



CLEAN, FLOWING WATERS FOR THE WEST

The Center for
Environmental Law & Policy

September 28, 2011

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Via e-mail to mgal461@ecy.wa.gov

Re: City of Yelm ROE No. G2-29085

Dear Mr. Gallagher:

Thank you for the opportunity to comment on the City of Yelm water right draft Report of Examination (ROE) referenced above. These comments are submitted by the Center for Environmental Law & Policy, a non-profit membership based organization dedicated to protecting the public interest in Washington's freshwater resources. We offer the following comments regarding the Yelm draft ROE.

Watershed plans. Watershed plans prepared under RCW 90.82 do not provide a basis for authorizing impairment of an adopted instream flow rule. Further, it is inappropriate to reference or use as justification the WRIA 13 watershed plan, which was not adopted and carries no legal or policy weight. Finally, the WRIA 11 plan cannot be used as a basis for authorizing depletion of water in WRIA 13.

Modeling. The ROE and Mitigation Plan note that the modeling is not accurate in predicting the impact of pumping the new water rights on instream flows in various surface waters. If the modeling is insufficient to provide an accurate description of impacts, then the project should not go forward. The presumption under the water code puts the burden on the applicant to demonstrate that water is not available, that impairment of other water users will not occur, and that the public interest will not be harmed. The assumption that because Yelm's impacts cannot be modeled they are therefore inconsequential contradicts this burden as well as basic principles of cumulative impacts.

OCPI. The use of the "overriding consideration of the public interest" exception set forth in RCW 90.54.020, utilized in the Yelm ROE to allow for out-of-kind mitigation for impacts to instream flows, is troubling. First, the 3-part "test" set forth in the draft ROE has no foundation in law or rule. This test is has been created out of whole cloth by the Water Resources Program to justify use of the exemption. Ecology needs to engage in rulemaking to define when OCPI can be used and to develop a more objective and quantitative approach to exercising this exception. This problem is demonstrated by the ROE's general, subjective conclusion that "benefits clearly outweigh harms" without any description or understanding of how the habitat-for-water trade-off actually might benefit the affected streams.

Second, while a water right becomes a property right of the City of Yelm that it may use in perpetuity, it is not clear that the non-water elements of the mitigation plan are likewise developed and protected in a way that will ensure that they remain in perpetuity, e.g., through irrevocable easements.

Third, standard municipal public water supply to serve future growth is not the type of use that merits trigger of the OCPI exception to protection of base flows. Municipalities are growing throughout the state. If future growth and human demand is accepted as the basis for depletion of regulatory instream flows, where does it end? Under the rationale contained in the Yelm ROE, every city and water utility in the state can claim that their need for water outweighs the public interest in protecting flows.

The extraordinary decision to award a water right under the OCPI provision should require commensurate extraordinary conditions imposed on the water right to ensure that water is not only not wasted, but that water conservation and efficiency measures are aggressively utilized. Trading instream flows for irrigation of lawns and golf courses is not in the public interest.

Reasonable Efficiency. The draft ROE references Yelm's water supply plan and conservation chapter, but makes no independent analysis of the efficiency of Yelm's water use. Ecology has an independent duty to assess the reasonable efficiency of a proposed water use prior to making a grant of a water right. Under the Dept. of Health water use efficiency rule, municipal water suppliers may select their own goals and are not required to achieve those goals. The fact that Yelm has a conservation plan tells us nothing. Despite Yelm's self-reference to its "acclaimed" conservation program, a casual drive through the city reveals sprinklers watering sidewalks, large green lawns, and other indicia of a less-than-effective conservation program.

Past and future groundwater impacts. The aquifers of Thurston County are under siege. Ecology's groundwater database indicates more permit-exempt wells are constructed in Thurston County than any other westside county. A new gravel mine proposed by Cal-Portland contemplates completely dewatering and destroying a small aquifer near Dupont. Apparently Yelm evaded State Environmental Policy Act review by applying for just under the 2,250 threshold for SEPA exemption. Nonetheless, Ecology is obligated to consider the environmental impacts of Yelm's proposed water use, including how it adds onto pre-existing damage to groundwater caused by current water rights and permit-exempt wells, and reasonably foreseeable consumption caused by failure to control permit-exempt wells.

Thank you for the opportunity to provide comments. Please do not hesitate to contact me at rosborn@celp.org or 509-209-2899 if I can provide further information.

Sincerely,



Rachael Paschal Osborn
Executive Director