and description of existing surface water or ground water withdrawals that may be adversely affected by the proposed use of the ground water exemption.

(f) The preparer's written professional opinion on the potential of the proposal to cause impacts to the natural and built environment including surface water flows.

(g) A statement of the report's limitations regarding its intended use, including scope, extent, and available data.

□

NEW SECTION

WAC 173-539A-070 Measuring and reporting water use. (1) For all uses of the ground water exemption for residential purposes within upper Kittitas County that commence after July 8, 2008, or within the remainder of Kittitas County that commence after the effective date of this rule, a source meter must be installed at the point of withdrawal, in compliance with such requirements as prescribed by Kittitas County and WAC 173-173-100.

(2) Metering data must be collected and reported within thirty days of the end of the recording period to Kittitas County and ecology. The following table shows the recording periods and the due dates for each metering report:

Recording Period	Report Due No Later Than:
October 1 - March 31	April 30
April 1 - June 30	July 30
July 1 - July 31	August 30
August 1 - August 31	September 30
September 1 - September 30	October 30

□

NEW SECTION

WAC 173-539A-080 Expedited processing of trust water applications and new water right applications associated with trust water rights. (1) RCW 90.42.100 authorizes ecology to use the trust water right program for water banking purposes within the Yakima River Basin.

(2) Ecology may expedite the processing of an application for a new surface water right or a ground water right hydraulically related to the Yakima River, under Water Resources Program Procedures PRO-1000, Chapter One, including any amendments thereof, if the following requirements are met:

(a) The application must identify an existing trust water right or pending application to place a water right in trust, if that such trust water right would have an equal or greater contribution to flow during the irrigation season, as measured on the Yakima River at Parker that would serve to mitigate the proposed use. This trust water right must have priority earlier than May 10, 1905, and be eligible to be used for instream flow protection and mitigation of out-of-priority uses.

(b) The proposed use on the new application must be for domestic, group domestic, lawn or noncommercial garden, and/or municipal water supply purposes of use within the Yakima River Basin. The proposed use must be consistent with any agreement governing the use of the trust water rights.

(3) If an application for a new water right is eligible for expedited processing under subsection (2) of this section and is based upon one or more pending applications to place one or more water rights in trust, processing of the pending trust water right application(s) shall also be expedited.

(4) Upon determining that the application is eligible for expedited processing ecology will do the following:

(a) Review the application to withdraw ground water to ensure that ground water is available from the aquifer without detriment or injury to existing rights, considering the mitigation offered.

(b) Condition the permit to ensure that existing water rights, including instream flow water rights, are not impaired if the trust water right is from a different source or located downstream of the proposed diversion or withdrawal. The applicant also has the option to change their application to prevent the impairment. If impairment cannot be prevented, ecology must deny the permit.

(c) Condition each permit to ensure that the tie to the trust water right is clear, and that any constraints in the trust water right are accurately reflected.

(d) Condition or otherwise require that the trust water right will serve as mitigation for impacts to "total water supply available."

□

NEW SECTION

WAC 173-539A-090 Educational information, technical assistance and enforcement. (1) To help the public comply with this chapter, ecology and Kittitas County may prepare and distribute technical and educational information on the scope and requirements of this chapter.

(2) When ecology finds that a violation of this rule has occurred, we shall first attempt to achieve

voluntary compliance. One approach is to offer information and technical assistance to the person, in writing, identifying one or more means to legally carry out the person's purposes.

(3) To mitigate for potential impact of an exempt use to the total water supply available and to avoid potential future regulation in favor of senior water rights, ecology encourages exempt users to participate in a mitigation program through the Yakima Basin Pilot Water Bank or to obtain a senior water right.

(4) To obtain compliance and enforce this chapter, ecology may impose such sanctions as suitable, including, but not limited to, issuing regulatory orders under RCW 43.27A.190 and imposing civil penalties under RCW 90.03.600.

□

NEW SECTION

WAC 173-539A-100 Appeals. All of ecology's final written decisions pertaining to permits, regulatory orders, and other related decisions made under this chapter are subject to review by the pollution control hearings board in accordance with chapter 43.21B RCW.

□

NEW SECTION

WAC 173-539A-110 Regulation review. (1) The exempt well management requirements in this chapter will be reviewed after the upper county ground water study is complete or within five years of rule adoption whichever occurs first and may be revised as part of a long-term management program. Ecology and Kittitas County intend to develop the long-term management program after they have completed a ground water study that focuses on portions of Kittitas County not fully addressed by the current USGS ground water study of the Yakima River Basin.

(2) Ecology may review this chapter whenever:

(a) New information is available;

(b) A change of condition occurs;

(c) Statutory changes warrant the review; or

(d) Reviews described in WAC 173-539A-060 show changes are necessary.

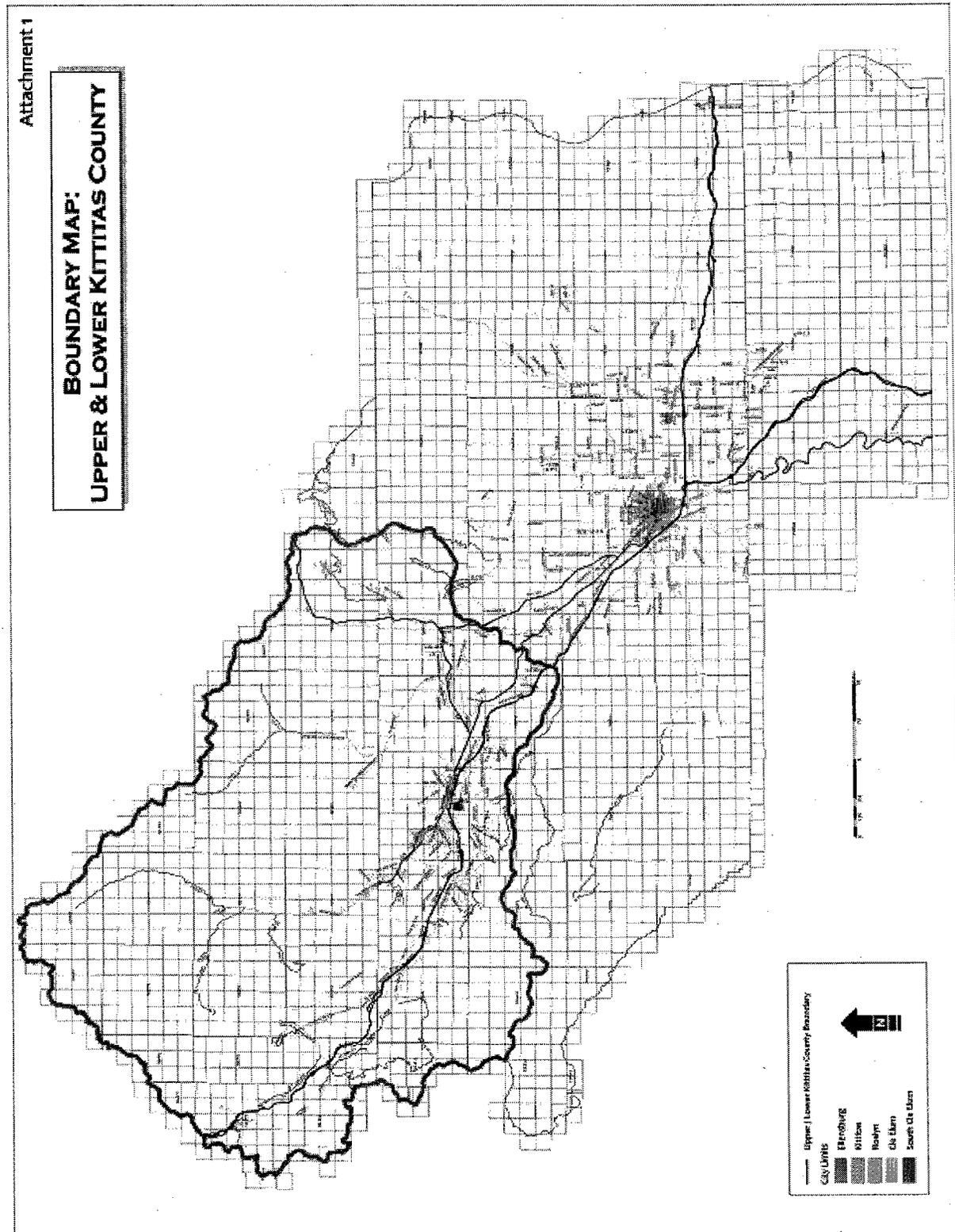
(3) Kittitas County, or interested citizens may request that ecology exercise its discretion to review this chapter at any time.

(4) If ecology begins a review of this chapter, it will consult with Kittitas County.

□

NEW SECTION

WAC 173-539A-990 Appendix 1 -- Map of upper Kittitas County boundaries.



□

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**ISF RULE
PRELIMINARY COST BENEFIT, MAXIMUM NET
BENEFIT, AND LEAST BURDENSOME ANALYSIS**

Dennis Schultz

7/5/09

GENERAL COMMENTS

- **This analysis does not present any other alternatives other than DOE's internally developed plan. This gives our locally elected officials no choice but to accept DOE's plan or face the stoppage of all building permits in the area.**
- **All costs of this rule will fall upon the property owners and the small businesses within the Area.**
- **The Conservation Standard is applied to all the sub-basins in the Area, yet, it is only needed in part of the Area. This puts an unneeded economic burden on most of the Area where it is not needed. What is the cost of this burden?**
- **The whole basis of this rule is based on the theory of 'Instantaneous Conductivity' between ground water and the streams. (If a gallon of water is drawn from a well, it instantaneously lowers the level of the basin stream by a gallon), regardless of the distance from the stream or the properties of the aquifer it is drawing from. It also assumes that wells located at higher elevations will draw water uphill into the wells.**
- **This county is not threatened with runaway development. In the rural areas it is almost impossible to subdivide and develop property.**
- **The growth projections used, are based on a growth boom 2006 and earlier. In the three years since then, growth has slowed to a point that the CETED projections have not been met.**

PROBABLE COSTS

- **Loss of land value**
 1. **It ignores the loss of land value in the Chimacum Basin. There are over 500 un-built residential properties in the basin. At least 400 of these properties will become un-buildable due to lack of water. 400 properties of at least 5 acres (many are 10 and 20 acres) worth \$20,000 per acre at current prices equate to a real estate value of over \$40,000,000. With this rule their value will drop to \$200,000 (current unusable open space value). This is a loss of \$39,800,000 that is missing from the analysis.**
 2. **People have purchased land or plan to purchase land in rural areas to have a ‘rural lifestyle’. This lifestyle usually includes plans to have a garden, or an orchard, or to raise some livestock, or to start a small farm. The proposed 350gpd allowance will not allow them to realize these dreams. This will drive down the value of this land as it is no longer desirable and potential buyers will purchase property elsewhere. And the people who have already purchased land will lose a large part of their equity in their land. Perhaps the Real Estate industry can come up with a rough estimate of the amount of this loss – both in lower property values and lost sales.**
- **COST to Agriculture**
 1. **This rule will have a major impact on Agriculture in the Area. Most of the area will not have any water for Agriculture. The future of Agriculture in Jefferson County is in the small specialty farm business. This type of farm usually can exist using a 5,000gpd Permit Exempt Well. The people starting these farms usually**

- do not have the financial resources to make a large investment and the time to wait for a Water Right.
2. Small farms of this type are usually located away from the rich bottomland along the creek beds because of the unavailability and high cost of these lands.
 3. Allowing only a limited number of Ag wells in only a few areas will deter many of these farms from starting.
 4. The local Farmers Markets are dependent on having a number of new small farmers entering the market every year as older farmers retire or develop a customer base to sell to outside of the farmers markets. This will cause a decline and possibly the end to some Farmers Markets.
- Cost of studies and permits
 1. The cost to have a study showing ground water ‘discontinuity’ or to prepare and implement a mitigation plan is beyond the means of most property owners. Yet these are the alternatives given to get more water.
 2. The cost of additional permits for such things as rainwater catchment and/or other water storage systems is not well defined.

Table 2

The Cost Summary is missing any data for loss of value in real estate as outlined above. Some of this loss can be directly quantified (Chimacum Basin) and some are very apparent, but are hard to quantify. These losses will become important as land values decrease due to this Rule. This Table is incomplete – it needs to be redone.

BENEFIT ANALYSIS

This is based on Permit Exempt wells pumping 5,000gpd and instantaneously reducing stream flows by that amount. It also assumes that wells will be pumped at the 5,000gpd rate continuously. This is a myth and has been disproven by a few studies in the area.

Table 3

The benefits in Table 3 are based on 100% consumptive use by Permit Exempt wells. There is no data available for actual withdrawal rate for the existing Permit Exempt wells. Common sense says that actual use is far less. There is no good data determining just what percentage of withdrawals are consumptive. Appendix 5 is flawed in its assumption that 90% of water withdrawn is consumptive. Most of the irrigation water drawn from Permit Exempt wells is used for drip or spot watering. A significant amount of this water is returned to the ground. There just isn't enough water to run rows of sprinklers or to flood irrigate in this area. Thus Table 3 is flawed in its assessment of water used due to its assumption of Hydraulic Continuity and consumptive use of water.

Availability without the Reserves

- Assumes that all sub-basins would be 'water short' and will require some type of storage. In fact most of the basins have adequate water for future development and will never need a catchment system. And, some of the areas do not have enough annual rainfall to support or fill a catchment system that would hold a 3 months supply.**

- It assumes that all 690 new homes will have to put in water storage at a cost of at least \$16,250,000.
- The claim of this as benefit from the reserves is totally erroneous! Remove it from the table!

Improved Water Management

This is supposed to be a Water Management Plan. It is in fact a set of water use restrictions. What is really needed is a study to determine where water shortage is a problem and where water is abundant. We need to know how to better use our water. A ‘One Size Fits All’ solution is no solution.

APPENDIX 5

The major error in this analysis is the assumption and use of ‘Instantaneous Hydraulic Continuity’ for the analysis and then putting in a disclaimer that they know this is not true. This makes the whole analysis an academic exercise and worthless in the real world.

The use of the cost of the Marrowstone Island water system for supplying water to the SIPZ areas is probably unrealistic. The Marrow stone system flows from Chimacum, through Indian Island, across the bay, and then on to the users. A local water system should be far less costly.

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[Sent via e-mail to cyne461@ecy.wa.gov]

January 4, 2010

Cynthia Nelson

Washington Department of Ecology

PO Box 47600

Olympia WA 98504-7700

RE: Initial Comments on Draft Version of WAC Chapter 173-518 Dungeness Instream Flow Rule

Dear Cynthia:

Washington REALTORS® represents the interests of approximately 18,000 members and their clients on matters relating to the development and transfer of residential and commercial real estate.

We appreciate the opportunity to submit initial comments on Ecology draft version of WAC Chapter 173-518, the proposed Dungeness Basin Instream Flow Rule (“ISF Rule”), and request that our comments be included in the agency’s rulemaking record.

As you know, the proposed ISF Rule, and the recently adopted WAC Chapter 173-517 instream flow rule for the Quilcene basin are of great concern to our local members. This letter includes comments on the rule language as well as suggestions on analysis that should be conducted during the formal rulemaking process.

1. Proposed Flow Levels Are Not “Minimum Flows” and Exceed Ecology’s Statutory Authority.

Ecology’s authority to adopt minimum instream flow is provided in Chapter 90.22 and 90.54 RCW, and both provide authority to Ecology adopt only “minimum” or “base” flows. RCW 90.22.010 provides that Ecology “may establish minimum water flows or levels . . .” RCW 90.54.020(3)(a) states that rivers and streams “shall be retained with baseflows . . .” Ecology lacks authority to adopt instream flow levels that are not true “minimum flows” or “baseflows.” Ecology has defined “baseflow”

as “that component of streamflow derived from groundwater inflow or discharge.” Sinclair and Pitts, Estimated Baseflow Characteristics of Selected Rivers and Streams, Ecology Water Supply Bulletin No. 60, Pub. No 99-327 (October 1999).

The flow levels proposed by the ISF Rule are contrary to the statutory authority granted to Ecology to set flows. A 1986 client advice letter from the Office of the Attorney General to Ecology describes the extent of Ecology’s instream flow rulemaking authority. Notably, this letter was written by Senior Assistant Attorney General Charles B. Roe, a preeminent water lawyer and original drafter of the statutes in question. The opinion of the Attorney General’s Office, was as follows:

. . . The intent was, simply stated, that streams with certain values were not to be dried up or reduced to trickles. Rather, flows, usually of an amount extending to a limited portion of a stream’s natural flow were to be retained in order to protect instream values of the stream from total relinquishment. Of import here, the thrust of the 1967 legislation was not designed to maintain a flow in excess of the smallest amount necessary to satisfy the protection and preservation values and objectives just noted . . .

Letter from Office of the Attorney General to Eugene F. Wallace, Program Manager for Water Resources, dated February 20, 1986, at 8.

The Attorney General letter further describes a two-step process under which flows that may be higher than a true minimum flow may be adopted through a “maximum net benefit” legal framework. The two-step maximum net benefit process is described (again, by Mr. Roe) in the Washington State Bar Association’s Real Property Deskbook:

Of import here, the 1967 and 1971 legislation was not designed to maintain a ‘minimum’ flow in excess of the smallest amount reasonably necessary to satisfy the protection and preservation of such values. It was not, however, the legislative intent to preclude [Ecology’s] power, in appropriate factual situations, to establish higher or ‘enhanced’ instream flows than those established under the minimum flows provided by RCW 90.22.010.

WSBA Real Property Desk Book, Water Rights, § 117.9(1)(b), p. 132-133.

The PCHB has also confirmed that instream flows are to be minimum flows, which may be increased only through the two-step maximum net benefits test – i.e., that the initial flow level is a true baseflow, not an optimal fish flow:

“Tacoma first urges that base flows may not be set at levels which provide the optimum flow regime for fish. We agree”

PUD No. 1 of Jefferson County et al. v. Ecology et al., PCHB No. 86-118 (1988).

Perhaps more importantly, the PCHB has also concluded that Ecology’s instream flow authority enables it only to protect existing instream flows, not establish flows beyond actual flows to provide a “restoration” level of instream flow protection:

The optimum fish flows adopted as base flows by Ecology are also inconsistent with the statutory authorization for base flows. Base flows, as authorized at RCW 90.54.020(3)(a), are those ‘necessary to provide for preservation of’ fish and related values. The term ‘preservation’ is not specifically defined, nor ambiguous. . . . the term ‘preservation’ means ‘the act of preserving’

The evidence in this matter is that the optimum fish flows adopted as base flows enhance fish habitat beyond that provided by the river in its natural state. This is inconsistent with the statutory plan that base flows ‘keep safe’ or preserve fish habitat, rather than enhance it.

Id.

The proposed instream flow levels for the Dungeness River far exceed actual flow levels, and are not minimum flows. Specifically, the proposed flows for August, September, and October are 180 cfs.

Using the date of September 1, this flow level has only been reached once since 2000.

Year

USGS Flows for Dungeness River

2009 112 cfs

2008 166 cfs

2007 148 cfs

2006 140 cfs

2005 99 cfs

2004 173 cfs

2003 157 cfs

2002 96 cfs

2001 148 cfs

2000 200 cfs

See <http://waterdata.usgs.gov/nwis/uv?12048000> (USGS flow gauge data for Dungeness River).

2. Exempt Well Withdrawals Are Not Causing Significant Impact on Streamflows.

Like in other instream flow rules recently adopted by Ecology, an underlying assumption is that impacts to streamflows have been directly caused by increased reliance on exempt groundwater wells that capture groundwater that otherwise would provide instream flow. While wells of a certain depth and location will capture groundwater that provide baseflow, the presumption that all wells must be regulated to protect surface water flows is not supported by the specific hydrogeology in WRIA 18. While certain documents relating to the ISF Rule assume that the reliance on exempt wells over the past 30 years has caused instream flow impacts, actual flow data does not support this presumption. Specifically, see flow data again for September 1 for the period of record from 1937 to 1948:

Year

USGS Flows for Dungeness River

1948 162 cfs

1947 146 cfs

1946 237 cfs

1945 143 cfs

1944 97 cfs

1943 174 cfs

1942 140 cfs

1941 212 cfs

1940 162 cfs

1939 156 cfs

1938 160 cfs

1937 174 cfs

The flow levels on September 1 for this historical period of record are similar to actual flows on September 1 from the past decade – in spite of the increasing reliance on exempt groundwater withdrawals that appears to be a cause of Ecology’s concern for streamflows. While a short answer may be that changes in irrigation practices toward more efficient irrigation diversion and delivery methods has resulted in streamflow improvements that more than offset any groundwater withdrawal impacts, the reality is that far more will be done to protect streamflows by focusing efforts on continuing to improve the efficiency of all surface and groundwater diversions.

3. Proposed ISF and Consistency with Local Land Use Plans and Zoning – Further Analysis of Land Use Conflicts is Required.

REALTORS® are greatly concerned that the availability of water in the proposed ISF Rule is inconsistent with land use plans and zoning adopted at the local level. Throughout WRIA 18, our members have assisted clients with transactions in which future development of vacant parcels relies on the use of exempt wells. Hundreds of such parcels of developable land exist within WRIA 18, and are part of Clallam County's land use plan adopted under the Growth Management Act. While the owners of these parcels believe water will be available in the future, the reality is that the groundwater reservations in the proposed ISF Rule will result in unbuildable lots, causing a severe loss of value to ordinary citizens.

One of the ironies of the conflict with land use plans and zoning created by Ecology's proposed ISF Rule is that it is the exact conflict that the Legislature sought to avoid through the watershed planning process – a process implemented in WRIA 18. Under RCW 90.82.070(1)(e), each watershed plan shall include “an estimate of the water needed in the future for use in the management area.”

Because the watershed plan was developed for WRIA 18 and approved by the Clallam County Commissioners, this information should be put to use. Specifically, Ecology should review the amount of water necessary to implement the County's land use plan and ensure that sufficient water is made available to avoid a conflict between its own ISF Rule and the Growth Management Act.

A meaningful analysis of the future conflict between ISF rules and local land use plans has been notably absent from the recent ISF rules adopted by Ecology. This is unfair both to the local governments who have spent significant time and expense to complying with the planning requirements of the GMA, and to local landowners who have purchased vacant land that at the time of purchase was buildable – but in the future may not be because of the limited water reservations in the ISF Rule. REALTORS® request that during the formal rulemaking period, Ecology provide a meaningful analysis of whether the water available for future domestic use in WRIA 18 will allow for implementation of local land use plans based on existing zoning.

We don't believe this is asking much – in fact, the Administrative Procedures Act already requires it. Under the APA, Ecology is required to “coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.” RCW 34.05.328(1)(i). The primary regulatory impact of the proposed ISF Rule will be to limit or condition rural development in certain areas of WRIA 18. Obviously, this is the same “activity or subject matter” regulated by the GMA itself, which requires local governments to adopt a comprehensive land use plan specifically including a “rural element” that allows rural development consistent with rural character.

At this point, we don't see how the proposed ISF Rule is coordinated at all with the county's comprehensive plan or with the specific zoning that has been adopted in many parts of the county. For example, some of the limited groundwater reservations provide enough water only for 2 or 3 additional exempt wells to be drilled – far short of the number of buildable lots in those sub-basins. If Ecology is going to adopt a regulation that renders a significant number of lots unbuildable or imposes mitigation requirements on those lots, Ecology should be straightforward with those landowners about the future impact of its regulation.

Finally, Ecology failure to provide sufficient water supply through the proposed ISF Rule violates RCW 90.54.020(5), one of the fundamental requirements of the state's Water Resources Act. This provisions states that “Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs.” The policy enacted by the Legislature that adequate potable water for human domestic needs “shall be preserved and protected” could not be stated more clearly. An ISF Rule that violates statutory authority by adopting more than minimum flows while failing to provide sufficient water for future domestic uses clearly violates the Water Resources Act.

4. Ecology Must Conduct Accurate Small Business Economic Impact Statement and Cost Benefit Analysis of Proposed ISF Rule.

Under the APA, Ecology is required to conduct both a Small Business Economic Impact Statement (SBEIS) and Cost-Benefit Analysis. REALTORS® ask that unlike the recent SBEIS and cost-benefit analysis conducted in the WRIA 17 rulemaking, that the analysis for the proposed ISF Rule specifically analyze (a) negative economic impacts to construction and real estate caused by limiting the water available for domestic use; (b) increased development costs associated with mitigation plans; (c) reductions in property value to landowners; and (d) lost local and state tax revenues associated with unbuildable property.

We hope that Ecology's economic analysis in WRIA 18 will avoid whatever methodology resulted in the extremely dubious conclusions in WRIA 17. For example, the WRIA 17 analysis concluded that as a consequence of adopting the instream flow rule, 819 new jobs will be created. For example, 384 jobs would be created in the construction sector, and 20 jobs in real estate. It is absurd for Ecology to assert that a rule placing a fixed limit on the supply of water available for future residential growth would result in a net gain of over 800 jobs, and specific gains in residential construction and real estate that would not occur otherwise. While we understand that the role of an agency in rulemaking is to produce analysis that defends the agency decision, the conclusion that instream flow rules actually create jobs in real estate and construction that would not exist absent the rule does not pass the straight face test.

5. Under Washington Water Law, Priority Date for Exempt Wells, Like Other Beneficial Uses, Must Be Based on Relation-Back Doctrine

Ecology's draft ISF Rule states that the priority date for exempt wells will be the date that water is put to beneficial use. Proposed WAC 173-518-070(4) states as follows: "The priority date of a withdrawal under the permit exemption in RCW 90.44.050, is the date upon which water is first put to beneficial use."

Ecology's conclusion that a water users priority and the right to use water is established only upon beneficial use is inconsistent with both the historical common law of water rights, and how the State Legislature codified the relation back doctrine. Ecology's current interpretation creates significant risk for lenders, homebuilders, and homebuyers and should be carefully examined and modified.

"The relation back doctrine was created under the principles of equity to allow an appropriator to receive as a priority date the date the appropriator first initiated the use of water and not later when the appropriation was completed. The ability to receive the early priority date depended on the appropriator's diligence in applying water to use.

An Introduction to Washington Water Law, Office of the Attorney General, January 2000, at III:27, citing RCW 90.03.340 and *Hunter Land Co. v. Laugenour*, 140 Wn. 558, 565 (1926).

The relation back doctrine is relevant to the process used to develop new housing in order to provide certainty to lenders, builders, and homebuyers. If the right to use water for domestic use is not actually obtained until the time of beneficial use, lenders and homebuilders are at significant risk that water may not be available. In the development process, the time from when a construction loan is issued to when the house is completed by a builder and then sold to a homebuyer can often take a number of years. During this period of time, the local government will have to determine whether water is available under RCW 19.27.097 in order for a building permit to be issued. The priority date for this type of project should relate back to when the project was first initiated, to protect the investments of the lender and builders, and so that consumers know that water will be available.

The structure of the mitigation requirements in the proposed ISF Rule further require that the priority date should be based on the relation back doctrine. The proposed ISF Rule would mandate that mitigation plans include financial assurances such as bank letters of credit, a cash deposit, negotiable securities, savings certificates, or surety bonds. See Proposed WAC 173-518-080. Even though such assurance would be provided by water users, Ecology appears to offer to no security in return – the priority date is part of the assurance to lenders and buyers as to the validity of water supply and

viability of the project. Ecology should not impose costly and complicated mitigation requirements and yet be unwilling to provide regulatory assurance in return.

For permitted water rights, the relation back doctrine was codified so that the “date of filing of the original application” becomes the priority date. RCW 90.03.340. Because exempt wells require no application, the analogous point in time would be the notice of intent filed by a well driller. So long as the project is developed and completed with due diligence, the priority date should relate back to the date of the notice.

Further, Ecology’s conclusion in the proposed ISF Rule that the priority date of an exempt withdrawal is the date of beneficial use is inconsistent with how it has dealt with the same legal issue in other instream flow rules. For example, in Chapter 173-503 WAC, the Skagit Basin Instream Flow Rule, the rule provides that exempt withdrawals based on a reservation of water have a priority date of the date of rule adoption when the water reservation was established. For other exempt withdrawals, the Skagit Instream Flow Rule does not provide a date of priority. This is likely correct, since the exact priority date of an exempt withdrawal may be based on fact specific considerations. In any case, Ecology should not be adopting instream flow rules in different parts of the state that are based on different legal standards.

6. Ecology Lacks Authority to Condition Beneficial Use of Water from Exempt Well on Obtaining Permit for Residential Structure.

The error in Ecology’s conclusion that the date of beneficial use of an exempt well determines its priority date is further compounded by its conclusion that “for domestic use, beneficial use shall not be considered to occur until water is used within a permitted residential structure.” Proposed WAC 173-518-070(4). By creating the additional legal requirement that beneficial use of water from an exempt well does not occur until a local government has issued a permit, Ecology is unlawfully conditioning the use of an exempt well on the action of a local government. What constitutes “beneficial use” of water is determined by the state water code (See RCW 90.54.020(1)), not by the

action of local government.

Further, it is common for construction projects to use (if not require) beneficial use of water at the construction site for uses such as dust control, fire suppression, potable consumption, concrete mixing, and other construction-related uses. Owner-builders often live on-site during construction, not in the “permitted residential structure,” but in a temporary structure or recreational vehicle. Such uses of water clearly establish beneficial use.

7. Proposed ISF Rule Must Be Reviewed To Determine Whether It Is Constitutional.

The proposed ISF Rule imposes its regulatory burden solely on water uses that are junior to the priority date of the adoption of the rule. Because all senior uses are not subject to the rule, even though most junior uses will be small withdrawals of water under the exempt well statute, Ecology should review the proposed ISF Rule to determine whether it meets constitutional requirements. In 2008, the Washington State Court of Appeals, Division I, issued a decision invalidating a King County ordinance in part on grounds that King County failed to show that the regulatory restriction on property owners subject to the ordinance was proportional to the impact caused by those property owners. *Citizens’ Alliance for Property Rights v. Sims*, 145 Wn.App 649 (2008).

Small exempt groundwater withdrawals will have little or no impact on surface waters in comparison to large groundwater withdrawals or diversions directly from the surface water source. Thus, there is no “proportionality” in the proposed ISF Rule. As the Court said in the CAPR decision,

These holdings are consistent with the fundamental purpose of the Takings Clause, which is not to bar government from requiring a developer to deal with problems of the developer's own making, but which is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Id.* at 669, citing *Burton v. Clark County*, 91 Wn.App. 505, 521-22 (1998) and quoting *Dolan v. Tigard*, 512 U.S. 374 at 384.

Ecology’s proposed ISF Rule clearly lacks the proportionality necessary to pass muster under a constitutional analysis. We believe Ecology should review the proposed ISF Rule under the Attorney

General's Memorandum for Avoiding Unconstitutional Takings of Property established under RCW 36.70A.370 during the formal rulemaking process.

8 Ecology Should Not Proceed With Rule Adoption Until Mitigation Programs Are in Place.

As it has done in other basins, Ecology appears poised to move forward with rule adoption without having mitigation programs in place. As an initial comment on mitigation, many of the areas that would be subject to groundwater closures absent mitigation likely have little impact on surface water flows. Yet, mitigation will be required across the basin regardless of the specific impacts of a proposed withdrawal.

The promise of having a functional, affordable, and rational mitigation program in place at some unknown point in the future after the adoption of an Ecology rule has been problematic in other parts of the state. The strategy of first closing basins through rulemaking and only then developing mitigation strategies is a bad idea that should not be repeated. As evidenced by regulatory closures enacted by Ecology in Skagit or Kittitas Counties, the closure logically results in motivating people seeking to use water before the reservations are depleted (Skagit) or a dramatic increase in the cost of water for transfer that could be part of a mitigation program (Kittitas). By closing a basin first, and then seeking to obtain water rights for mitigation, Ecology creates exclusively a seller's market that drives up costs that will ultimately be paid by homeowners.

During the rulemaking process, it is impossible to analyze the true impacts of the rule because there is no mitigation plan or requirements in place: will mitigation sufficient for an average single-family house cost \$1,000 or \$20,000; will mitigation plan approval take one week or one year? Ecology must seek to develop mitigation requirements as part of the rule itself, so that regulated entities can understand the rule and its impacts. While premise for requiring mitigation in many parts of the basin is dubious, at the least, the mitigation requirements must be integrated into the local land use approval process. Homeowners and small builders should be expected to possess expertise in hydrogeology or provide Ecology or local governments with costly consultant reviews in order to

obtain building permits.

Thank you for the opportunity to provide initial comments on the draft ISF Rule.

Sincerely,

Bill Riley, President

Washington REALTORS®

cc: Clallam County Board of Commissioners

Sen. Jim Hargrove

Rep. Lynn Kessler

Rep. Kevin Van De Wege



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000

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February 25, 2010

Mr. Dennis A. Schultz, President
Olympic Stewardship Foundation
250 N. Jacob Miller Rd.
Port Townsend, Wa 98368

RE: Petition to Repeal Chapter 173-517 WAC

Dear Mr. Schultz:

The Washington State Department of Ecology (Ecology) received your petition requesting rule removal on December 29, 2009. The petition requests that Ecology remove Chapter 173-517 WAC, "Water Resources Management Program for the Quilcene-Snow Water Resource Inventory Area (WRIA 17)" from the Washington Administrative Code. The petition contends that the rule does not do what it was intended to do; imposes unreasonable costs; and does not meet the criteria of RCW 19.85.040 (Small Business Economic Impact Statement – Purpose – Contents), and the findings in RCW 19.85.020 (Regulatory Fairness Act. Definitions. Findings).

Ecology reviewed and evaluated your comments. We did not find a basis to support your request and are thereby denying the petition to repeal Chapter 173-517 WAC. A detailed response to your specific concerns is attached. If you have questions, please contact Ann Wessel in our Water Resources Program, at ann.wessel@ecy.wa.gov / (360) 470-6785.

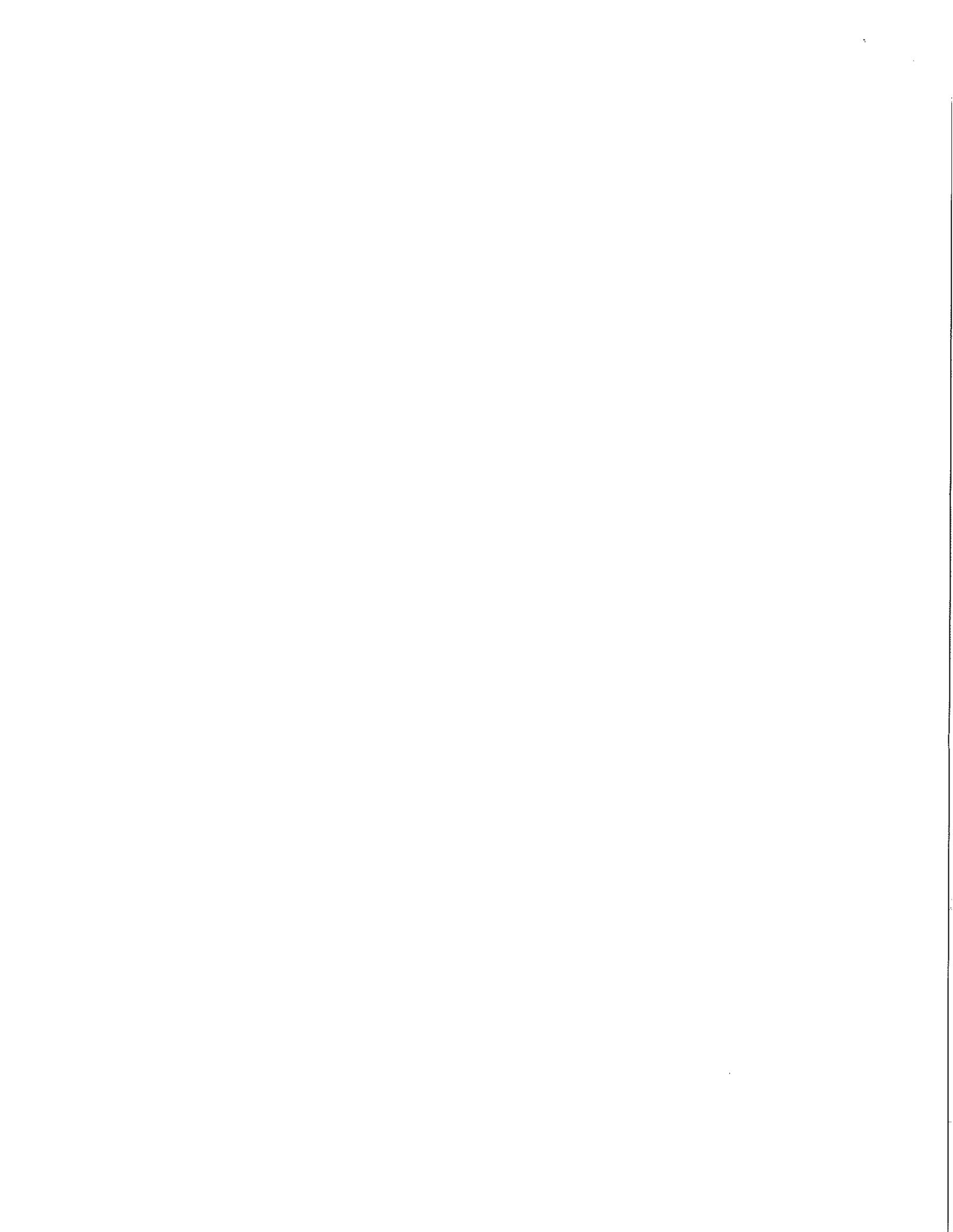
Sincerely,

Ted Sturdevant,
Director

Attachment

cc: Jefferson County Board of Commissioners: John Austin, Phil Johnson, and David Sullivan
Thomas Loranger
Ann Wessel





ATTACHMENT

Page One

WRIA 17 – Chapter 173-517 WAC

List of Petition Issues

1. The rule does not do what it was intended to do.

Response:

Ecology does not agree with the petitioner's claim that the rule does not do what it was intended to do. The petition provides no information to substantiate this claim.

2. The rule imposes unreasonable costs.

Response:

Ecology does not agree with the petitioner's claim that the rule imposes unreasonable costs. The petition provided no information to substantiate this claim.

Ecology calculated the total probable costs of this rule, and published the cost values, assumptions, and methods for our calculations in the Cost Benefit Analysis for this rule. Ecology based the evaluation of the costs and benefits on an analysis and comparison of water right management in WRIA 17 with and without the rule. The analysis of the probable rule costs includes consideration of:

- The cost of restrictions on future water right permitting.
- The cost of restrictions on permit exempt wells, the conservation standards, and outdoor irrigation in Chimacum Subbasin.
- Ecological costs.
- Metering costs.
- Rule implementation costs.
- The cost of an additional public meeting for out-of-subbasin water use.

Ecology found that the probable cost of the rule did not exceed the probable benefits of the rule.

3. The Small Business Economic Impact Analysis does not meet the criteria of RCW 19.85.040 and the Findings in RCW 19.85.020.

The petition argues that the Small Business Economic Impact Statement prepared by Ecology prior to adopting this rule is inadequate for the following reasons:

- It is based on "old data" not current conditions.
- It only compares the effects of the rule vs. a moratorium on all new construction and development for 16 years. No alternative approaches are analyzed.
- It shows a major loss of jobs, not new jobs being created.
- It shows a major loss in construction income.
- It uses an inappropriate model and data to predict growth.
- It does not solve our water management needs here in Jefferson County.
- This rule will discourage the growth of new business - it will place this area in an uncompetitive position, compared to other counties.
- No alternative approaches have been proposed.
- The prime industries in this area, agriculture, aquaculture, forestry, and mining were not involved in drawing up this rule.
- This rule will cause a significant loss in construction sales and in real estate values.

ATTACHMENT

Page Two

- This rule does not reduce any of the costs for small businesses. It will increase the costs for new businesses to locate here.
- It ignores the existence of an existing construction industry workforce, many of whom will not have work under the planned build-out rate of 45 homes a year.
- Other than public meetings and press notices, it appears that no effort was made to contact local businesses or survey their future plans to determine the impact of this rule.

Response:

Ecology does not agree that the Small Business Economic Impact Statement for this rule is inadequate, nor does it fail to meet the criteria of RCW 19.85.

- RCW 19.85.030 requires the preparation of a Small Business Economic Impact Statement to assess disproportionate cost to small businesses resulting from a new rule and, "where legal and feasible in meeting the stated objectives of the statutes upon which the rule is based, reduce the costs imposed by the rule on small businesses." The statutes on which this rule is based include 90.03, 90.22 and 90.54 of the Revised Code of Washington. These statutes call for protection of instream values and establishing instream flows. Ecology found that while there are disproportionate costs to small businesses, it is unlikely there will be significant adverse impact on small or large businesses as compared to the baseline.
- The economic analysis does not compare the effect of the rule against a moratorium on all new construction and development for 16 years. It is based on a comparison of water right management in WRIA 17 with and without the rule.
- RCW 90.22.020 states that "flows or levels authorized for establishment under RCW 90.22.020, or subsequent modification thereof by the department shall be provided for through the adoption of rules." In addition, RCW 90.82.130(3) creates an obligation for state agencies to implement Watershed Plan recommendations. These obligations are binding upon adoption of the Watershed Management Plan. The Quilcene-Snow Watershed Management Plan recommended "that Ecology continue to work collaboratively with the Planning Unit, per RCW 90.82.080, in an attempt to achieve consensus and approval of instream flows to be adopted by Ecology." An alternative approach to adopting instream flow levels in a rule was not available to Ecology given these statutory directives. Alternative water management options that Ecology considered during the rule development process are presented in the Least Burdensome Analysis that is incorporated in the Cost Benefit Analysis for the rule. The petition suggested a local "water board" that could manage water allocation decisions as an alternative to this rule. The authority for such a local entity does not exist in the state water code.
- Ecology used Jefferson County building permit data to project demand for new residences outside of water supply areas for each subbasin where we set flows. The high growth rates at Kala Point and Port Ludlow were not included in our baseline. The projected demand for new residences was used to evaluate the sizes of reserves. If actual growth occurs at a slower rate, available water will last longer.

ATTACHMENT

Page Three

- Ecology relied on standard and defensible methods of economic analysis to estimate the economic impacts to small businesses resulting from adoption of this rule. In addition, the economic analysis documents were peer reviewed by an outside economist. The petition provides no information to substantiate the claims that the rule will cause a significant loss in jobs, construction sales, and real estate values, or will increase the costs for new businesses to locate in Jefferson County. The petition seems to indicate that zoning restrictions prevent new businesses from locating in areas under Jefferson County jurisdiction; however, zoning designations are outside the scope of this rule.
- Ecology relies on available data to run the Office of Financial Management's NAICS-based input/output model. This model is recommended by OFM. We do not have access to IRS tax returns, and, therefore, cannot base the analysis on the information described in the petition. We use data from the Washington State Department of Employment Security to make sure we identify active businesses. It is possible to identify sole proprietorship businesses using data from the Washington Department of Revenue.
- This rule establishes instream flow levels, closures, and creates limited reserves of water that together are intended to protect instream values, help protect existing water rights, and serve as a framework for future water management decisions in eastern Jefferson County. Ecology agrees that ongoing effort is needed to solve water management needs in Jefferson County.
- Ecology does not agree that the existing construction workforce will be significantly affected by this rule. The rule does not affect water supply availability for new construction in the city of Port Townsend, or in the service areas of Jefferson County PUD #1 and the Olympic Water and Sewer Company at Port Ludlow, all of whom operate under existing water rights. In addition, the rule does not restrict new permit-exempt well uses in the coastal areas, including the Miller and Quimper Peninsulas. Finally, the rule establishes reserves of water that are projected to meet demand, until 2025, for residential development in the subbasins with newly-established instream flows.
- Ecology extended offers to meet with a wide range of stakeholder interests, including business organizations. Not all organizations chose to meet with us. Those that did included the Brinnon/Quilcene Chamber of Commerce, Jefferson County Association of Realtors, representatives of the agricultural community, Jefferson County Water Utilities Coordinating Council, Jefferson County PUD #1, the city of Port Townsend, Jefferson County, Tribes, Clallam County and the WRIA 17 Watershed Planning Unit.

ATTACHMENT

Page Four

4. It does not meet the criteria of RCW 34.05.325 (6)(a)(iii).

Excerpts from the petition:

RCW 34.05.325 (6)(a) Before it files an adopted rule with the code reviser, an agency shall prepare a concise explanatory statement of the rule:

(iii) Summarizing all comments received regarding the proposed rule, and responding to the comments by category or subject matter, indicating how the final rule reflects agency consideration of the comments, or why it fails to do so.

Many of Ecology's answers to the questions in the comments are of the nature: 'DOE disagrees', and did not respond to the questions asked.

Response:

Ecology agrees that, in some instances, we responded to comments received on the proposed rule with brief statements to the effect that Ecology did not agree with the comment or thanking the person for their comment. In all instances, these were comments expressed as statements about the rule. Where comments were expressed as questions, Ecology made every effort to respond with a complete answer.

5. It does not meet the requirements of the 'Cost/Benefit Analysis' as required in RCW 34.05.328 (1)(d) and (1)(e). Or the findings with respect to The Regulatory Reform Act of 1995.

Excerpts from the petition:

RCW 34.05.328(1) Before adopting a rule described in subsection (5) of this section, an agency shall:

(d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented;

The benefits claimed are over exaggerated and costs minimized or ignored.

(e) Determine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection;

No alternative solutions have been presented other than a moratorium on all new development.

RCW 34.05.328 Findings -- Short title -- Intent -- 1995 c 403: "(1) The legislature finds that:

(c) Despite its importance, Washington's regulatory system must not impose excessive, unreasonable, or unnecessary obligations; to do so serves only to discredit government, makes enforcement of essential regulations more difficult, and detrimentally affects the economy of the state and the well-being of our citizens.

ATTACHMENT

Page Five

This rule will definitely have a negative impact on the local economy.

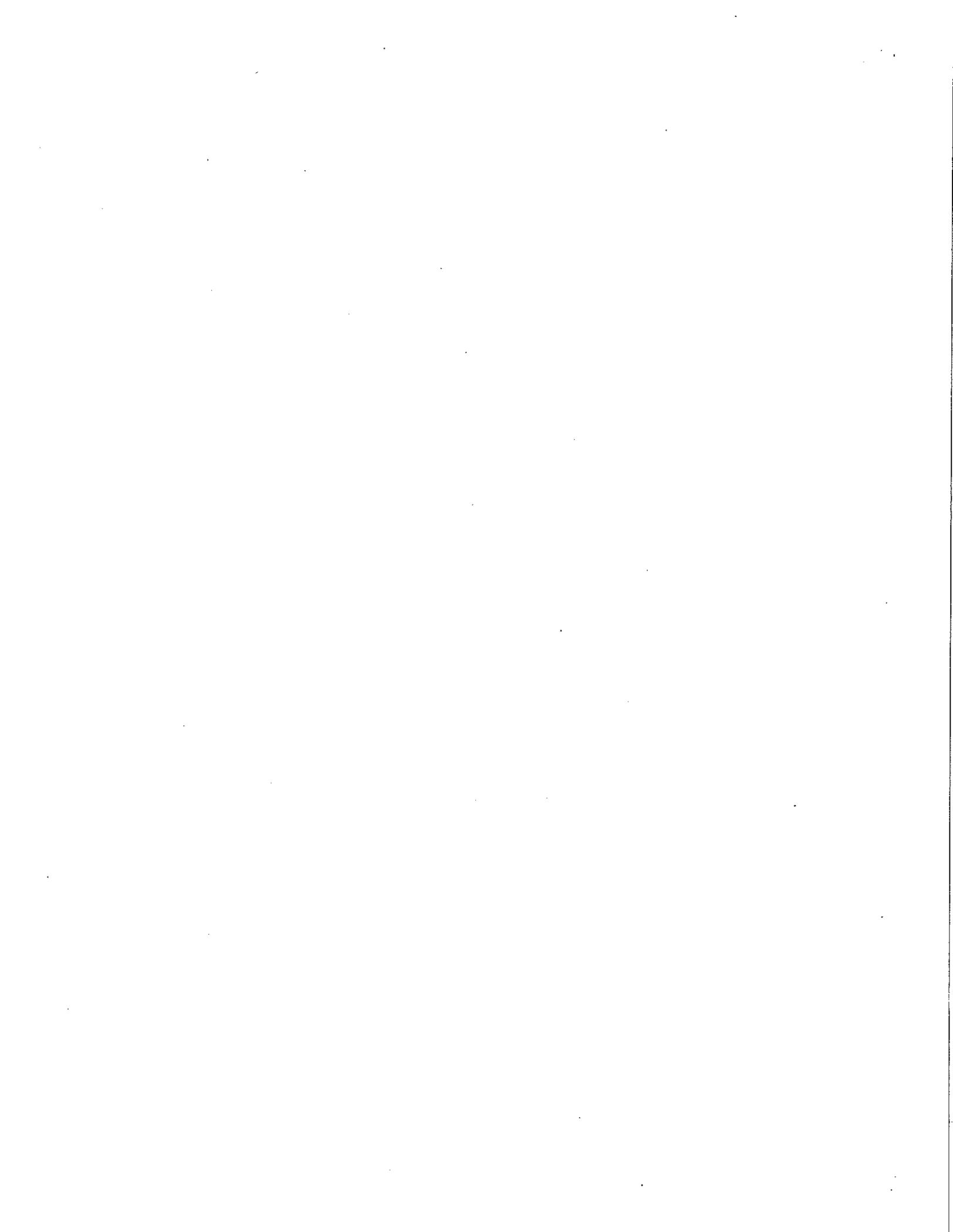
RCW 34.05.328 Findings -- Short title -- Intent -- 1995 c 403:

(2) The legislature therefore enacts chapter 403, Laws of 1995, to be known as the regulatory reform act of 1995, to ensure that the citizens and environment of this state receive the highest level of protection, in an effective and efficient manner, without stifling legitimate activities and responsible economic growth.

This rule does not meet the goal of this law.

Response:

Ecology does not agree with the petition's assertions regarding the Cost Benefit Analysis. Please see the responses to petition issues #2 and #3, above.





1820 Jefferson Street
P.O. Box 1220
Port Townsend, WA 98368

Phil Johnson, District 1 David W. Sullivan, District 2 John Austin, District 3

July 6, 2009

Jay Manning
Director, Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Re: In-stream Flow Rule for WRIA 17

Dear Director Manning,

Thank you for the chance to comment on WAC 173-517, the proposed in-stream flow rule for Water Resource Inventory Area (WRIA) 17, the Quilcene-Snow watershed. We have appreciated the efforts that the Department of Ecology has made since the fall of 2005 in improving the in-stream flow rule language for WRIA 17. We feel that Ecology has integrated some key requests and language into the rule. In particular, the inclusion of rainwater catchment and the possibility of mitigating for future water withdrawals beyond those allowed for in the reserves. In addition, we appreciate Ecology funding of the development of a ground water and surface water interaction model for the Chimacum watershed by the US Geological Survey (USGS) which is due to be completed in 2010. This model will be an excellent tool in gaining a working knowledge of one of our most resource limited watersheds and the information will be valuable for informing future mitigation and water management actions.

In the spirit of continuing and fruitful interaction with Ecology, the County states, or restates, the following important items of concern:

- The County requests that Ecology continue to support watershed planning efforts and efforts to find and fund mitigation strategies that would allow for the use of new agricultural water and for outdoor irrigation for new homes in the Chimacum sub-basin. We believe that a long term prohibition on new outdoor irrigation in the Chimacum sub-basin, where some of our best soils are located is unacceptable, therefore a mitigation strategy needs to be implemented as soon as possible for this sub-basin.

We believe that several projects and ideas currently proposed or being explored by members of the WRIA 17 Planning Unit may be able to serve as possible mitigation. Included in these are the Aquifer Storage and Recovery study by Jefferson County PUD#1, using existing water rights to augment low flows (“pump and dump”), credit for decommissioning wells in water service areas and reverse osmosis for municipal supplies. The continued exploration of a water bank or exchange also has merit. It is vital that Ecology continue to work with local entities to develop and fund a local watershed planning process after current watershed planning funds run out in 2012.

- Jefferson County has serious concerns that the proposed rule will drastically limit and curtail new agricultural activity in portions of the county. We appreciate that some of the reservations in the Salmon Creek and Snow Creek sub-basins will be available for agriculture. We further appreciate that the rule leaves open the option of additional water rights in the Big Quilcene, Little Quilcene and Thorndyke sub-basins. However, solutions and mitigation will need to be found for those who would otherwise use permit-exempt wells for small scale agriculture but will be unable to under the new conservation standards set for most of WRIA 17 under this rule. We request that Ecology provide technical and financial assistance for mitigation.
- Since habitat, water quality and water quantity are all important aspects of salmonid survival, the County requests that water quality and habitat restoration be credited, where appropriate, toward mitigation strategies for new water withdrawals. In the definition of “mitigation plan” in proposed WAC 173-517-030(12), we request that it reads (changes underlined) “A mitigation plan may address impacts, including those to water quality and habitat, to a stream, basin, reach, or other area, for an individual withdrawal or for multiple withdrawals in a sub-basin.”? Is Ecology aware of any case law that would prohibit the use of habitat or water quality improvements to mitigate and offset water withdrawals, and if so can you please identify it?
- Has Ecology considered a two tiered approach to for the management of water in the Chimacum sub-basin? For example, perhaps groundwater withdrawals further from the creek, near the mouth of the creek, or from a deeper aquifer may be used for outdoor irrigation use. We appreciate the addition of section 173-517-150(8)(b), to allow for data gathered in the groundwater study currently underway by the USGS, to influence areas in Chimacum subject to the no outdoor irrigation provision in the Chimacum Creek sub-basin. However, we request that section read (changes underlined) “If the report for the U.S. Geological Survey ground

water model currently under construction for the Chimacum Creek sub-basin identifies specific areas where new well pumping will not have significant adverse effect on critical stream base flows, withdrawals from these areas” For example, if it were determined that a new groundwater withdrawal, used for summer outdoor irrigation only slightly impacted winter creek flows, since this creek is open to new water withdrawals in the winter anyway, this withdrawal would be allowed if this section were rewritten as above.

- We appreciate the inclusion into the proposed rule of the consideration of metering data when accounting for use under the reserves. It is vital that we adjust the reserves based not just on estimates of new use but actual use of water. This will provide a clear incentive to conserve water for new users.
- There are many wells in Jefferson County that are senior in time to the effective date of the in-stream flow Rule but from which there has been either no water withdrawn or less water withdrawn than the 5,000 gpd a permit exempt well owner could withdraw. Few persons understand that a water right is merely a potential right until it is “perfected” by use of that right and that it is “perfected,” in general, only to the extent of the quantity of water withdrawn. The County foresees instances where this misconception about the rights that arise from a permit exempt well will collide with implementation of the proposed rule. In light of these likely collisions the County asks what resources or efforts for education and explanation will Ecology have in place within and for Jefferson County AFTER the in-stream flow rule becomes effective?
- Just to clarify, if evidence is presented to Ecology that an unperfected water right that predates the in-stream flow rule (such as a previously unused permit exempt well) was being used and therefore perfected after the effective date of the rule, would that water right be debited from the reserve for that particular sub-basin?
- The in-stream flow rule should provide clear incentive to decommission wells by crediting the reserve or, potentially, a mitigation bank of water. If a decommissioned well predates the rule, consideration should be given to crediting the reserve or mitigation bank at a higher rate than the conservation standard set out in the rule.
- The maps provided are insufficient in detail. The County requests that the GIS layers generated by Ecology be made available to the County. If a parcel falls on the boundary between two management areas which rules apply to the water withdrawal?

- In WAC 173-517-030 definitions need to be added for beneficial use, reserve management area, timely and reasonable (as it applies to connection to public water system) and coastal management areas. Some of these may be able to be referenced from other statutes.
- The County requests that Ecology provide rebates or other credits to citizens required to install meters to help ameliorate the cost to impacted citizens.
- Is it necessary to “commit (county compliance) to Ecology in writing” as is stated in proposed WAC 173-517-150 (2) since the county is always obligated to follow state law? We presume that if it still deemed necessary, that a letter from the county to Ecology stating that the county has read and understands the rule will be sufficient. Is that an accurate conclusion?
- What will be the mechanism used by Ecology to inform the citizens that the reserve established under Chapter 173-517 WAC for a particular sub-basin within WRIA 17 has been entirely depleted and thus that sub-basin is closed to new water withdrawals?

We understand that after this rule is signed Ecology and County staff will cooperate in educating stakeholders about the rule and transferring information to Ecology. The county will distribute information about the new requirements, developed by Ecology, to interested parties. The county will provide information about rainwater catchment. Indeed, the county already has a policy on rainwater catchment. Lastly, the county will send Ecology yearly data on building permit activity in each of the sub-basins. The County understands this to be the full extent of its obligations with respect to implementing the in-stream flow rule, WAC 173-517. If Ecology determines otherwise it should inform the County as soon as possible.

We look forward to continuing to work with Ecology to develop mitigation strategies and other solutions to our water supply issues in Jefferson County.

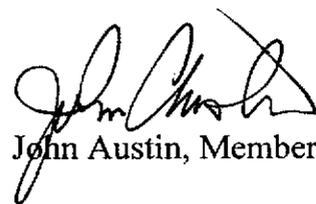
Sincerely,



David Sullivan, Chairman



Phil Johnson, Member



John Austin, Member

cc: Anne Wessel, DOE
Phil Wiatrak, DOE

State of
Washington
House of
Representatives



Joint Administrative Rules Review Committee

2nd Floor, John L. O'Brien Building
Representative Hasegawa, Chair
PO Box 40600
Olympia, WA 98504-0600

June 25, 2010

Mr. Dennis Schultz, President
Olympic Stewardship Foundation
250 North Jacob Miller Road
Port Townsend, Washington 98368

Dear Mr. Schultz,

Your submittal petitioning the Joint Administrative Rules Review Committee (JARRC or Committee) to review rules adopted by the Department of Ecology (Department) regarding the Water Resources Management Program for the Quilcene-Snow Water Resource Inventory Area (WRIA 17), Chapter 173-517 WAC, has been considered. The purpose of this letter is to advise you of the outcome of the review of your petition.

JARRC Background

As you know, the JARRC is a joint legislative committee charged with oversight over executive agency rulemaking. It has the authority to examine three main issues: (a) whether a rule is consistent with the intent of the Legislature as expressed by the statute the rule implements, (b) whether the rule was adopted in accordance with the law (i.e., in accordance with the Administrative Procedures Act and the Regulatory Fairness Act), and (c) whether a policy or interpretive statement is being used in lieu of a rule.

The JARRC has selective jurisdiction, meaning that it is not required by law to conduct hearings on every petition it receives. In addition, while the JARRC may review petitions addressing one or more of the three issues outlined above, the Committee does not review the policy behind the rules. In other words, the JARRC is not authorized to consider whether the substance of a rule is good or bad.

Finally, due to constitutional separation of powers principles the JARRC is not authorized to suspend or repeal a rule or to order an agency to amend or repeal a rule, even if the Committee finds that an agency has exceeded its statutory authority.

Petition Summary

Your petition makes several arguments supporting your position that the Department lacks the authority to adopt some or all of Chapter 173-517 WAC. I understand your primary arguments to include the following, which I have briefly summarized below:

- The Department is not authorized to adopt WAC 173-517-120, the conservation standard for new permit exempt wells, because the rule restricts water usage in an amount inconsistent with the plain language of RCW 90.44.050. In addition, the petition further argues that Attorney General Opinion (AGO) No. 6, dated September 21, 2009, supports this position.
- Although WAC 173-517-030 requires certain users to implement an approved mitigation plan, the Department does not have a mitigation program in place. The lack of a mitigation program has caused problems in other areas of the state; therefore, the Department should be required to have a mitigation program in place prior to rule adoption.
- There are inconsistencies between various rules adopted by the Department under state water rights laws, Title 90 RCW, and local plan and land use zoning requirements of the Growth Management Act (GMA). As a result, the Department is not authorized to adopt rules that are inconsistent with the GMA.
- The Department's rules result in a failure to provide adequate water for future domestic use, which violates the Water Resource Act of 1971, Chapter 90.54 RCW.
- The Department's authority to adopt minimum in-stream flow is limited to "true" minimum flows or base flows and the flow levels set by the Department are not "true" flows. As a result, the flows set by the Department are contrary to legislative intent of RCW 90.54.020(3)(a) and 90.22.010.
- The Department has failed to comply with the requirements the Regulatory Fairness Act, Chapter 19.85 RCW, by failing to consider the impact on three major industries located within rural areas that are subject to these rules. The Small Business Economic Impact Statement (SBEIS) submitted by the Department is not accurate or realistic.

Discussion

First of all, I want to thank you for the thorough and thoughtful petition that you submitted. The subject matter is extremely complex, and I understand that the issues and concerns you raise in your petition have undergone lengthy discussion by many interested parties and stakeholders.

It is my opinion that the issues you raise require the attention of the legislative standing policy committees that have expertise in this extremely complex issue. My reasons for reaching this conclusion are briefly outlined below:

- There is a clear disagreement related to the interpretation of RCW 90.44.050 and whether the Department is authorized to exercise its discretion to restrict water usage, as provided in WAC 173-517-120, in furtherance of its duties to protect the state's waters. The AGO reaches one conclusion, but that Opinion is advisory only and may or may not reflect the intent of the Legislature. Based on the lingering different interpretations of the Department's authority subsequent to the issuance of the AGO, it is highly unlikely that the JARRC could dispense with the differing opinions and come to a clear understanding of legislative intent in this matter.
- Whether the Department should have a mitigation plan or program in place prior to adoption of these rules is a valid issue to raise; however, it is an issue that is outside of the JARRC's jurisdiction.

- The observation that there are possible inconsistencies between some provisions of Title 90 and the Growth Management Act may, in fact, be accurate. However, it appears that the Department has adopted rules consistent with the broad authority established in Title 90, and the issue of inconsistencies between the GMA and Title 90 is outside the scope of the JARRC's jurisdiction. This is, however, an issue that should be considered by the relevant standing policy committees of the Legislature.
- There is no statutory definition of "adequate" water supplies for domestic use, and the Department is not subject to a direct statutory obligation to provide water to all domestic users without regard to other statutory considerations, discretion, and duties. The statute cited, RCW 90.54.020(5), is a "general declaration of fundamentals" that must guide the Department's actions; it does not provide detailed parameters to define such terms as "adequate," and the Department's rulemaking actions are not clearly inconsistent with its authority.
- The Department has extensive authority to protect the waters of this state, including but not limited to the authority provided in RCWs 90.54.030 - 050. State law does not define "minimum flows" or "base flows". The Department is statutorily granted the discretion to establish the appropriate flows by rule for the stated purposes. Nothing in the petition establishes that the rules adopted by the Department are in conflict with their authority.
- Regarding the concerns raised related to the Regulatory Fairness Act and the sufficiency of the SBEIS, these matters are best considered by the standing policy committees of the Legislature in conjunction with the substantive issues raised in your petition.

Conclusion

I sincerely appreciate the time you took to present your arguments to the Committee. For all of the foregoing reasons, it is my opinion that these extremely complex issues are worthy of further consideration by the standing policy committees in the House of Representatives and the Senate, which will be aided by their expertise in the subject matter. As a result, the petition for JARRC review is denied. However, I will forward this petition to the appropriate policy committees and I urge the petitioner to work with the appropriate House and Senate legislators and staff.

Sincerely,



Representative Bob Hasegawa, Chair

cc: Rep. Joel Kretz, Vice Chair
Rep. Brian Blake
Rep. Bruce Chandler
Sen. Jim Honeyford
Rep. Timm Ormsby
Sen. Craig Pridemore
Sen. Phil Rockefeller
Rep. Norma Smith
Ms. Courtney Barnes
Ms. Diane Smith

ISF RULE
SMALL BUSINESS ECONOMIC IMPACT ANALYSIS
7/5/09
Dennis Schultz

GENERAL COMMENTS

- **All costs of this rule will fall upon the property owners and the small businesses within the Area.**
- **This analysis assumes that without the Rule, there will be no change or growth within the Area for the period of the analysis. This is an unreal assumption. This analysis must contain an analysis of what will happen if the Rule is delayed or not imposed. This analysis skews all the possible benefits in favor of the Rule. Where is the comparison: Rule vs no Rule?**
- **The Conservation Standard is applied to all the sub-basins in the Area, yet, it is only needed in part of the Area. Most of the basins in this area do not have a water shortage. This puts an unneeded economic burden on most of the Area where it is not needed. What is the cost of this burden?**
- **It does not take into consideration the current economic state of the County which has changed dramatically since the period used for analysis. This analysis needs to be updated for current economic conditions.**
- **The four major industries in the area covered by WRIA17 are: Agriculture, Mining, Forestry, and Aquaculture. Yet, these are completely ignored in the analysis. Why were they left out?**
- **This analysis does not take into consideration the unusual land use policies and zoning in effect in Jefferson County.**
- **There is almost no land zoned for Retail, Manufacturing, Distribution, or Service Industries in the Area. Most of which are located in the city. What little there is, is**

- located in existing Water Service areas. Given the political climate, this is very unlikely to change.
- **The whole basis of this rule is based on the theory of ‘Instantaneous Conductivity’ between ground water and the streams. (If a gallon of water is drawn from a well, it instantaneously lowers the level of the basin stream by a gallon), regardless of the distance from the stream or the properties of the aquifer it is drawing from. It also assumes that wells located at higher elevations will draw water uphill into the wells. It totally ignores existing studies, the geology of the basins, the probable existence of a lower disconnected aquifer, and the permeability of the aquifer formations.**

IMPACT ON SMALL BUSINESSES

- **Almost all of the businesses located in the Area are either: Home Based Businesses or Cottage Industries. These are all that are allowed under the current Jefferson County Development Code.**
- **Jefferson County does not require business licenses for these businesses. And does not have any data on these businesses.**
- **Most of these business pay taxes as personal income on Form 1040. Therefore very little known about the type and nature of these businesses. They are NOT included in any SIC Code reporting.**
- **The impact of the proposed water rule on future businesses is totally unknown. The major impact will be, that potential businesses will locate somewhere else in a more friendly business environment. How many potential jobs will be lost?**

IMPACT ON AGRICULTURE

- **The future of Agriculture in Jefferson County is in the small specialty farm business. This type of farm usually can exist using a 5,000gpd Permit Exempt Well. The people starting these farms usually do not have the financial resources to make a large investment and the time to wait for a Water Right.**
- **Small farms of this type are usually located away from the rich bottomland along the creek beds because of the unavailability and high cost of these lands.**
- **Allowing only a limited number of Ag wells in only a few areas will deter many of these farms from starting.**
- **The local Farmers Markets are dependent on having a number of new small farmers entering the market every year as older farmers retire or develop a customer base to sell to outside of the farmers markets. This will cause a decline and possibly the end to some Farmers Markets.**

COSTS

- **Rainwater Catchment is touted as the solution to having more water available. Will a 'standard' household rainwater catchment system meet Health Department standards for a business. Will the benefit exceed the cost of designing, installing, and maintaining a catchment system?**
- **Professional Services are very expensive and beyond the means of many business owners. This Rule assumes that future water will users have the resources to pay for groundwater conductivity studies, mitigation planning and installation, and rainwater catchment systems if they want any water in excess of the minimum.**

SIC CODES

- **The use of SIC Code and USDA Agricultural data reports is worthless in this County. Most of the possible data is lost because it is never reported as such to the respective agencies.**

EXPECTED JOBS CREATED OR LOST

- **This section is lacking any analysis about the alternatives if the rule is not implemented.**
- **THIS ANALYSIS (TABLE 2) ASSUMES THAT ALL FUTURE GROWTH AND DEVELOPMENT WILL ONLY COME ABOUT AS A RESULT OF THE PROPOSED RULE.**
- **Without the rule are DOE or Jefferson County going to put a freeze on all new development?**
- **The model used (NAICS) is totally inappropriate for this county. It assumes land use zoning and availability that does not exist.**
- **Most of the jobs predicted in Table 2 will be located outside of Jefferson County where the current businesses (such as retail and manufacturing) are currently located and there is land for future growth.**
- **Most of the people taking these jobs will elect to live close to the jobs as the cost of commuting and high cost of living will make rural Jefferson County unattractive.**

COMMUNITY INVOLVEMENT

- **Apparently Agriculture, Forestry, Mining and Aquaculture are not considered businesses by DOE.**

- **They were not involved by DOE in the development of the proposed Rule even though they are the major businesses in the Area.**
- **IN 2005 DOE MADE A COMMITMENT TO THE COMMUNITY TO WORK JOINTLY WITH STAKEHOLDERS TO DEVELOP THIS RULE. THEY REPEATEDLY REFUSED TO SIT DOWN AND WORK OUT A WORKABLE WATER MANAGEMENT PLAN.**
- **We are still waiting for DOE to keep its promise!**

SUMMARY

- **This is a very biased analysis. It implies big benefits without showing where they will come from. IT NEEDS TO BE REDONE!**
- **It is full of qualifiers such as: ‘might see’, ‘likely lower costs’, ‘could have added costs’, would be a large benefit’, etc. There are almost no statements proving real definite benefits.**
- **The claim of 890 new homes, 819 new jobs, an annual labor income of \$\$25,000,000, and revenues of \$34,500,000 are just wild optimistic guesses.**

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ISF RULE
PROPOSED WAC 173-517-xxx
7/5/9
Dennis Schultz

RECOMMENDATIONS:

- 1. Hold off on the Rule until the USGS Study of the Chimacum Basin and other on-going studies are complete. There is no real justification for pushing through this rule except that DOE is behind schedule to implement this rule. None of the other stake holders have any pressing need to implement the rule. It will not put any more water in Chimacum Creek and probably will not result in any loss either.**
- 2. Keep the existing Permit Exempt Well rule. Start a program to collect data on actual well use by asking users to voluntarily meter their usage and report the type of usage of the water, so you have real data for your Benefit Analysis instead of guessing the usage.**
- 3. Be realistic in analyzing ground water flow in the Chimacum Basin. Forget your theory that water will flow uphill from streams to wells completed above the stream beds. Admit that we do not have ‘Instantaneous Hydraulic Continuity’ between the wells and the creeks.**
- 4. Work with a stakeholder group to draw up a realistic water use plan that determines where water can be taken without harm to the streams and where water must be rationed. This proposed set of water use restrictions has nothing of a constructive nature in it for users. All it can do is create bad feelings toward DOE.**
- 5. Set the in-stream flow for Chimacum Creek to reflect the actual flow for recent history and forget the flows experienced 50 years ago.**

Section -060

- 1. Needs to specify how often the Rule will be reviewed if a review is not called for earlier.**
- 2. Needs to specify who can call for a review, and what the procedure will be. This Section is too vague.**

Section -120

(2)(a) Sounds like anyone wanting a 5,000gpd use must submit a mitigation plan. Is this a requirement in the other sections that specify 5,000gpd wells can be authorized? If so it will make these wells too expensive for almost all potential users.

CONSERVATION STANDARD

- 1. Forget about setting a Conservation Standard until you have some hard data on which to base it.**
- 2. The current approach to the standard will do nothing but create bad feeling and economic hardship on property owners, particularly where it isn't needed.**
- 3. Realize the economic impact a Conservation Standard will have on property values in areas where it is not needed.**

Section -130

(3)(a) Does this mean that wells will or will not be allowed in the Port Townsend Service area? How about wells for Agriculture?

(3)(d) Just what is procedure to register and who will manage these registrations? Will there be a limit on how many wells?

Why do you insist on including the ‘un-named’ creek on the Quimper Peninsula when it has been shown to not be a Salmonid stream or to flow into salt water?

Section -150

(6) Specifies that no water is available for agriculture unless it is given in a Water Right. What happened to the Permit Exempt 5,000gpd agriculture well?

(8) Again, why not wait for the model before implementing these rules. Why not wait for (8)(a) or (8)(b) ?

Table 8 is inconsistent with Section -150.

Section -160

This section assumes unrealistic use of water, particularly for irrigation. All irrigation water is not 100% consumptive. Furthermore, irrigation does not take place 24 hours a day 30 days a month. A typical irrigation plan is to water for a fixed period of time and then stop until it is needed again. It is definitely stopped during harvest cycles. And pumping is expensive, therefore, most farmers try to limit their pumping costs. Most water rights are set to cover extreme dry spells (insurance against crop loss) not an average annual need. A history of real data (voluntary metering) will give a much better picture of actual usage.

Section -190

(1)(b) Just how do you propose to determine the number of stock that have historically ranged the property? How about property boundary changes or changes in the type of livestock

Such as changes from dairy to feeder calves or from horses to sheep?

SUMMARY

I have lived all my life in water short areas. I believe in planning water use wisely. You use the slogan ‘People, Farms, Fish’ for this rule. Yet it gives all the benefits to the fish and it still won’t put any more water in the streams. It will cause real economic hardships on the undeveloped property owners who typically that have all their personal assets tied up in their land.

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PETITION FOR ADOPTION, AMENDMENT, OR REPEAL
OF A STATE ADMINISTRATIVE RULE (RCW 34.05.330)

CHAPTER 173-517 WAC

PETITIONER'S NAME **Dennis A Schultz, President, Olympic Stewardship
Foundation**

TELEPHONE NUMBER **360-379-0338** e-mail **dschultz@waypt.com**

STREET ADDRESS **250 N Jacob Miller Rd**

CITY **Port Townsend** STATE **WA** ZIP CODE **98368**

AGENCY RESPONSIBLE FOR ADMINISTERING THE RULE
Department of Ecology

1. NEW: I am requesting that a new WAC be developed.
I believe a new rule should be developed.
The subject of this rule is:
The rule will affect the following people:
The need for the rule is:

2. AMEND: I am requesting a change to existing WAC:

3. REPEAL: I am requesting existing WAC be removed. **YES**

CHAPTER 173-517 WAC

I believe this rule should be changed or repealed because (check one or more):

- It does not do what it was intended to do. **YES**
- It imposes unreasonable costs. **YES**
- It is applied differently to public and private parties.
- It is not clear
- It is no longer needed.
- It is not authorized. The agency has no authority to make this rule.
- It conflicts with another federal, state, or local law or rule. Please list number of the conflicting law or rule, if known:
- It duplicates another federal, state or local law or rule. Please list number of the duplicate law or rule, if known:
- Other (please explain): **The SMALL BUSINESS ECONOMIC IMPACT ANALYSIS does not meet the criteria of RCW 19.85.040 and the Findings in RCW 19.85.020. SEE ATTACHED SHEETS (7 pages) for a detailed discussion and excerpts from the RCW's .**

PETITIONER'S SIGNATURE

DATE

**Dennis A Schultz
President,
Olympic Stewardship Foundation**

December 29, 2009

Discussion

This analysis uses the period from 1996 to mid 2006 as a base for making projections. In those years, large developments such as Kala Point and the Port Ludlow Master planned Resort were built and largely completed.

- Since that time no such developments have been planned or started.
- Building permits have dropped from over 400 in 2007 to 200 in 2008, to under 70 in 2009.
- Most of the jobs and companies in construction and real estate have disappeared and the workers are unemployed or left the area.
- This rule restricting water, particularly in those rural areas where there is no real water shortage, will depress real estate values as potential buyers realize that they will not be able to live the rural lifestyle they are looking for. The equity loss for those with buildable properties that will not receive water in the Chimacum basin is on the order of at least \$40,000,000.
- The long time impact of this rule on property tax should be discussed in this section.
- The drop to an average of 45 new homes a year from the current 70, will be an even greater loss of jobs and income in the construction industry – not a benefit
- What about the approximately 1,000 current construction workers currently in this county? Will they be put out of work, or expected to go elsewhere?

This analysis assumes that if the Rule is not adopted, DOE will close the watershed to all new water uses. If this happens, it will drive many businesses out of the county or force them to shut down. It does not legitimately compare the benefit or costs of the rule against current conditions, or any other alternatives, but rather against conditions that it knows would be ruinous to the county and its residents, totally impractical and politically impossible if they were attempted. This is using the WAC and DOE's administrative powers as administrative blackmail: 'Do it our way or we will ruin you economically!'

The \$25,000,000 projected labor income (Table 2) calculates out to about a median family income of about \$30,000 for the 819 new jobs that this rule will create. This is defined by the federal government as 'poverty level income' not family supporting jobs! These families can not afford to live in this county. With a current unemployment rate over 10%, this county does not need this kind of help. This is not a benefit!

The \$35,000,000 benefit for new home construction is based on the alternative that absolutely no new homes will be constructed between 2009 and 2025, i.e. DOE will close the watershed to all new water uses and put a freeze on all new construction. Even if this rule is put to use, it will cause a dramatic decrease in the building industry and jobs. This \$35,000,000 represents a major decrease in business income, not a benefit. The current building rate of 70 new homes a year represents \$56,000,000 in income.

Most of the industrial areas in Table 2 do not exist in this county. The NAICS based model used for this projection is not applicable to Jefferson County. 'The OFM 2002 Washington Input-Output Model is used to predict a picture of the state's economic structure including inter-industry linkages and the economy's dependence on U.S. domestic and international markets' (from OFM website). It is not meant to be used to predict the economic structure of a rural county. It does not have an intrastate industrial geographic location element. Many of the potential jobs in table 2 do not exist within a reasonable distance from Jefferson County. If this model is the basis for the benefits analysis, it must be validated by some other justified method. Specifically, it ignored most of the small businesses in WRIA17. Almost all of the small businesses in the area are 'Home Based' or 'Cottage Industries' as defined in the Jefferson County Unified Development Code. Jefferson County has no data about these businesses as it does not require a business license for them. Owners of these businesses report their income on IRS Form 1040. None of this business is found in the IRS SIC Code reporting data. The list of businesses used by Tryg Hoff is a very partial list full of errors. Most, if not all of the businesses were never contacted by Hoff to validate his projections. A number of these businesses no longer exist. Some of them cannot expand because of code limitations and some are retiree businesses with no desire to expand. And yet, he made large projections for their growth (to grow from a part time helper to a range of 4 to 9 new employees). Jefferson County and City of Port Townsend codes restrict the number of employees in these types of businesses. The section 'Expected Jobs Created or Lost' and 'Table 2' are meaningless and are based on erroneous data and analysis. This must be redone!

The problem with this rule is not the incremental cost of doing business. It is that it will keep businesses from locating here. There is almost no land zoned for industrial or commercial use in the county areas. There is about 740 acres in total zoned for these uses and most of that is already in use or under severe development restrictions.

DOE's answer to the water restrictions is: buy property with water rights, or buy water rights to transfer, or pay for mitigation. In reality, agricultural land with water rights rarely comes on the market, transfer of water rights won't allow transferring water from basin to basin, and there are no water mitigation projects that users can buy into.

The impact of this rule has to be reanalyzed. If implemented, it will be a financial disaster for the county in a few years.

What we really need is a better plan to manage the water we have, and to allocate it to the users that need it. Possibly a 'water board', or some such authority, that can determine where and how water is currently being used, who needs water, and, that can act on water allocation in a timely manner is what we need. The proposed 'one size meets all' rule applied to a number of sub-basins with very different characteristics is a very poor way to manage our water resources. This rule is just a rewrite of the rule proposed in 2005. There has to be a better way to manage our water.

In summary:

- It is based on 'old data' not current conditions.
- It only compares the effects of the rule vs a moratorium on all new construction and development for 16 years. No alternative approaches are analyzed.
- It shows a major loss of jobs, not new jobs being created.
- It shows a major loss in construction income.
- It uses an inappropriate model and data to predict growth.

It does not solve our water management needs here in Jefferson County.

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RCW's that this rule does not meet the criteria of:

(Pertinent sections are underlined and comments are in red)

This rule does not meet the findings in RCW19.85.020, in particular (1),(7), (9) and (10):

RCW 19.85.020

Definitions.

Findings -- 2007 c 239: "The legislature finds that:

(1) A vibrant and growing small business sector is critical to creating jobs in a dynamic economy;

This rule will discourage the growth of new business - it will place this area in an uncompetitive position, compared to other counties.

(7) Unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

See (1)

(9) Alternative regulatory approaches which do not conflict with the state objective of applicable statutes may be available to minimize the significant economic impact of rules on small businesses;

No alternative approaches have been proposed.

(10) The process by which state rules are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, to examine the impact of proposed and existing rules on such businesses, and to review the continued need for existing rules." [2007 c 239 § 1.]

The prime industries in this area, Agriculture, Aquaculture, Forestry, and Mining were not involved in drawing up this rule.

This Small Business Economic Impact Analysis (SBEIS), Chapter 173-517, does not meet the criteria of RCW 19.85.040(1), (2) and (3):

RCW 19.85.040

Small business economic impact statement — Purpose — Contents.

(1) A small business economic impact statement must include a brief description of the reporting, recordkeeping, and other compliance requirements of the proposed rule, and the kinds of professional services that a small business is likely to need in order to comply with such requirements. It shall analyze the costs of compliance for businesses required to comply with the proposed rule adopted pursuant to RCW [34.05.320](#), including costs of equipment, supplies, labor, professional services, and increased administrative costs. It shall consider, based on input received, whether compliance with the rule will cause businesses to lose sales or revenue. To determine whether the proposed rule will have a disproportionate cost impact on small businesses, the impact statement must compare the cost of compliance for small business with the cost of compliance for the ten percent of businesses that are the largest businesses required to comply with the proposed rules using one or more of the following as a basis for comparing costs:

This rule will cause a significant loss in construction sales and in real estate values.

(2) A small business economic impact statement must also include:

(a) A statement of the steps taken by the agency to reduce the costs of the rule on small businesses as required by RCW [19.85.030\(2\)](#), or reasonable justification for not doing so, addressing the options listed in RCW [19.85.030\(2\)](#);

This rule does not reduce any of the costs for small businesses. It will increase the costs for new businesses to locate here.

(d) An estimate of the number of jobs that will be created or lost as the result of compliance with the proposed rule.

It ignores the existence of an existing construction industry workforce, many of whom will not have work under the planned build out rate of 45 homes a year.

(3) To obtain information for purposes of this section, an agency may survey a representative sample of affected businesses or trade associations and should, whenever possible, appoint a committee under RCW [34.05.310\(2\)](#) to assist in the accurate assessment of the costs of a proposed rule, and the means to reduce the costs imposed on small business.

Other than public meetings and press notices, it appears that no effort was made to contact local businesses or survey their future plans to determine the impact of this rule.

It does not meet the criteria of RCW 34.05.325 (6)(a)(iii), (responses such as: ‘DOE disagrees, etc.’ are not acceptable).

RCW 34.05.325

Public participation — Concise explanatory statement.

(6)(a) Before it files an adopted rule with the code reviser, an agency shall prepare a concise explanatory statement of the rule:

(iii) Summarizing all comments received regarding the proposed rule, and responding to the comments by category or subject matter, indicating how the final rule reflects agency consideration of the comments, or why it fails to do so.

Many of Ecology’s answers to the questions in the comments are of the nature: ‘DOE disagrees’, and did not respond to the questions asked.

It does not meet the requirements of the 'Cost/Benefit Analysis' as required in RCW 34.05.328 (1)(d) and (1)(e). Or the findings with respect to The Regulatory Reform Act Of 1995:

RCW 34.05.328

Significant legislative rules, other selected rules.

(1) Before adopting a rule described in subsection (5) of this section, an agency shall:

(d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented;

The benefits claimed are over exaggerated and costs minimized or ignored.

(e) Determine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection;

No alternative solutions have been presented other than a moratorium on all new development.

Findings -- Short title -- Intent -- 1995 c 403: "(1) The legislature finds that:

(c) Despite its importance, Washington's regulatory system must not impose excessive, unreasonable, or unnecessary obligations; to do so serves only to discredit government, makes enforcement of essential regulations more difficult, and detrimentally affects the economy of the state and the well-being of our citizens.

This rule will definitely have a negative impact on the local economy.

(2) The legislature therefore enacts chapter 403, Laws of 1995, to be known as the regulatory reform act of 1995, to ensure that the citizens and environment of this state receive the highest level of protection, in an effective and efficient manner, without stifling legitimate activities and responsible economic growth.

This rule does not meet the goal of this law