



To Protect and Promote the Health and the Environment of the People of Kittitas County

June 14, 2010

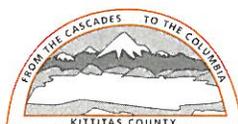
Washington State Department of Ecology
Central Regional Office
15 W. Yakima Ave., Ste 200
Yakima WA 98902
Attention Tom Tebb, Director, Central Regional Office

Dear Mr. Tebb,

In response to the July 16, 2009 moratorium on ground water use in upper Kittitas County, Kittitas County Public Health Department (KCPHD) had to revise the water availability approval requirements for issuance of building permits. For clarification purposes, section 19.27.097 RCW requires an applicant for a building permit to "provide evidence of an adequate water supply for the intended use of the building." *Id.* The statute lists three forms that evidence may take. The first is "a water right permit from the department of ecology, the second is a letter from an approved water purveyor stating the ability to provide water, or the third, another form sufficient to verify the existence of an adequate water supply". AGO 1992 No. 17 provides guidance that a water right permit from ecology would only prove half an applicant's case; the applicant would still need to show that his or her water was potable. This would hold true if the applicant chooses to provide "another form sufficient to verify the existence of an adequate water supply". KCPHD does not believe that it can make a determination regarding potable water without bacteriological and nitrate tests providing evidence that the water is safe for human consumption. This is not an issue with a letter from an approved water purveyor as group system requirements already include the necessary tests. With either a water permit or other verification of adequate water supply, this requirement would have to be specifically addressed prior to an applicant obtaining water availability approval and a subsequent building permit.

The department of commerce has provided guidance to County regarding RCW 19.27.097 in the form of WAC 365-196-825. This section points counties and cities to the AGO 1992 No. 17 for guidance. It also indicates that local regulations should be consistent with rules adopted by the department of ecology that limit the availability of additional ground water within a specific geographic area. AGO 1992 No. 17 states "any applicant for a building permit who claims that the building's water will come from surface or ground waters of the state, other than from a public water system, must prove that he has a right to take such water."

However in September of the next year, the Supreme Court in *Rettkowski v Department of Ecology* 122 Wn2d 219 P.2d 232 (1993) affirmed the Superior Court of Lincoln County ruling that only the Superior Court



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had jurisdiction to make determinations as to a water right. While Ecology is a necessary party in such adjudication, a local health department would lack that standing.

WAC 365-196-825 grants neither the County nor Public health the authority to make determinations regarding water rights. The department of commerce in its original notice filed as WSR 07-19-125 explained why it did not do a small business economic impact statement as required by Chapter 19.85 RCW stating that 365-195 WAC provided guidance only, and is not substantive. Neither a non-substantive guidance document nor an AGO can grant Public Health jurisdiction that state law, according to the Supreme Court, grants only to the Superior Courts.

So having reached the conclusion that Public Health lacks jurisdiction to make a determination as to someone's right or lack thereof to withdraw water, how can the County act consistent with the moratorium in Upper Kittitas County? Such a rule limits the availability of ground water within a specific geographic region, and would create a strong presumption that such water does not exist. Only with the actual observance of the water supply in question would such a presumption be rebutted. This need to witness the water couples nicely with the need to test it to determine potability. Consequently, it is our intention to only issue water availability approval and thus building permits to individuals that have either a letter from a water purveyor guaranteeing a connection or have water in sufficient quantity for the purpose of the building which has recently (within one year) received passing tests for quality.

For us to refuse to issue water availability approvals or building permits to applicants with adequately producing wells would be akin to the Ecology's issuance of a cease and desist orders to the irrigators in the Sinking Creek area. Absent an order from a Superior Court enjoining their use and restraining our issuance of a permit, the issue of an applicant's right to ground water withdrawal will not be considered by the County.

It is our intent to proceed as outlined above which includes requiring wells be drilled, adequate well production documented, storage requirements satisfied (if necessary) and passing test for water quality completed prior to issuance of a building permit. This intent is based upon our understanding of the law and limits of our authority.

We would ask that if you have any comments or input, including any additional authority indicating that the County can make a definitive determination regarding water rights that you please provide those to us before June 30th, 2010. We are concerned that after someone builds a home, the subsequent buyer will be left exposed. We welcome a discussion of what we can do to guard against that.

Sincerely,



Catherine Bambrick, Administrator