Water Availability Guidance for Local Government – Key Advisory Group

March 4, 2015 Meeting Notes

Attendees

- Carla Carlson, Muckleshoot Tribe
- Dave Christensen, Ecology
- Stuart Crane, Yakama Nation
- Mike Dexel, Ecology
- Mike Hermanson, Spokane County
- Steve Hirschey, King County
- Jennifer Holderman, Ecology
- Rebecca Inman, Ecology
- Paul Jewell, Kittitas County
- Scott Kuhta, Dept of Commerce
- Erica Marbet, Squaxin Island Tribe
- Wes McCart, Stevens County
- Laura Merrill, WA Assoc. of Counties
- Cynthia Nelson, DOH
- David Norman, Facilitator
- Glen Smith, Washington Groundwater Assoc.
- Alan Reichman, AGO
- Art Starry, Thurston County
- Clay White, Snohomish County
- Patrick William, CELP
- Daryl Williams, Tulalip Tribes

Court of Appeals Hirst Decision – Alan Reichman

Court of Appeals ruled that Whatcom County had adequately protected water resources in their comprehensive plan and development regulations, reversing the Growth Management Hearings Board decision. Key aspects of the decision related to:

1) The county’s provision to prevent daisy-chaining permit-exempt wells for development proposals to avoid the permitting process to achieve their water supply by requiring disclosure of ownership of adjacent parcels; and

2) Determining that they will deny land use applications in areas where Ecology has a rule that says water is not available, unless the applicant can supply adequate mitigation.

The court agreed that the Nooksack rule, circa 1985, was not intended to regulate permit-exempt well uses. Further, the decision stated that counties must act in a way consistent with Ecology rules, may rely on Ecology’s interpretation of those rules, and are not required to adopt restrictions to protect water resources beyond what is established in Ecology’s rule.

February 4, 2015 Meeting Notes

Only one comment was submitted regarding the February 4 meeting notes. It was accepted as written and reflected in the final version.
Guidance Outline

One suggestion was made to revise the outline to provide a narrative discussion of the regulations that authorize and direct Ecology and counties roles in determining water availability in permitting and land use decisions. The group decided to retain the current outline for now and consider changes to the outline after further content has been added.

Draft Roles & Responsibilities Section

Three people provided edits to the draft version distributed by Ecology. The group discussion provided the following comments and suggestions:

- Several comments that too much detail is included. The guidance should be kept simple and basic. County staff will not wish to wade through extra stuff.

- Separate sections needed for land use decisions versus building permit processing.

- Remove the last bullet from the list of key statements from the Kittitas decision. “To interpret the County’s role under RCW 58.17.110 to only require the County to assure water is physically underground effectively allows the County to condone the evasion of our state’s water permitting laws. This would come at a great cost to the existing water rights of nearby property owners, even those in adjoining counties, if subdivisions and developments overuse the well permit exemption, contrary to the law.”

- Combine the second and third bullets under Key Roles for Local Governments, for collecting information from applicants and considering the legal implications of permit-exempt withdrawals.

- Add bullet under counties’ role related to Campbell & Gwinn, limiting projects to one exemption.

- Rewrite first bullet under Ecology’s key roles addressing providing information on the legal availability of water.

- Last bullet of Ecology’s key roles, “Does Ecology have the authority to regulate junior users?”

- Confusion was voiced on the format that described roles and then laws. Would case law also be included? Ecology responded that it would. Another suggested that including case law, as it changes over time, could result in the guide becoming outdated with each new decision.

- The guide should illustrate communication pathways, how Ecology and the county will work together, and minimize the inclusion of case law. Response that case law was vital, and was in fact key to how and why we are developing the guidance. Suggestion that guidance and case law be kept separate. Lower court decisions included in an appendix that is updated as
necessary. Certain cases, decided by the Supreme Court, are seminal and should be included in the guidance (Kittitas, Campbell, Postema, and Swinomish).

- Not all land use decisions are subdivisions. The guide should contain direction for all aspects under RCW 58.17.
- Information on water availability should be used at planning stage so that building permits are straightforward.
- The guidance should be guidelines, not instructions.
- Guidance should include both how to determine whether water is available and what to do when it is not.
- Areas of the state vary in whether there are rules in place, and the content of the various rules so one solution doesn’t work state-wide.

**Water Availability Tools**
Ecology asked what tools would be useful, such as a web-based tool that could help determine water availability at a particular location, or flowcharts? Group was interested in the web-based tool and had the following comments.
- Mitigation strategy help is needed.
- Keep the information fact-based rather than interpretive.
- Ecology needs to make sure that interpretations are consistent state-wide, as currently the regions disagree on the meaning of statute and rules and how they should be applied.
- Incorporate local regulations that apply, which will require working closely and cooperatively with the counties.
- Add a disclaimer: that it does not replace the judgment of a hydrogeologist, that rules are open to interpretation until verified by the courts, and the information provided may not be complete.
- This tool would be great and would reduce the needed content in the guide.
- Should provide links to applicable rule language, mitigation options, and so on.
- Having it function down to parcel level may not be possible as parcel lines change. Response that the tool is likely to be more effective at a watershed level, rather than down to individual parcels.
- The tool could work in place of requiring individual letters from Ecology on water availability for individual projects and permits.
• Could include water system service area boundaries. Response that infrastructure may not yet exist in some areas of a system’s service area. Logistical difficulty in acquiring service area maps/boundaries from all public water systems in every watershed.

• Care needs to be made that it doesn’t ruin people’s property values. Should include supply options even where new water rights are not available.

• Caution that the tool cannot do the hydrogeologist’s job, but can provide information on the applicable rule.

• Is it Ecology’s role to determine water availability? Response: Ecology gives its best interpretation, but the county may disagree. Some of the rules are ambiguous and open to interpretation.

• Once the interactive tool is developed, county and Ecology staff should take part in training to promote consistency in information sharing and comprehension.

Agreed Actions

☐ Those in the group who have not yet provided comments on the draft Roles & Responsibilities Section will submit their suggestions to Ecology by COB Wednesday March 11. Members are encouraged to send their comments to the entire group.

☐ Ecology will review comments received and attempt to resolve into one document and distribute it to the group by March 18, preparatory to group discussion at our next meeting.

☐ Ecology will also attempt to draft and distribute further material for other sections of the outline, which will also be discussed at our next meeting, as time allows.

☐ Next Meeting time is 1:00 to 4:00 PM, Wednesday April 1, 2015.