



September 14, 2011

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Re: Water Availability Requirements; Building and Subdivision Permits

Dear Mr. Starbard, Ms. True, and Dr. Fleming:

We write to you on behalf of the Center for Environmental Law and Policy (“CELP”), a nonprofit advocacy organization dedicated to preserving and restoring the state’s freshwater resources. As explained below, we are concerned that King County may not be fully compliant with state laws governing protection of natural resources and water rights holders. Specifically, our concern is that the County appears to be authorizing development in basins—including basins that are either closed or subject to instream flows—that relies on permit-exempt groundwater wells for water supply without first ensuring that water is available for appropriation. We respectfully request a meeting with you and your staff to discuss these issues further.

## I. OVERVIEW OF STATE WATER CODE AND THE REGULATION OF GROUNDWATER WITHDRAWALS.

In Washington State, all surface and ground waters are in public ownership, and subject to the state's regulatory control. Washington adheres to the prior appropriation doctrine of water law under which an individual may establish a right to use these public waters if certain conditions are met. A right established in this fashion is senior to rights issued later in time. In times of shortage, junior water rights holders may be cut off or "curtailed" in order to protect the full use of the senior holders. The legislature established a regulatory system providing for permits that memorialize these rights, both for surface water, RCW 90.03.250, and groundwater, RCW 90.44.050. These statutes are complemented by a comprehensive set of regulations governing permitting processes. See RCW 90.03.250; RCW 90.03.260, et seq.; RCW 90.44.060; WAC 173-152-050. The authority granted to Ecology also includes the direction and ability to set and protect instream flows. RCW 90.22.010; WAC ch. 173-500.

The Groundwater Code contains a narrow exemption from the duty to obtain a permit from Ecology prior to using any water.

[N]o withdrawal of public ground waters 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 as herein provided: EXCEPT, HOWEVER, That any withdrawal of public ground waters 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....

RCW 90.44.050; Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9 (2002) ("the exemption in RCW 90.44.050 allows appropriation of groundwater and acquisition of a groundwater right without going through the permit or certification procedures of chapter 90.44 RCW"); AGO 2005 No.17 ("Under the statute, an authorized use of groundwater without a permit establishes a water right to the same extent as a right established by permit.").

It must be emphasized that permit-exempt wells are exempt only from the duty to obtain a permit to use groundwater, not the other provisions of the Water Code. A right established through a permit-exempt well has the same legal effect and must abide by the same requirements of prior appropriation and state regulation of water resources as a permitted withdrawal. See Campbell & Gwinn, 146 Wn.2d at 9 ("once the [exempt well] appropriator perfects the right by

actual application of the water to beneficial use, the right is otherwise treated in the same way as other perfected water rights.”) In other words, a permit-exempt well must be regulated or curtailed, where necessary, to protect and prevent impairment to more senior rights.

In addition to regulating the use of the public’s water resources, Ecology may take various steps to protect both senior water rights holders and instream values. It may establish, by regulation, minimum instream flows to protect instream values. RCW 90.22.010 (“The department of ecology 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[.]”). Such regulatory flows operate as water rights in themselves, i.e., any request for additional appropriation must be assessed in light of the potential impacts on those flows. RCW 90.22.030. Ecology may also close streams to further appropriation. RCW 90.54.050. Once a stream is closed to further appropriation, no future water rights may be granted. See, e.g., WAC 173-507-020 and 030; WAC 173-508-050 and 070; WAC 173-509-040 and 060. Where Ecology closes a stream to additional withdrawals, it is unlawful to initiate a permit-exempt groundwater withdrawal that would impact the stream. Id.

## II. KING COUNTY HAS A NONDISCRETIONARY DUTY TO DETERMINE WATER AVAILABILITY PRIOR TO ISSUANCE OF ANY DEVELOPMENT PERMIT THAT WILL REQUIRE POTABLE WATER.

As part of the Growth Management Act, the legislature adopted RCW 19.27.097, which states as follows.

Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply.

Similarly, a proposed subdivision “shall not be approved” unless the jurisdiction makes a written finding that there are “appropriate provisions” for “potable water supplies[.]” RCW 58.17.110(2). King County is a GMA county, and subject to these statutes. Under the terms of these statutes, the County may not authorize either a building permit or a new subdivision unless it has been shown that adequate water supply is available for such development. Id.

In a recent decision, the state Supreme Court emphasized that local jurisdictions must comply with these statutes in their permitting decisions by confirming the legal availability of water. Kittitas County v. Eastern Wash. GMHB, 256 P.3d 1193, 1210 (Wash. 2011). The Supreme Court in Kittitas rejected the argument that these statutes only require counties to confirm the “physical” availability of water, but must ensure that development applications are

consistent with laws governing water rights. Id. (“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 could 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.”); see also Swinomish Indian Tribal Community v. Skagit County, 138 Wn. App. 771, 780 (Wn. App. Div.1, 2007) (counties are “legally required to follow the dictates of that statute.”).

Similarly, a 1992 AG opinion interpreting RCW 19.27.097 found that “adequate water supply” encompasses both water quality and water quantity. AGO 1992 No. 17. The opinion finds that the local building department has the obligation to determine whether adequacy of water supply has been demonstrated, and in making this determination, the local building department “will be guided by existing laws regarding . . . appropriation of waters of the state,” including the state surface water and groundwater rights statutes. AGO 1992 No. 17.<sup>1</sup> Any applicant that intends to rely on groundwater withdrawals must obtain a determination from the County based upon sound evidence and direction from Ecology, that s/he has the legal right to such a withdrawal, which includes a demonstration that the withdrawal will not interfere with other, more senior users, including established instream flows. RCW 43.27A.090(10); RCW 90.54.010(2), .090. In 1993, Ecology and the Department of Health jointly issued “Guidelines for Determining Water Availability in New Buildings” which state: “Ecology regional offices will notify local permitting authorities about areas where water is no longer available for appropriation or areas where Ecology is investigating problems concerning water availability. The local permitting authority must consider this information before proceeding with issuance of additional building permits within such an area.” Id. at 2; see also id. at 4 (water well test reports “indicate only the physical availability of water. They do not indicate the legal availability of water.”) (emphasis in original). Of course, where groundwater is closed—or where surface waters are closed and a groundwater withdrawal would adversely affect the stream—a legal right to the groundwater withdrawal cannot be shown.

Consistent with the 1992 AGO opinion, Ecology took the position in the Kittitas litigation that counties have a nondiscretionary obligation to ensure that water is legally available prior to issuance of building permits or subdivision plats by cities and counties. In a legal brief, Ecology stated its position as follows:

[L]ocal governments have the responsibility to make their best effort and exercise their best judgment to determine if appropriate and adequate water is physically and legally available to support the uses proposed under land use applications. To do so, local governments must consider water resources laws and facts as administered by

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<sup>1</sup> Department of Commerce regulations enacted recently confirm that AGO No. 17 should be “consulted for assistance in determining what substantive standards should be applied” in making water adequacy determinations. WAC 365-196-825(2).

Ecology, such as reviewing what water right statements of claims, permits, and certificates are held by the applicant and what water use is authorized under those rights to determine if there is adequate water for the proposal . . . . Therefore, local governments are obligated under the GMA and various land use laws to ensure protection of surface and groundwater sources and conduct water assessments for land use applications.

Similarly, in a June 25, 2010 letter to Kittitas County, Ecology confirmed that the County's failure to make water adequacy determinations for developments intending to rely on new permit-exempt wells violated its legal duties. The Supreme Court in Kittitas gave "great weight" to Ecology's position on this issue. 256 P.3d at 1209. Copies of the brief or the letter can be provided to you on request.

Other elements of the GMA reinforce a county's duties to protect groundwater supplies. See, e.g., RCW 36.70A.070(1) (comprehensive plans "shall provide for protection of the quality and quantity of groundwater used for public water supplies"); RCW 36.70A.070(5)(c)(iv) (requiring protection of "critical areas. . . and surface water and groundwater resources"); RCW 36.70A.020(10) ("availability of water" one of GMA planning goals). Under these GMA provisions, counties must ensure that their comprehensive plans protect water resources by only allowing new development where adequate water is available. Counties may meet this obligation by preventing growth in areas where Ecology has found that water is limited (for example, where a basin is closed to new appropriations or where an instream flow rule is not met). Id.; see also Olympic Environmental Council v. Jefferson Cty., 2002 WL 104839 (Wash. WGMHB, Jan. 10, 2002) at \*10 ("We are not persuaded by the County's arguments that it has no authority to impose some form of water conservation measures, limiting the number of new wells allowed or other measures to reduce the withdrawal of groundwater from individual wells if that withdrawal would disrupt the seawater/freshwater balance and lead to greater seawater intrusion. The exemption of RCW 90.44.050 does not limit a local jurisdiction from complying with its mandate for protection of groundwater quality and quantity under the GMA.") Alternatively, counties may allow limited growth in such areas so long as their comprehensive plans and development regulations allow them to make accurate water availability determinations under RCW 58.17.110 and RCW 19.27.097, thus ensuring that "the rural character of the area" and surface and groundwater resources are fully protected. RCW 36.70A.070(5)(c)(iv). Mitigation options may be developed, as has occurred with the Upper Kittitas County Water Exchange.<sup>2</sup>

To summarize, GMA jurisdictions are under an obligation to ensure that water is both physically and legally available for any building and subdivision permits issued by that jurisdiction.

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<sup>2</sup> See <http://www.ecy.wa.gov/programs/wr/cro/wtrxchn.html>.

This includes ensuring that proposed permit-exempt wells do not interfere or conflict with basin closures and do not interfere with senior rights in those areas, including instream flows.

### III. KING COUNTY APPEARS TO BE VIOLATING THE LAW BY FAILING TO ENSURE SUFFICIENT WATER IS AVAILABLE PRIOR TO AUTHORIZING NEW DEVELOPMENT.

For the reasons discussed above, King County is under a nondiscretionary duty to ensure that water is legally available prior to authorizing any new building permits or subdivisions. Where such development has a valid water right from Ecology, or where an authorized water purveyor will provide supply from existing rights, this duty is easily satisfied: the County must simply ensure that the development's entitlement to water is valid. Where the development intends to utilize permit-exempt wells (even if the use of the exempt wells is considered "interim"), the County's obligations may be more complicated. For example, where the proposed groundwater withdrawal is located within a basin that has been closed to new surface appropriations, or where Ecology has set instream flows that are not consistently met, there is a presumption that no additional water is legally available. If an applicant were to seek a new groundwater right from Ecology in such an instance, Ecology would be required to deny the application unless Ecology has determined there is no hydraulic continuity. In the case of permit-exempt wells, Ecology has no formal regulatory role prior to development of permit-exempt wells, and under the GMA, it falls to King County to make a determination of water availability or adequacy.

Where an applicant proposes to rely on a permit-exempt well, counties must conduct the water availability determination in accordance with state water law, the rules and regulations issued by the Department of Ecology, and the holdings of the courts. Where, for example, Ecology has closed a basin to further groundwater withdrawals, counties have an obligation to deny subdivision and building permit applications that seek to rely on any groundwater withdrawal that is not mitigated.<sup>3</sup> Ecology's closure of a basin by rule "embod[ies] Ecology's determination that water is not available for further appropriations." Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 95, 11 P.3d 726 (2000). Such a rule would be an example of a "state water appropriation law" which the counties must follow in making availability determinations. 1992 AGO No. 17. Such applicant is not without recourse: the project proponent could demonstrate water availability by, for example, proposing appropriate mitigation as allowed by Ecology rule, or by obtaining a transfer of an existing water right as approved by Ecology.

Generally, the same situation exists where Ecology has closed a surface water body by rule and an applicant intends to rely on a new withdrawal from a potentially hydraulically connected groundwater body. Where streams are closed, new water is no longer "legally"

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<sup>3</sup> See, e.g., WAC 173-539A-050 (requiring water budget neutrality).

available for appropriation—even if there is physical water in the stream. Accordingly, counties must deny the application if the withdrawal would have *any* effect on the flow or level of the surface water, even a *de minimis* one. Postema, 142 Wn.2d at 90, 95. Likewise, where Ecology has established minimum in-stream flows by rule, subsequent groundwater withdrawals may not contribute in any way to the impairment of such flows. Id. at 81. Because it is the applicant’s burden to “provide evidence” that water is available for a new subdivision or building, RCW 19.27.097; RCW 58.17.110, a permit for a new building or subdivision must be denied unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body potentially hydraulically connected to an impaired surface water body will not cause any further adverse impact on flows, no matter how small.

Many basins within King County suffer from over-appropriation, low flows, and harm to senior water rights holders. In 1979 and 1980, Ecology completed instream flow rules in all four WRIsAs in the County. As a result, many of the streams in those WRIA’s have been closed to any new appropriations, and others have established minimum flows that, in many cases, are not met. See WAC 173-507-030; WAC 173-508-040; WAC 173-509-040; and WAC 173-510-040. Under the rules, this closure extends to exempt well uses of groundwater where the groundwater is hydrologically connected to or will affect the surface water. See, e.g., WAC 173-507-040; WAC 173-509-060. There are very small exceptions in each WRIA. For example, indoor water use for a single residence (i.e., not a subdivision or commercial use) is often exempt from the requirements of these instream rules. See WAC 173-507-050; WAC 173-508-080; WAC 173-509-070; WAC 173-510-070.

There are other indicia that water is not available. For example, USGS stream gauges show that minimum flows in King County WRIsAs are often not being met. Endangered species listings typically identify low flow as a limiting factor; water quality problems in many rivers are related to quantity (e.g., dissolved oxygen and temperature); and aquifer declines and saltwater intrusion are problems in coastal zones. The National Marine Fisheries Service (“NMFS”) has emphasized that local jurisdictions may be violating the Endangered Species Act (“ESA”) by authorizing removal of water where it impairs essential behavioral patterns of ESA-listed salmonids. 65 Fed. Reg. 42472 (July 10, 2000) (listing categories of activities that “may be most likely to result in injury or harm to listed salmonids”); 64 Fed. Reg. 60727 (Nov. 8, 1999) (definition of “harm” under ESA).

King County itself has prepared reports identifying streams with low flow, including the King County Water Supply Planning Tributary Streamflow Report and Appendices (2006). Four groundwater management planning areas, authorized pursuant to RCW 90.44.400, have been created in King County. King County Code Ch. 9.14, Groundwater Protection, directs the County to manage groundwater to ensure protection of both quality and quantity.

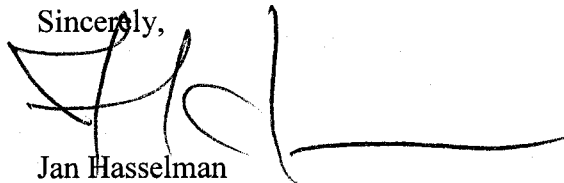
We are concerned that King County has not been ensuring that water is available prior to issuing building and subdivision permits. Nor does it appear that the County has been enforcing

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the requirement that new exempt wells are allowed in WRIA's 7-10 only when a well is used for indoor, residential water use for a single residence. As a result, we believe King County is not in compliance with the law. We would like an opportunity to meet with you and your staff regarding these issues because we believe that King County can come into compliance, and that compliance will be extremely beneficial to existing, senior water users and to the water resources in the County. As climate change brings the prospect of less water available to a growing population, it is critical for King County to ensure that instream flows are met and protected.

Please feel free to contact the undersigned with questions and to set up a meeting to discuss next steps. Thank you for your consideration of these important issues.

Sincerely,

A handwritten signature in black ink, appearing to be 'JH', with a long horizontal line extending to the right.

Jan Hasselman  
Amanda Goodin  
Janette Brimmer