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Jefferson County Association of REALTORS®
Government Affairs Committee
219 W. Patison Street
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Department of Ecology
Water Resources Program Attn: Ann Wessel
PO Box 47600
Olympia WA 98504-7600

RE: WRIA 17 Proposed Water Management Rule, WAC Chapter 173-517

Dear Ann:

The Jefferson County Association of REALTORS® (“JCAR”) is submitting this letter from its Government Affairs Committee in response to the Department of Ecology’s proposed Water Management (instream flow) Rule for WRIA 17. JCAR members have been involved with the formulation of this rule and related water resource issues for a number of years. We have a member on the planning unit, have planned and hosted a number of meetings to inform both our members and the public, and have taken out ads in the local newspapers to make sure that local residents and landowners are aware of the proposed Rule. As REALTORS® we know the beauty of the land and the value of the natural resources Jefferson County offers us as community members and our clients as land and home owners and buyers.

We agree that instream flow water resource issues should be addressed and believe that actions that actually improve streamflows and groundwater resources are the better approach. Regulations, where necessary, need to be clear and concise. As proposed by Ecology, we believe certain parts of the rule are beyond the agency’s statutory authority, conflict with other legal requirements, and will negatively impact homeowners, homebuyers, and the quality of life in Jefferson County. We also are concerned that some of the data used by Ecology is not accurate and that additional information on water resources and hydrogeology is necessary before adopting a final rule. Below we provide specific comments on a number of provisions in the rule.

1. Coastal Management Areas

Ecology has included a new concept called “Coastal Management Areas” within the proposed rule (WAC-173-517-130(1)), indicating that these are areas where future groundwater withdrawals could negatively impact the instream values of small streams, or contribute to the seawater intrusion. We believe that Ecology should be required to first show that there will be a negative impact from future water withdrawals in order to regulate these areas. Furthermore, we do not believe Ecology has a sufficient statutory mandate to regulate these areas under this section of the law. Regulatory authority over coastal area is found in the Shoreline Management Act, not the water code, and the SMA provides a more balanced approach involving both state and local shoreline regulation, as opposed to state-only regulations.

2. Regulation of the “Unnamed Stream”

The waterway indicated in the rule to be the “Unnamed Stream” is subject to additional restriction on groundwater withdrawals and well construction activities. The “Unnamed Stream,” however, is a series of drainage basins that do not interface with Discovery Bay, and fish passage and existence in the basins are not and have never been seen. We do not believe that Ecology has the statutory authority to regulate such an area.

3. Stream Flow Levels

The instream flow levels that would be set by the proposed rule are levels that have only been achieved by actual flow levels two times in the previous 80 years, in 1952 and 1958. This clearly exceeds Ecology’s statutory authority to adopt minimum instream flows by rule. 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 meaning of “minimum flow” or “baseflow” has not been subject to court decision, however, the Attorney General’s Office has previously provided Ecology with legal interpretation of what these terms mean. In 1986, then Senior Assistant Attorney General Charles B. Roe provided an information opinion as to the extent of Ecology’s instream flow authority, based on both Chapters 90.22 and 90.54 and the legislative history of those acts:

. . . 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 Senior Assistant Attorney General Charles B. Roe to Eugene F. Wallace, Program Manager for Ecology Water Resources, February 20, 1986, at 8. (Attached as Exhibit 1).

Mr. Roe's analysis from 1986 still stands today, and is provided as legal authority on instream flows in the WSBA Real Property Deskbook, which further provides:

“The first determination is to provide for foundational ‘minimum flows’ (or ‘baseflows’) as contemplated by RCW 90.22.010 and RCW 90.54.020(3)(a). The second determination, reaching after conducting a ‘maximum net benefits’ test as described in RCW 90.54.020(2), focuses on whether an additional increment of enhanced flow should be provided above ‘minimum flows.’”

WSBA Real Property Deskbook, Water Rights (C. Roe) § 117.9(1)(b), p. 117-133, also citing Northwest Steelhead and Salmon Council et al. v. Ecology, PCHB No. 81-148.

The flow levels proposed by Ecology far exceed minimum or baseflows, and Ecology has not properly conducted a maximum net benefits test to justify selecting flow levels beyond minimum or baseflows. Due to this fact, Ecology needs to reevaluate this rule and set the levels and the related restrictions to levels that are historically achievable flows that are truly minimum or baseflows.

4. Serving a Water Right

In the cost benefit analysis included within the rule proposal, Ecology currently valued each and every adult spawning salmon at over \$5,000. The instream flow levels being what they are, we believe that the Department of Fish and Wildlife (WDFW) should be establishing opportunities to directly serve the new water right they are creating. Taking this action would be very beneficial for the DOE and DFW and would move the burden off of the rural land owner.

5. Impacts to Local Cottage Industry Agriculture

The Small Business Economic Impact Analysis (SBEIS) concludes that “there are very few businesses in the affected area of this Rule” and discussions with Tryg Hoff from Ecology has clarified that the document parameters consider only businesses that report income to the IRS. That being said, Ecology has shown in its analysis of WRIA-17, and particularly in rural areas, that most businesses are cottage industry and/or small sustainable agriculture on rural residential lands. These “businesses” were not looked at or considered in the SBEIS, a possible tax burden shift was not considered, and the loss of future agriculture was not valued. We feel that Ecology needs to revisit the SBEIS in order to make it more accurately reflect the nature of our local community.

6. Job Creation

Ecology's SBEIS concludes that as a consequence of adopting the instream flow rule, 819 new jobs will be created, including 384 jobs in the construction sector, and 20 jobs in real estate. We disagree with Ecology's assertion that a rule placing a fixed limit on the supply of water available for future growth in Jefferson County could result in a net gain of over 800 jobs. Ecology uses the fact that rule provides limited supplies of water to create a false baseline

against which to measure economic impacts. In the past, Ecology has informed the WRIA-17 planning unit that the rule restrictions are not based on a water shortage or over-allocation of water rights. We believe the number of purported jobs created is inaccurate because water is currently readily available and not water short. We believe the SBEIS needs to be changed to reflect this fact.

7. Previously Drilled Wells, Priority Dates, and Relation-Back Doctrine

The Hydrologic Services Co. (HSC) Build-Out Analysis (Attached as Exhibit 2) and the well data provided to Ecology from the Jefferson County Department of Health (Attached as Exhibit 3) shows there are several hundred wells that have been drilled in Eastern Jefferson County that have not yet been used for a beneficial domestic use. Many of these wells are in the Chimacum sub-basin and will be subject to no outdoor use after the rule is in place. We believe that the citizens who have drilled wells and done soils testing with the understanding that they would be able to develop their properties and have the opportunity for all the beneficial uses that a permit-exempt well provides under 90.44.050. In answering a query from the county as follow-up to a question from a landowner in the Chimacum sub-basin, Ann Wessel attempted to clarify Ecology's position on the impact of the instream flow rule on pre-existing wells, and how Ecology would determine the priority date of exempt wells, in the following:

“Your best assurance of establishing your water right under this exemption is to beneficially use water for the purpose you intend for the future. For domestic use, beneficial use is considered to occur when water is used within a permitted residential structure. Ecology prefers a Certificate of Occupancy for the residence to demonstrate domestic use of water.

The proposed rule establishes reserves of water that will provide water for new and previously unused permit-exempt wells for many years into the future. Based on the building permit record, we project each reserve will provide water through 2025. If alternative sources of water are not developed and available when the reserve is used up, there will likely be further restrictions on those who want to start using water at that time.

After the rule takes effect we will be coordinating with the County, tracking new building permits and applying the requirements of the rule to each new residence. This means we intend to debit the reserves and apply the conservation standard to each new user regardless of their using an individual or shared well.”

E-mail from Ann Wessel (Ecology) to Neil Harrington, Jefferson County DOH) , dated 7/2/09.

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.

For permitting 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.

8. Shared Well Agreements

Shared well agreements are prevalent in the rural areas of WRIA-17. When one party in a shared well agreement is vested with beneficial domestic use and another is not, Ecology has asserted that the second party will be subject to the rule limitations. We believe that if a well predates the adoption of the instream flow rule, it is senior to the rule and therefore additional users or increases in use are not subject to the rule. Ecology’s position will create a situation where different users on the same well have different priority dates and requirements under the instream flow rule. This results in conflict among water users who have invested jointly in the development of water resources and who have a reasonable expectation of being able to use water.

9. Least Burdensome Option

The Least Burdensome Analysis does not explore all the possible ways in which the proposed rule could be imposed to find a true Least Burdensome option. The HSC study shows that in the Chimacum sub-basin, approximately 60% of undeveloped parcels in the area are zoned rural 1du/10 acres and 1du/20 acres. These are parcels that will be restricted to no outdoor watering, destroying the opportunity for our community’s future small farms and rural way of life. Ecology should look to find a way to truly create a Least Burdensome option that preserves the ability for landowners to engage in agricultural activities.

10. 1/10th of 1% Basis for Reservation in Chimacum Sub-Basin

The water reserve given to people in the Chimacum sub-basin is 1/10th of 1% of the flow level set in rule. In other areas that have been regulated under such rules, the reserve levels for people have not been nearly this minimal. We believe that it is beyond Ecology's authority to limit the amount of water to such an extreme degree and should be changed to allow greater flexibility for water users within the Chimacum sub-basin.

11. Conflict With Local Planning

By adopting this rule and limiting the number of households that can be allowed in certain areas of the County, Ecology is invalidating the growth projections and other aspects of the County's Comprehensive Plan required under Chapter 36.70A RCW, the Growth Management Act ("GMA"). Under the GMA, local governments are required to plan for future growth, including making sufficient land and zoning available to accommodate this growth. It is questionable whether under Ecology's rule that water will be sufficient for 20 years, and without question that at some point, Ecology's rule could prevent local governments from being able to accommodate population growth. Ecology's promise to reexamine water demands in the future provides little comfort.

By creating conflicts with the GMA that have not be reconciled or analyzed, Ecology's rulemaking process also violates the requirements of the Administrative Procedures Act, Chapter 34.05 RCW. Under the APA, Ecology was required to: (h) Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by the following:

- (i) A state statute that explicitly allows the agency to differ from federal standards; or
- (ii) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives stated under (a) of this subsection; and
- (i) 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

The GMA, local comprehensive plans and zoning, and Ecology's instream flow rule all relate to constraints on future population growth and land use. Even though the local comprehensive plan will be undermined by the proposed instream flow rule, Ecology has not analyzed whether this is "justified," or provided "substantial evidence that the difference is necessary." Further, there has been little progress in coordinating the rule with other state and local laws.

12. Livestock Watering

The proposed rule indicates in section WAC-173-517-190(b) that water for livestock is limited to "no greater number of stock that historically range that parcel." Ecology has no statutory authority to use instream flow rules to prevent landowners from increasing the number of stock at a piece of property, or to begin raising stock even though the property was not historically used for this purpose. We interpret this to be affecting water rights that are senior to the water right developed in this rule and clearly outside the statutory mandate of the Ecology.

More fundamentally, we question why Ecology would want to prohibit landowners from raising farm animals, which is an important part of our rural economy and way of life.

13. Impacts to Real Estate Consumers

Ecology's rule is premised on the collection, analysis, and distribution of significant amounts of data relating to water use, building permits, and other information. Neither Ecology nor local governments have the human resources necessary to actually implement all of the various details of the rule. Ultimately, this will create risks to real estate consumers. Under the Seller Disclosure Act, Chapter 64.06 RCW, sellers of residential real estate, both improved and unimproved, must provide buyers with a checklist responding to various questions about the property, including whether the property has water supply. The instream flow rule is so complicated that we do not believe average real estate sellers will have sufficient knowledge to be able to complete the seller disclosure form, which in turn creates significant uncertainty for real estate buyers.

14. Continued Support for Alternative Water Supply Studies and Options

One of our major concerns with the proposed rule is that it limits future water supply without any certainty that alternative water supplies will be made available. We acknowledge and appreciate the support provided by Ecology to the WRIA-17 Planning Unit for the USGS study and the ASR project. We support working towards a better understanding of water movement and alternative water supply options. Ecology's adoption of an instream flow rule will require continued work and funding on the part of the agency to examine future water supply options. Water availability for supply and storage options from the Big Quilcene River and the Chimacum Creek at certain high flow periods is an important beneficial use and tool that Ecology has allowed for in the proposed rule and must continue to pursue.

Thank you for your time and we look forward to your comments on the issues we have just raised.

Sincerely,



Teren MacLeod
Government Affairs Chairperson
Jefferson County Association of REALTORS®

Enclosures:

- 1 – 1986 Memo from Office of the Attorney General
- 2 – HSC Buildout Analysis
- 3 – Jefferson County Well Information

Attachment 1



OFFICE OF THE ATTORNEY GENERAL

Inter-office Correspondence

Date: February 20, 1986

To: Eugene F. Wallace, Program Manager for
Water Resources, Department of Ecology

From: Charles B. Roe, Senior Assistant Attorney General *CBR*

Subject: Instream Flow Statutes - Chapters 90.22 and 90.54 RCW

You have requested my views as to the meaning of the state's instream flow statutes contained in chapter 90.22 RCW and RCW 90.54.020. This is my response.

Chapter 90.22 RCW, enacted initially in 1967 and re-enacted in 1969, authorizes the establishment by the Department of Water Resources (now the Department of Ecology) of minimum water flows or levels for lakes and streams. A portion of that chapter, RCW 90.22.010, provides:

The department of water resources may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same. In addition, the department of water resources shall, when requested by the department of fisheries or game commission to protect fish, game or other wildlife resources under the jurisdiction of the requesting state agency, or by the water pollution control commission to preserve water quality, establish such minimum flows or levels as are required to protect the resource or preserve the water quality described in the request. Any request submitted by the department of fisheries, game commission or water pollution control commission shall include a statement setting forth the need for establishing a minimum flow or level. This section shall not apply to waters artificially stored in reservoirs, provided that in the granting of storage permits by the department of water

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resources in the future, full recognition shall be given to downstream minimum flows, if any there may be, which have theretofore been established hereunder. (Emphasis supplied.)

RCW 90.54.020, enacted in 1971, sets forth a comprehensive list of state policy "fundamentals" for utilization and management of the state's waters. Of special relevance to this discussion is the "fundamental" contained in RCW 90.54.020 (3)(a) which reads:

(3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served. (Emphasis supplied.)

In addition, RCW 90.54.020 contains another "fundamental" for water management, the importance of which cannot be overstated for purposes of this discussion. It provides in RCW 90.54.020(2):

Allocation of waters among potential uses and users shall be based generally on the securing of maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

The responsibility for implementing the above program and policy is vested primarily in the Department of Ecology. RCW 90.54.040. See generally Stempel v. Department of Water Resources, 82 Wn.2d 109, 117, 508 P.2d 166 (1973). Indeed, as to the establishment of minimum flows under state law, the authority to establish such flows is, by express "affirmation," vested exclusively in the Department of Ecology by RCW 90.03.247. Other state agencies are, by said section, not authorized to establish such flows.

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Your inquiry relates primarily to the flows and levels that are provided by the aforementioned legislative enactments of 1969 and 1971.

I. CONCLUSION-SUMMARY

Existing state instream flow laws, contained in the aforementioned legislation, announce a very strong policy of retaining waters in naturally flowing streams of the state. The amount of water flow to be retained for a particular specific stream, or a reach thereof, will vary. These amounts are to be determined through a two-phase evaluation process by the Department of Ecology as set forth primarily in chapter 90.22 RCW and in RCW 90.54.020(2) and (3).

RCW 90.22.020 and RCW 90.54.030(3), which embody the first phase evaluation, provide for the establishment by the Department of Ecology of minimum or base flows to ensure that instream values of a stream, such as aesthetics, fisheries, or recreational values, are protected against termination from lack of water because of future appropriations, i.e., direct diversions from the stream itself. Stated simply, the basic policy of this phase is to keep all streams currently "alive" in that condition. It is not, however, a policy designed to retain flows that are greater than necessary to ensure the continued existence of the instream values associated with the stream on a minimum basis.

The second phase of instream flow retention policy is contained in RCW 90.54.020(2). That section sets forth a "maximum net benefit" test for allocation of future water uses. Under this test, a higher instream flow is required if it is determined by the department that instream values bring about the "maximum net benefit" usage of the waters of the stream. Thus, under appropriate findings derived from a maximum net benefit evaluation of a stream, the department shall require that all or a portion of the naturally occurring waters of stream be retained therein for all or portions of each year.

In sum, the policy of Washington instream flow protection laws today are:

1. To keep streams flowing for protection of instream values through the establishment of "minimum" flows that assure no streams with such instream values are authorized to be dried up in the future; and

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2. To provide for instream flows above the "minimum" when such flows provide the people of the state the maximum net benefit return of the use of the state's public waters.

In order to understand the basis for my conclusions, it is necessary to know of the historical events, including the pertinent legislative history, underlying the enactment of chapters 90.22¹ and 90.54 RCW.²

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- 1 As to both the 1967 and 1969 versions of chapter 90.22 RCW, please note that writer hereof was not only the drafter thereof but, along with Senator (then Representative) Alan Thompson, the legislation's prime sponsor, was the chief proponent for their enactment during their successful legislative journeys. This proponent activity was performed on behalf of both the Department of Water Resources and the Attorney General's Office. Of import to this paper, a major element of this activity was to describe the objectives of the bill and the meaning of legislation's various sections to the pertinent legislative committees.
 - 2 The writer hereof was also the principal drafter as well as the executive branch proponent for enactment of chapter 90.54 RCW during the 1971 legislative session. This activity was conducted on behalf of Governor Daniel J. Evans, the Department of Ecology (Director John A. Biggs), and the Attorney General's Office (Attorney General Slade Gorton) working in very close coordination with Representative Sid Flanagan, Chairman of the Legislature's Interim Committee on Water Resources and the committee's minority leader, Representative Thompson. Chapter 90.54 RCW was written by the writer early in the 1971 session because the Interim Committee could not reach an agreement on a committee bill for introduction in the 1971 session. While portions of chapter 90.54 RCW, not including its instream flow provisions and "fundamentals," had its roots in the Interim Committee's efforts, chapter 90.54 RCW was drafted independent of that Interim Committee and after it ceased to actively function.

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II. BACKGROUND

A. The 1917 Surface Water Code.

Since 1917, the foundation state surface water management statute has been the surface water code, chapter 90.03 RCW. The centerpiece of that code is the water right permit system contained in RCW 90.03.250 through RCW 90.03.340. This permit system has, since its enactment, provided the exclusive means under Washington law for establishing new rights to divert surface waters. RCW 90.03.010.

While the code does not expressly deal with a minimum flow retention policy for streams, it does require the administrator of the permit system to deny an application for a water right permit if it would be "detrimental to the public welfare" or the "public interest." RCW 90.03.290. As a matter of historical implementation, the administrator of the water right permit system has measured applications for water rights against this public interest criteria and, when he determined that it was not "detrimental to the public interest," issued water right permits and certificates that authorized diversions which dewatered (dried up) streams. Decisions having this full "appropriation" impact were applied to many streams of our state, especially those located east of the Cascade Range.

B. The Amendments to the Water Code in the 1940s and Related State Statutory Provisions

The 1917 water code's permit system was modified in 1947 by requiring, in RCW 90.03.290, that:

... in the event a permit is issued by the supervisor upon any application, it shall be his duty to notify both the director of fisheries and the director of game of such issuance.

See section 1, chapter 133, Laws of 1947.

Thereafter, in 1949, the legislature modified the relationship of the water resource management agency and the two state fishery management agencies in RCW 75.20.050. That section provides:

It is the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.

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The director of ecology shall give the director of fisheries and the director of game notice of each application for a permit to divert water, or other hydraulic permit. The director of fisheries and director of game have thirty days after receiving the notice to state their objections to the application. The permit shall not be issued until the thirty-day period has elapsed.

The director of ecology may refuse to issue a permit if, in the opinion of the director of fisheries or director of game, issuing the permit might result in lowering the flow of water in a stream below the flow necessary to adequately support food fish and game fish populations in the stream.

The provisions of this section shall in no way affect existing water rights.
(Emphasis supplied.)

C. The Water Resources Agency's Implementation of the 1940's Enactments.

During the 1950s and through the mid-1960s, the water agency³ administered the 1917 water code's permit system in accordance with the statutory requirement to notify the fishery agencies of water right permit applications and to consider the recommendations of the agencies as to water needs for fishery resources. Thereafter, following the aforementioned 1917 water code's "public interest" criteria, which included taking into account the information obtained from the departments of fisheries and game, the code's administrator ruled upon water right permit applications.

³ From 1950-1957 the water right permit system of the 1917 code was administered by the department of conservation and development, from 1957-1967 by the department of conservation, and through the remainder of the 1960's by the department of water resources.

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In rulings on many water right applications, the administrator issued permits containing a condition that no diversions of public waters may be made which would cause a stream to fall below a specified minimum flow designed to protect instream fishery values. In other fishery value protection situations, the administrator "closed" streams to further appropriation and denied applications for permits. On the other hand, applications were also approved that authorized a stream to be, in effect, dewatered, i.e., dried up.

Of note, all of the above-described decisions were made by the administrator without reference to any published agency criteria or guidelines relating to the interrelationship of the 1917 code and RCW 75.20.050. Indeed, there were no written "rules" or "guidelines" developed by the water code's administrator during this period. Implementation thereof was accomplished through an inter-agency effort administered on an ad hoc basis with regular (twice-monthly) exchanges of fishery "needs" information imparted at meetings of representatives with expertise of the agencies involved. The history of this period is that the recommendations of the fishery agencies were oftentimes accepted and permits so conditioned.

It is against this backdrop that the legislative actions of the 1967-1971 period, central to your inquiry, took place.

III. THE 1967-1971 MINIMUM BASE FLOW LEGISLATION

A. Chapter 90.22 RCW - 1967 version.

The "minimum flow" legislation of 1967 was enacted, in primary part, to establish a policy of retaining water in streams, in order that thereafter various instream values (including fish populations) would not be forever lost through "overappropriation" under the state's water right laws. A major change brought about by the 1967 legislation was the statutory direction to the Department of Water Resources (predecessor agency to the Department of Ecology) to retain waters in streams. Prior to 1967, the "public interests" determinations made by the Department of Water Resources did not require minimum flows to be retained in streams when requested by the fishery agencies. With the coming of the 1967 legislation, the Department of Water Resources was required to establish minimum flows for a stream, when requested by one of several state agencies, namely the department of fisheries, the game commission, or the water pollution control agency. After minimum flows for a stream were formally established by the department,

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(n)o right to divert or store public waters shall be granted by the department of water resources which shall conflict with regulations adopted pursuant to RCW 90.22.010. . . . RCW 90.22.030.

The 1967 legislation also required the establishment of all minimum flows for a stream to be "through the adoption of rules." RCW 90.22.020. Thus, flow-setting actions of the government agency were to be formalized in a context that allowed the public to be fully aware of their impact. See RCW 90.22.020.

In terms of the extent of flows and levels to be maintained, the 1967 legislation contemplates "minimum" flows to be established. These flows are designed to "protect," where appropriate, aesthetic, recreational, fishing, and wildlife values, and to "preserve" water quality necessary to meet water quality standards established by the water pollution control commission. 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 extinguishment. 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.

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- 4 Thus, minimum flows, set pursuant to RCW 90.22.020, must be established pursuant to the rule-making procedures of the state's Administrative Procedures Act. See chapter 34.04 RCW.
 - 5 The powers of the Water Pollution Control Commission contained in chapter 90.48 RCW are now vested in the Department of Ecology. See RCW 43.21A.060.
 - 6 It should be noted that the establishment of minimum flows for a stream does not assure that such flows will be in the stream. In streams which are dewatered or drastically reduced due to the exercise of water rights established prior to the establishment of minimum flows, the minimum flows settings constitute only state policy objectives for the stream rather than a reality.

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B. Chapter 90.22 RCW - the 1969 amendment.

During 1967 and 1968, no minimum flow or level establishment proceedings were initiated by the Department of Water Resources. This condition of inactivity came about because neither of the two fisheries management agencies nor the water pollution control commission requested the department to take such steps.

In 1969, the legislature broadened the power of the Department of Water Resources to adopt flows and levels by allowing it to do so on its own initiative. RCW 90.22.010 (section 3, chapter 284, Laws of 1969 ex. sess.). This additional grant of power did not, however, change the basic intent of the 1967 enactment as it pertained to minimum flows to be established for a stream.

C. Water Resources Act of 1971 - Chapter 90.54 RCW

The issue of the degree of flows to be maintained within streams was addressed once again by the legislature two years later. In the Water Resources Act of 1971, chapter 90.54 RCW, the legislature set forth a wide range of water management policies, entitled "fundamentals," together with directions to the Department of Ecology primarily to implement them. Two of the policies are of special note here; namely, RCW 90.54.020 and RCW 90.54.020 (3)(a) both quoted at the outset.

The words of the "fundamental" of RCW 90.54.020(3)(a), while not identical to those of the 1967 enactment contained in RCW 90.22.010, represent an affirmation of the general minimum instream flow policy established in 1967. The Department of Ecology's formal interpretation of the two statutes' interplay appears to be in accord therewith. See WAC 173-549-016, adopted by the Department of Ecology in 1984 pursuant to RCW 90.54.040, which provides:

For the purposes of this chapter, the term minimum instream flow shall be synonymous with the term base flow as defined in chapter 90.54 RCW and the term minimum flow as defined in chapter 90.22 RCW.

See a similar interpretation by the Department of Ecology in WAC 173-509-020.

This interpretation, established by rule by the agency with primary responsibility for implementation of the two statutes noted, is entitled to great weight. See Weyerhaeuser Co. v.

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Department of Ecology, 86 Wn.2d 310, 545 P.2d 5 (1976). The department's position is not only a reasonable one but is one that is, in my view, completely faithful to legislative intent. This conclusion is derived from my direct, extensive participation in the legislative activity leading to the two statutory enactments.

Of import here, this does not mean that the Department of Ecology is without power, under appropriate factual patterns, to establish instream flow requirements that are greater than those established under the limited flows provided by RCW 90.22.010, as affirmed in the fundamental of RCW 90.54.020 (3)(a). Northwest Steelhead and Salmon Council, et al. v. State of Washington, Department of Ecology, et al., PCHB No. 81-148, page 16, Conclusion of Law IX (decided August 3, 1983). Reference is made to the second fundamental of the Water Resources Act of 1971 noted earlier. That section, RCW 90.54.020(2), provides:

Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

When the two above-quoted fundamentals are read together, the Department of Ecology is required, as it performs its water management responsibilities, to make two determinations related to the retention of waters within a stream. The first determination is to provide for "minimum flows" (or "base flows") as contemplated by RCW 90.22.010 and RCW 90.54.020(3)(a). The second is to determine, after conducting a "maximum net benefits" test as described in RCW 90.54.020(2), whether an additional increment of flow should be provided above "minimum" flows to satisfy instream beneficial uses, such as aesthetic and fisheries uses. Accord; NORTHWEST Steelhead and Salmon Council, et al. v. State of Washington, Department of Ecology, et al., supra, Conclusion of Law VIII.

7 See footnotes 1 and 2.

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IV. CONCLUSION

The state's instream water policy of 1967-1971 is solidly founded. It is a progressive one that operates on the basic proposition, contrary to a historical state policy of long standing, that retention of minimum flows is required in most perennial streams not already fully appropriated. In addition to this "first priority" of water allocation for the protection of basic instream values, the Water Resources Act of 1971's mandate to embody "maximum net benefit" principles to the allocation of remaining unappropriated waters of a stream allows, when merited, for increasing instream flows beyond the first priority foundation flows.

This memorandum contains my views and does not constitute a formal opinion of this office.

I trust this is of assistance to you. Please contact me if you have any questions.

CBR:ec

March 9, 2009

MEMORANDUM

TO: Bill Clarke, Attorney and Teren MacLeod, Realtor

FROM: Joanne Greenberg, P.E.

RE: Final DRAFT Buildout Analysis of Chimacum Subbasin

As per your request and in accordance with the contract issued by Bill Clarke on 12/4/2008, we have undertaken a full buildout analysis of the Chimacum Creek Subbasin. This memo serves as a final draft summarizing what was accomplished as part of this analysis.

The goal of this analysis was to determine/estimate the number of new homes that could be built within the Chimacum Basin watershed boundary. This is considered a surrogate for understanding the additional domestic water supply needs of the basin outside of existing water service areas. This means that we assumed that each vacant parcel would require a new exempt well to be drilled or additional water drawn from an existing well. Additional assumptions are as follows:

Assumptions

- Jefferson County PUD #1 Service Area was excluded
- Acreage values were obtained from the Assessor's database. If not available, area presented in j-Map was used (Jefferson County online parcel map).
- If a parcel is vacant and the acreage < zoning acreage, one house could still be built on the parcel.
- Polygons with duplicate parcel numbers were counted as one total area. In other words, one parcel number includes the acreage from all of the polygons associated with that parcel number
- If the polygon appeared to be subdivided into similar sizes but only had one parcel no., the buildable homes are based on the total area and the zoning under that parcel no. For example, even if a parcel seems to have been subdivided into similar size polygons, those lots are not buildable unless each has its own parcel number. If they do not have their own parcel number prior to the rule implementation, it is possible they would not be able to get parcel numbers after the rule is set.
- Four parcels in Vacant Land (9100) with significant building values were moved to the appropriate land use category.

- Building values greater than \$10,000 were assumed to have a livable dwelling unit on it and thereby a water supply sufficient for that structure.
- Parcels with building values less than \$10,000 were assumed buildable unless spot checking proved otherwise.
- Areas in PPR (Parks, Preserves, Recreation) zoning were excluded
- The following land use codes were eliminated from the analysis:
 - ✓ 4800 Utilities
 - ✓ 4810 Public utilities: state assessed land
 - ✓ 5000 Commercial: whl-ret inc inc restaurants
 - ✓ 6000 Commercial banks, offices, services
 - ✓ 6242 Cemeteries
 - ✓ 6911 Churches
 - ✓ 7600 Community Areas: greenbelts, parks
 - ✓ 7670 Regional Park
 - ✓ 9700 Exempt
 - ✓ 9720 State DNR Managed Timberlands
 - ✓ 9725 State Forest Board

Buildout Analysis Results

The Chimacum Creek Subbasin encompasses about 24,000 acres or 37.5 mi² of which about 3,680 acres are within the PUD#1 service area. Of the remaining 20,325 acres, 71% of the land area contains parcels that remain buildable. An estimated 597 additional homes could be built on 481 parcels based on current zoning regulations (Table 1). This is an estimate because of the assumptions that were used in the analysis and certainty would only come from fully investigating each parcel to determine whether or not a well has been constructed and the water used on that parcel. A random sampling of parcels with building values less than \$10,000 were investigated to determine whether or not a potable water supply determination had been made or whether or not a livable structure was obtaining a water supply through use of an exempt well.

The 481 parcels represent 53% of the 915 parcels that were analyzed in this study. This means that 47% of the parcels are already developed. The distribution of buildable versus developed parcels in each zoning category can be found in Table 2. The zoning designation RR-5 is 75% built out with only 3 parcels able to accommodate more homes. RR-10 is 60% built out with an additional 165 parcels considered buildable and RR-20 has an additional 126 parcels (or 58% of the total) which can accommodate a dwelling. Rural Forestry and Commercial Forestry parcels are over 80% buildable which translated to 81 parcels being buildable. The agricultural lands, AL-20 and AP-20, have capacity for an additional 105 homes.

Table 3 shows a more detailed breakdown of developed and developable parcels by land use code and zoning designation. The 597 additional homes that could be built are displayed as a percentage of the total in a pie chart by zoning designation (Figure 1) and displayed spatially in Figure 2.

By comparing the buildable parcels to the wetlands overlay, about 53 parcels are covered by wetlands to the point that the construction of buildings might be questionable. However, the wetlands layer is not currently mapped to the parcel level and therefore this interpretation is likely to change if the wetlands are mapped more accurately. In addition, Ecology's well log database shows that about 397 wells are located near to buildable parcels. Since the well logs are mapped to the centroid of a quarter-quarter section in which they are located, it is not possible to identify which buildable parcels actually have operational wells on them. Figures 3 and 4 show the wells in the Chimacum Subbasin that are located near to buildable parcels and the wetlands overlay onto buildable parcels, respectively.

Data Sources:

1. Teren MacLeod provided the following data:
 - Jefferson County Assessor's Database dated 5/23/2008
 - Current Zoning Designations
 - Wetlands shapefiles
 - Water Service Areas shapefiles
 - Land Use Codes
2. Well logs obtained from the Department of Ecology's well log database website
3. Hydrology and Chimacum Cr Subbasin boundary from previous work in WRIA 17 obtained from Department of Ecology and Jefferson County

Water Use Analysis

Given that the Department of Ecology assumes 350 gallons per day (gpd) per household, that value has been applied to the 597 additional homes that represent full buildout in the Chimacum Subbasin. The water supply needs for those homes totals 0.32 cfs. From previous work documenting water use for homes and gardens, HSC estimated the return flow of inside and outside water use to be about 65%¹. That means that 65% of the 0.32 cfs returns to the Chimacum system, given the parcel is in hydraulic connection with that system. In other words, 35% of 0.32 cfs or 0.11 cfs is consumptively used and is lost to the local system.

¹ HSC Memo dated September 28, 2005 addressing the draft rule in Skagit County and exempt well return flow.

Table 1: Summary of Full Buildout by Parcels and by Number of Additional Homes

| Land Use Code | 1100 | 1101 | 1900 | 8000 | 8100 | 8120 | 8300 | 9100 | 9800 | Total |
|---|------|------|------|------|------|------|------|------|------|-------|
| Built Out Parcels | 257 | 81 | 24 | 3 | 41 | 4 | 17 | 0 | 7 | 434 |
| Buildable Parcels | 7 | 12 | 13 | 1 | 89 | 5 | 119 | 223 | 12 | 481 |
| Total | 264 | 93 | 37 | 4 | 130 | 9 | 136 | 223 | 19 | 915 |
| # additional homes | 9 | 12 | 13 | 1 | 113 | 5 | 184 | 247 | 13 | 597 |
| <p>The number of additional homes may exceed the number of parcels due to the ability to subdivide a parcel under its zoning designation</p> <p>Land Use Codes: 1100 RES-SINGLE RESIDENTIAL-SINGLE UNIT 1101 MH-REALW/LND RESIDENTIAL-MH REAL W/LAND 1104 MH SITE RP MH SITE RP ONLY 1900 VAC HM-CABIN VACATION HOMES AND CABINS 8100 OSAG OPEN SPACE AGRICULTURE(A) 8120 OSTBR OPEN SPACE TIMBER(T) 8300 DESIGNATED TIMBERLAND 9100 VACANT LAND VACANT LAND 9800 SITE IMPS SITE IMPS/OTHER IMPS</p> | | | | | | | | | | |

Table 2: Summary of Developed and Buildable Parcels

| Zoning | Developed Parcels | | Buildable Parcels | | Total Parcels* | |
|--|-------------------|------|-------------------|-----|----------------|------|
| AL-20 | 33 | 52% | 31 | 48% | 64 | 100% |
| AP-20 | 34 | 31% | 74 | 69% | 108 | 100% |
| CF-80 | 8 | 13% | 52 | 87% | 60 | 100% |
| IF-20 | 1 | 50% | 1 | 50% | 2 | 100% |
| PPR | 3 | 100% | 0 | 0% | 3 | 100% |
| RF-40 | 5 | 15% | 29 | 85% | 34 | 100% |
| RR-10 | 250 | 60% | 165 | 40% | 415 | 100% |
| RR-20 | 91 | 42% | 126 | 58% | 217 | 100% |
| RR-5 | 9 | 75% | 3 | 25% | 12 | 100% |
| Total | 434 | 47% | 481 | 53% | 915 | 100% |
| *This does not include parcels with land use codes that were excluded from the analysis. | | | | | | |

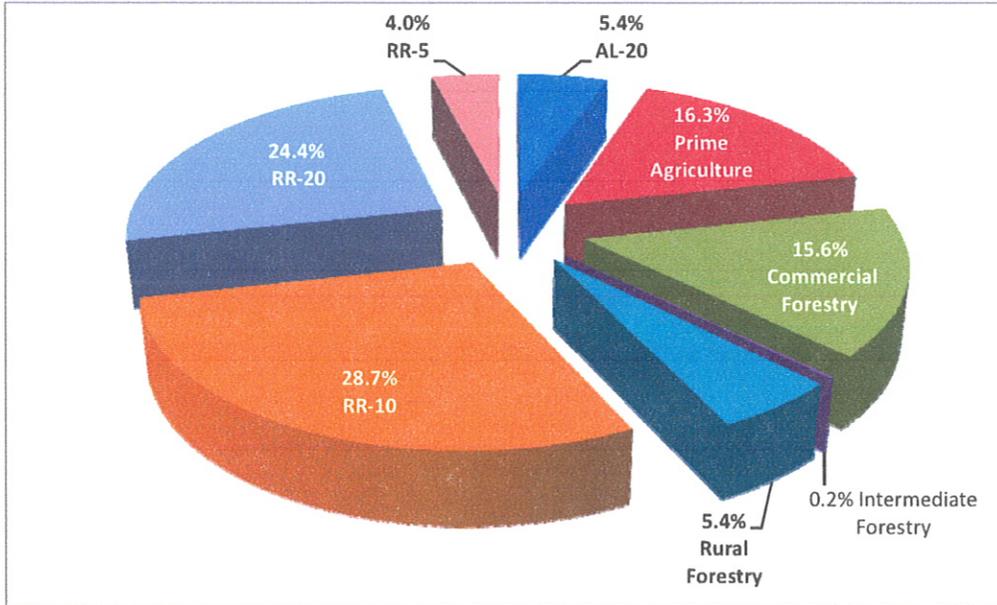


Figure 1: Distribution of Additional Homes Allowed Under Current Zoning to Achieve Full Build Out

Table 3: Parcel Summary for Chimacum Subbasin by Zoning and Land Use

| Land Use Code | 1100 | | | 1101 | | | 1900 | | | 8000 | | | 8100 | | | 8120 | | | 8300 | | | 9100 | | | 9800 | | | | | | | | |
|---------------|------|---|-----|------|----|----|------|----|----|------|---|---|------|----|-----|------|---|---|------|---|---|------|-----|-----|------|---|---|-----|-----|-----|---|----|----|
| | D | B | T | D | B | T | D | B | T | D | B | T | D | B | T | D | B | T | D | B | T | D | B | T | D | B | T | | | | | | |
| Zoning | 17 | | 17 | 3 | 1 | 4 | 1 | 1 | 2 | 3 | 3 | 3 | 7 | 7 | 14 | 1 | | 1 | | | | 1 | 1 | 2 | | | | 20 | 20 | 20 | 1 | | 1 |
| AL-20 | 2 | 1 | 3 | 1 | | 1 | | | | | | | 30 | 69 | 99 | | | | | | | 1 | 1 | 2 | | | | 2 | 2 | 2 | | 1 | 1 |
| AP-20 | 2 | 1 | 3 | 1 | | 1 | | | | | | | 3 | 2 | 5 | | | | | | | 2 | 47 | 49 | | | | 2 | 2 | 2 | | | |
| CF-80 | 1 | | 1 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| IF-20 | 2 | | 2 | | | | 1 | | 1 | | | | | | | | | | | | | | | | | | | | | | | | |
| PPR | 2 | | 2 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| RF-40 | 2 | | 2 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| RR-10 | 172 | 2 | 173 | 52 | 9 | 61 | 16 | 6 | 22 | 1 | 1 | 1 | | | | 1 | 1 | 1 | | | | 3 | 23 | 26 | | | | 4 | 4 | 4 | | 1 | 1 |
| RR-20 | 53 | 3 | 56 | 22 | 2 | 24 | 6 | 6 | 12 | | | | 1 | 10 | 11 | 1 | 1 | 1 | 2 | 5 | 7 | 4 | 17 | 21 | | | | 118 | 118 | 118 | 5 | 7 | 12 |
| RR-5 | 7 | | 7 | 2 | | 2 | | | | | | | | | | | | | | | | 7 | 29 | 36 | | | | 74 | 74 | 74 | 1 | 2 | 3 |
| Total | 257 | 7 | 264 | 81 | 12 | 93 | 24 | 13 | 37 | 3 | 1 | 4 | 41 | 89 | 130 | 4 | 5 | 9 | 4 | 5 | 9 | 17 | 119 | 136 | | | | 223 | 223 | 223 | 7 | 12 | 19 |

D= # developed parcels
 B= # buildable parcels
 T = # total parcels

Chimacum Creek Subbasin Full Buildout Analysis Based on Zoning

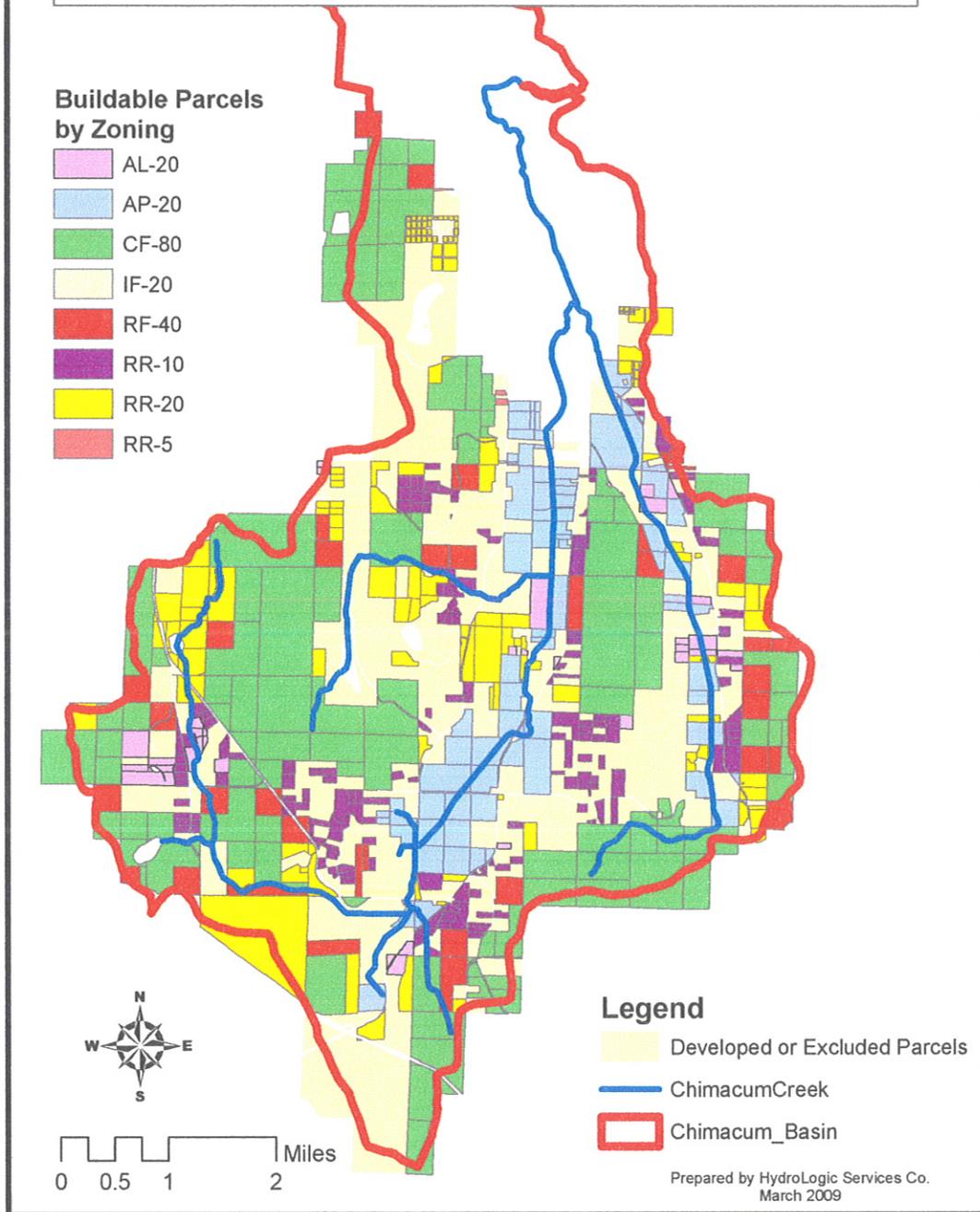


Figure 2: Buildable Parcels identified according to Zoning Designation

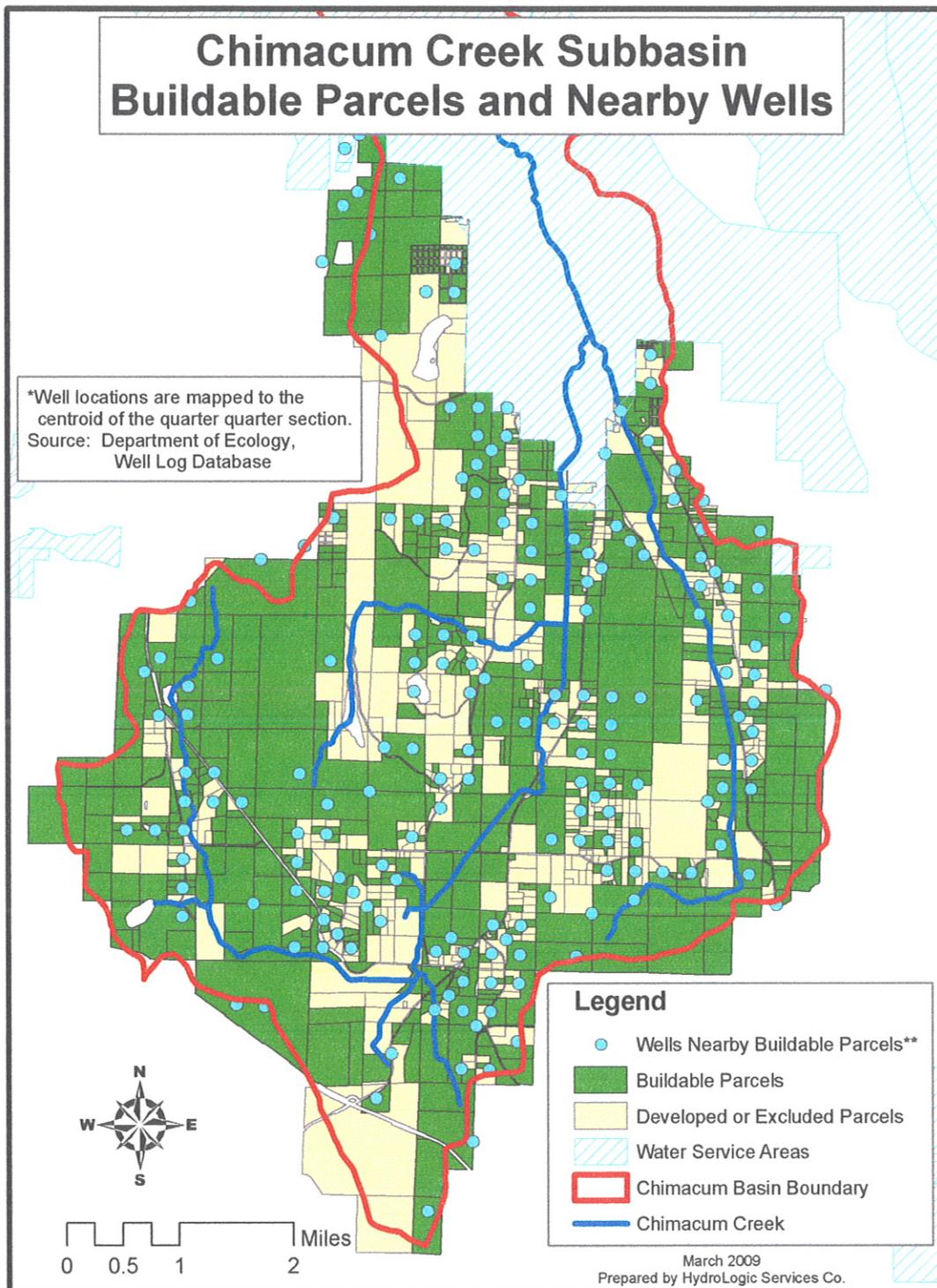


Figure 3: Buildable Parcels with Wells Located Nearby

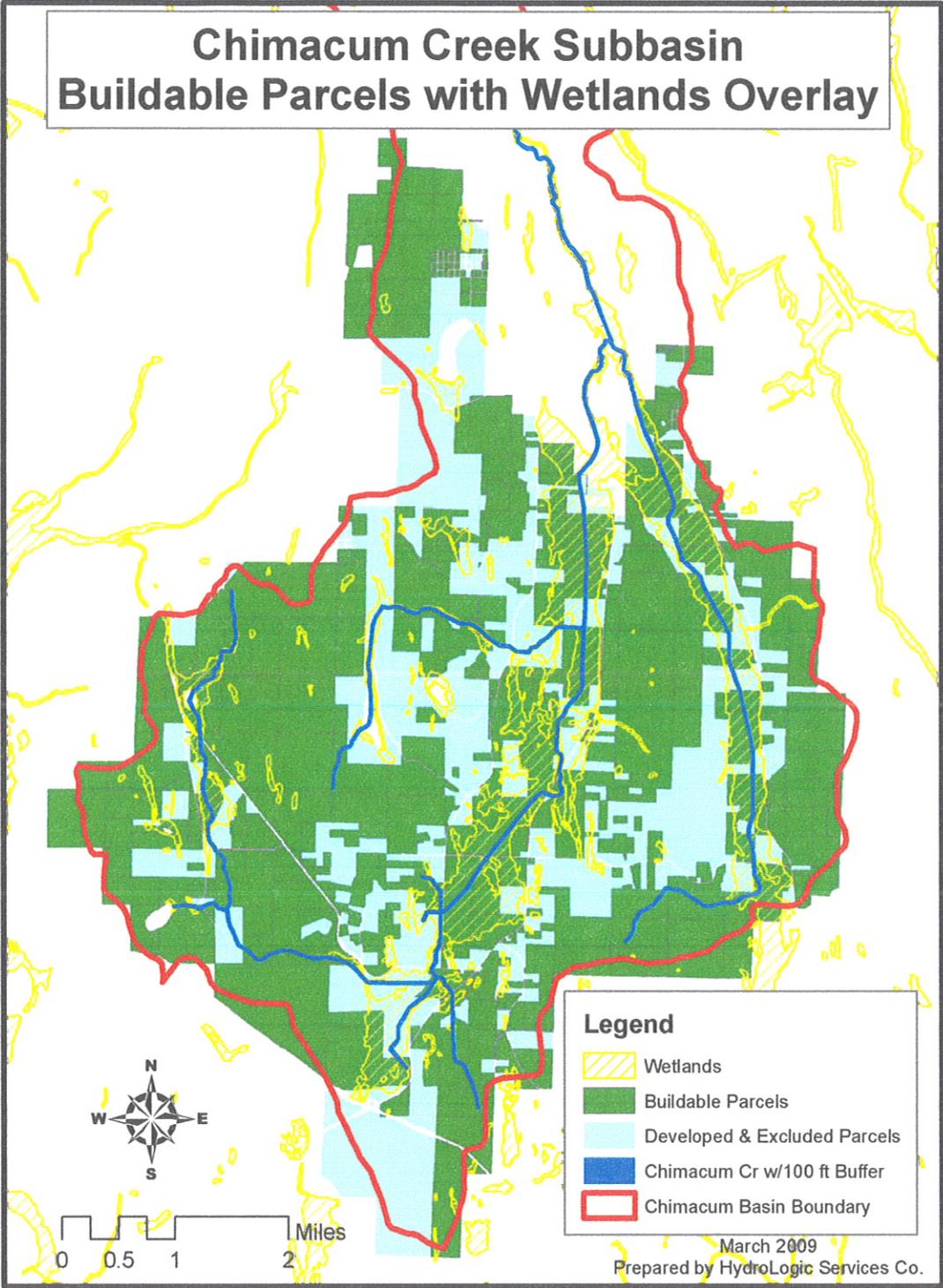


Figure 4: Buildable Parcels and the Potential Effect by Wetlands

Teren MacLeod

From: Neil Harrington [nharrington@co.jefferson.wa.us]
Sent: Monday, June 29, 2009 2:50 PM
To: Teren MacLeod
Subject: FW: well info
Attachments: image001.png; image002.png; image005.png; stats on USR app vs pot rev 1995-2009.xls

Hi Teren

This is the information that Susan Porto provided to the Department of Ecology. It is important to emphasize the limitations of the data discussed below. See below for mapping that was created for the well inspection activities and refer to the enclosed spreadsheet which is the basis of the maps. The overlay colors are the 4 basins shown in the legend of the map at right. The first two maps with the blue dots indicate wells that were applied for (well status A, "active"). This map was cut in half, north portion and south portion of the eastern part of the county. The third map showing the yellow "x" shows which wells of those drilled received potable water review (well status C, "closed").

To clarify the well inspection process:

An application for well inspection is called a USR case (*Utility Service Review*.) One of the things we do when we receive a USR application, is check to see if a well is being proposed in a current water service area and then implement the coordinated water system plan during this process. We started with figuring out how many wells have been drilled in the entire county since this process was started, mid 1996. The number of applications received since 1996 is 1288+/-, which put the case in the database into an "active" status, thus the activity code of "A" in the enclosed spreadsheet. The number of wells we know to have been drilled is 1243+/- . Based on these number we decided that since there are only 45 wells that made application who did not get their well drilled that we could use the application received as a good estimate of the number of wells drilled in the county since 1996. We then got the number of USR cases that had an activity for "potable water review" (**see data entry issue next paragraph****) which meant that a building permit was received, using the well that has an existing USR case and therefore *put the well to beneficial use*. This activity put the case in the database into a "closed" status, thus the activity code of "C". *Keep in mind, these numbers will not capture any building permits that proved out*

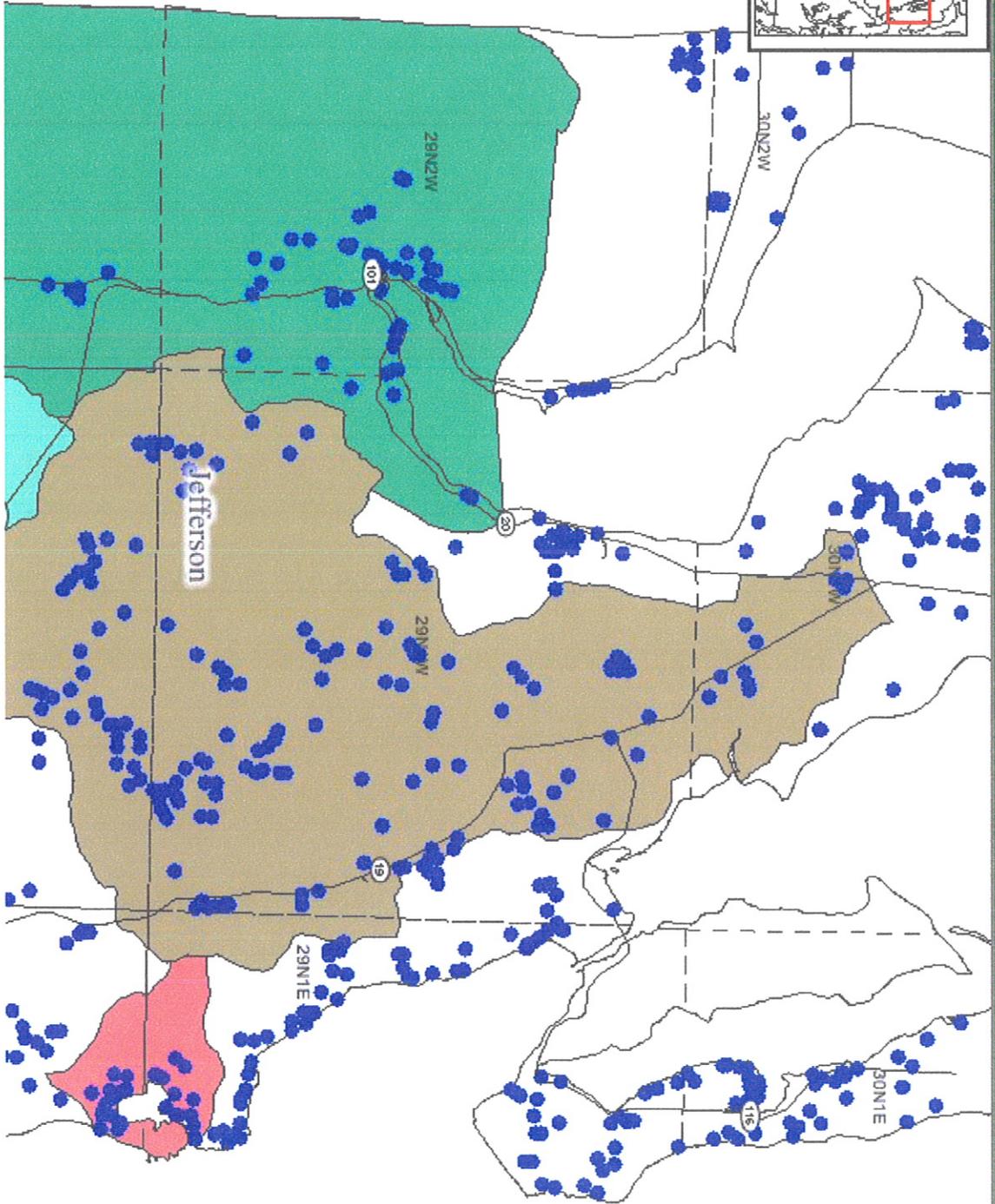
Attachment 3

potable water using a well drilled prior to the USR process, about mid year 1996. 370 of the 1288 cases had an activity for potable water reviewed or in other words 370 wells were put to beneficial use of 1288.

**Our concern with this was that we really don't believe that the potable water review activity was used consistently until after 2001. So, we then broke up the dates of these two activities into 1996 to 12/31/2001, with 499 applications received and 84 potable water review and then 1/1/2002 to 3/30/2009 with 794 applications received and 289 potable water reviews. As in all data bases, the more we think about the information the more problems we find with the data. Such as the fact that the active cases also include well reconstruction and decommissioning applications. We have figured that these kinds of activities include approximately 110 of the 1288 total.*

Anyway, hope this information is helpful.

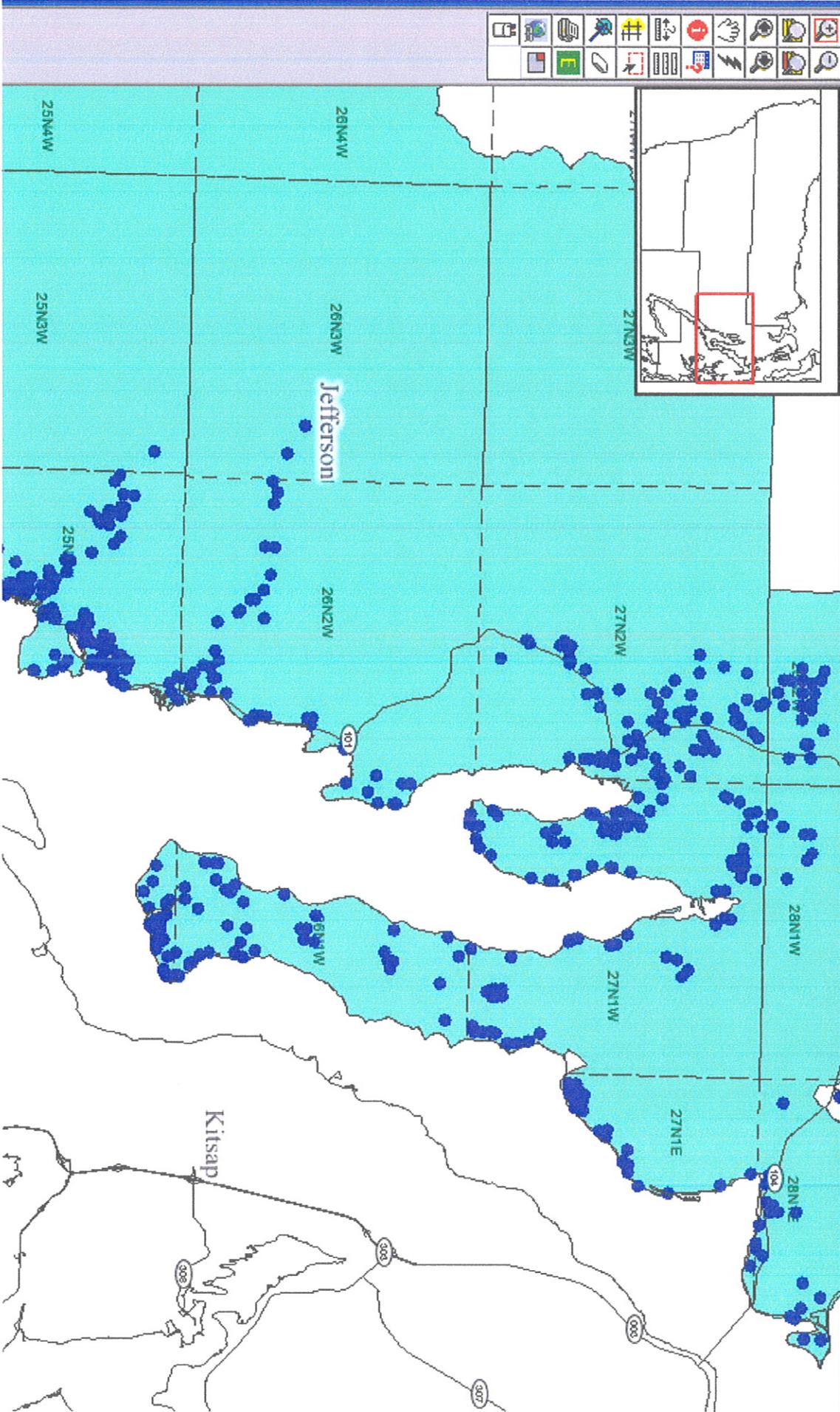
Neil Harrington
Jefferson County Water Quality Program Manager
(360) 385-9411
615 Sheridan St.
Port Townsend WA
98368

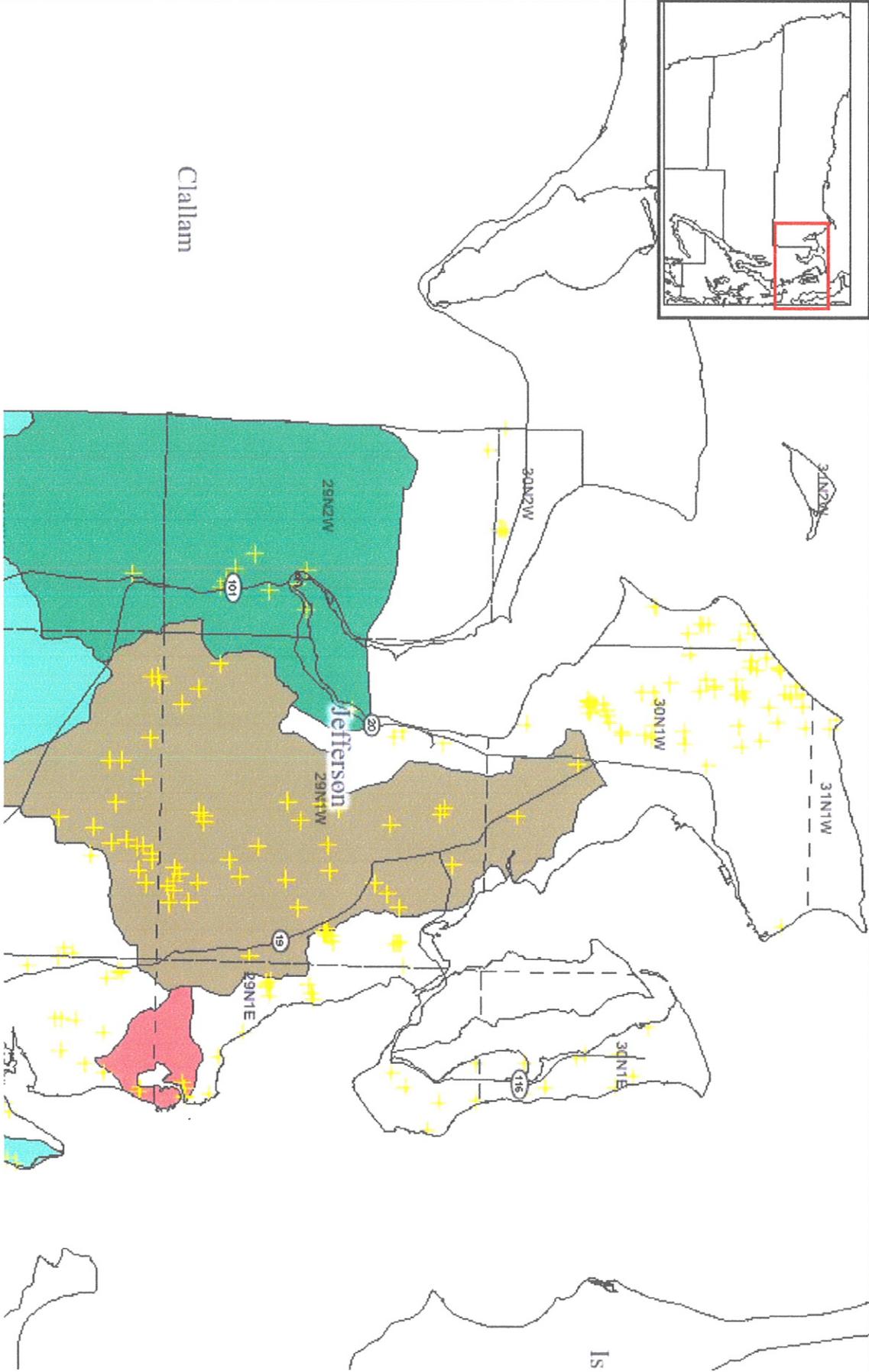


<http://gisserver/website/ms/viewer.htm?mapset=eh&value=z>

jMAP

jMAP - Environmental Health





| FREQUENCY | ACTIVITY_CODE | ZONE |
|-----------|---------------|----------------|
| 201 | A | Chimacum Creek |
| 61 | C | Chimacum Creek |
| 58 | A | Discovery Bay |
| 11 | C | Discovery Bay |
| 565 | A | Hood Canal |
| 154 | C | Hood Canal |
| 36 | A | Mats Mats |
| 7 | C | Mats Mats |