CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for Environmental Law & Policy

(Originally published in the Fall 2000 issue of Washington WaterWatch)

Leeway turned loophole: the problem with exempt wells

By Sims Weymuller

In a state with precious few water resources and increasing pressure on what remains, the need for basin and even state wide water management is critical. CELP and its allies are working hard to shape and encourage a coherent water use policy that will protect our resources into the future. However, some developers have approached the subject with a "build first, plan later" mentality that pits their own profit maximization over the needs of other people, farmers, fish and the environment.

Recently, they have exploited an area of the law designed to give relief to individual and/or non-commercial water users that rely on wells for everyday uses. Developers have turned this "private well exemption," intended for minor groundwater withdrawals, into an enormous loophole through which millions of gallons of Washington water flows yearly, without regard to the public interest.

The Exempt Well Provision

The Washington Water Code contains a set of provisions outlining the process and priorities for groundwater withdrawals. The Department of Ecology is required to consider whether the water in question will be put to a beneficial use and whether that use is consistent with the public interest. Reasonably, the Water Code contains a provision (RCW 90.44.050) which allows families and others to avoid the water right permitting process by relying on a well for the domestic use of water not to exceed five thousand gallons a day.

This exempt well statute was intended to provide water to families reliant on groundwater for household tasks, lawn and garden use, and even stock-watering purposes without the hassle of getting a water right permit. The logic behind the exemption is that because of the small scale and wide dispersal of their uses, "exempt" wells would not have a substantial effect on the water table.

The Exemption In Use: How leeway becomes loophole

Unfortunately, with exploding population growth in Washington state, some developers are using the exempt well provision to sidestep the water right permitting process. Simply put, they do not want to wait in line to receive the required permits to provide water for new subdivisions. Many of them have turned the private well exemption into a lucrative loophole. Some developers claim that their large withdrawals are actually a whole bunch of little withdrawals and are thus exempt under the statute. By simply stating that an individual well will be provided for each or every few homes, developers avoid paying for their water and slip past the water permitting laws.

To make matters worse, some county governments are aiding them in the process or looking the other way. According to the Washington Water Code, counties must make a finding of water availability when considering

an application for land development (e.g. plats, short plats, etc.) (RCW 58.17.110). Under the law, residential developments must demonstrate avail-ability of a municipal water supply or the developer must acquire a water right. CELP has discovered that some counties across Washington, rural and urban alike, are allowing developers to side-step this requirement, and are granting these plat applications and allowing the building to go on unchecked.

The Attorney General Opinion: Not meant to be a Loophole!

This use of the exempt well loophole is illegal. In 1997, the Washington State Attorney General delivered an opinion flatly stating that these types of developments "should be considered a single 'withdrawal' and would not be exempt from the permitting requirement…if the total amount withdrawn…exceeds 5000 gallons per day." (AGO 1997 No. 6). The Attorney General observed that, without a permit, the developer would clearly not be allowed to drill one enormous well to supply the whole development, so drilling scores of small wells does not relieve that burden. In the words of the Attorney General "this would undercut the unity and integrity of the state's water system."

Case in Point – King County

Even though much of King County has the benefit of a reliable municipal water supply, many proposed developments have used the exempt well loophole to bypass water availability requirements. The King County Department of Development and Environmental Services is the agency charged with approving short plats, plats, boundary line adjustments and building permits. Simultaneously, the King County/Seattle Department of Health is charged with ensuring that wells are safe, sanitary and up to code once they are drilled. Unfortunately, neither agency is considering the opinion in the course of approving water supplies for new developments.

Since the 1997 Opinion, at least 20 housing developments in King County, all at various stages of approval, have relied on the exempt well loophole for their water. The largest concentration is in the Rock Creek area where ten different developments plan to rely on exempt wells. There is a clear pattern of approval for these projects, in spite of the AG opinion and the detrimental effects of the practice to Washington's waters.

What are we doing about this problem?

CELP is considering legal action in King County to encourage county officials to obey the law regarding exempt wells. Our hope is that an environmentally sound exempt well approval policy in King County will set a precedent for other counties in Washington state which are misusing the exempt well provision.