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May 11, 2012

Via Email, Followed by First-Class U.S. Mail

Ms. Maia Bellon
Program Manager, Water Resources Program
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Re: County Decisions Regarding Water Availability
Follow-up From April 2012 Meeting

Dear Maia:

This letter is to follow up on our meeting with Ecology on April 12, 2012. At the conclusion of that meeting, you requested more detailed information from the Center for Environmental Law and Policy ("CELP") and Earthjustice regarding steps Washington counties must take to ensure both legal and physical availability of water prior to issuing building permits in compliance with the Growth Management Act ("GMA"). This letter will set forth some of CELP's and Earthjustice's thinking on a structure and requirements for those county decisions.

Local government water availability determinations—a legal condition precedent to new development projects—are made in light of and must comport with the rules and guidance issued by Ecology, along with all other sources of state water law, and, of course, must be consistent with facts regarding the hydrology and in stream conditions in the subject basin. It is plain that the issue here is primarily with exempt wells as any project holding an actual water right from Ecology, or that can demonstrate connection to a purveyor with an existing water right, can satisfy the GMA requirements.

The counties' duty under the GMA to determine water availability before authorizing new subdivisions or building permits that rely on exempt wells is critical to the protection of water resources throughout the state. As such, and given the expected impacts of climate change and the already-precarious position of so many of Washington's water resources, a precautionary approach with built-in margins of safety must be an explicit requirement of each decision.

In practice, the counties' water availability determinations will depend in significant measure on the water source on which a subdivision or building permit applicant intends to rely, and Ecology rulemaking, formal findings, or other applicable statements on such sources. Where an applicant intends to rely on a public water system for its water supply, the inquiry will not generally be difficult: absent an indication that public water supply is overextended or in

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violation of its water rights permit, counties may simply require that an applicant provide "a letter from an approved water purveyor stating the ability to provide water." RCW 19.27.097. Where an applicant intends to rely on a new or transferred water right, counties must simply ensure that the applicant actually possesses a water right from the Department of Ecology. Id.

Where an applicant plans to rely on a permit-exempt well, counties must conduct the water availability determination in accordance with state water law, including the water rights statutes, RCW Chapters 90.03 and 90.44, the regulations and research from the Department of Ecology, and applicable court decisions. The most straight-forward situation is where Ecology has closed a basin to further groundwater withdrawals. In that situation, counties have an obligation to deny subdivision and building permit applications that seek to rely on any groundwater withdrawal that is not mitigated.[1] 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. 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 from Ecology.

In the situation where Ecology has closed a surface water body (but not groundwater) and an applicant intends to rely on a new withdrawal from a groundwater body in the basin, the county must still look to Ecology's decisions in making an availability determination. Where streams are closed, new surface water is no longer "legally" available for appropriation—even if there is physical water in the stream. The same is necessarily true of groundwater that is connected to that surface water. Postema, 142 Wn.2d 68, 95, 11 P.3d 726 (2000). Accordingly, counties must examine hydraulic connectivity between the groundwater well and the surface water and deny the application if the groundwater is potentially connected to the surface water or withdrawal would have *any* effect on the flow or level of the surface water, even a *de minimus* one, or would impair a more-senior right. Postema, 142 Wn.2d at 90, 95. To assess these possibilities, counties should consider all information available from Ecology on connectivity and effects and then it is ultimately the obligation of the applicant to demonstrate no connection (or full mitigation with an ample margin of safety) and no impairment to other existing users.[2]

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[1] See, e.g., WAC 173-539A-050 (requiring water budget neutrality).

[2] We note that in some recent instream rules, Ecology has allowed exempt wells that are metered, limited to in-house use only, and subject to 350 gpd. We may want to discuss the extent to which this provides some workable ideas. We are concerned about impacts even of this magnitude in extremely stressed basins where flows are not being met and also concerned that it may provide a disincentive for counties to fully require applicants to make the requisite demonstrations, but we are willing to discuss the option.

Where neither the surface nor groundwater is closed, but where Ecology has established minimum instream flows by rule,[3] subsequent groundwater withdrawals may not contribute in any way to the impairment of such flows. Postema, 142 Wn.2d 81. If flows set by rule are not met for any portion of the year, or if users in the basin have been curtailed, 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. Where flows are not being met for any part of the year, a permit for a new building or subdivision must be denied unless the applicant can demonstrate full mitigation (with ample margin of safety) or that there is no connection between the ground and surface water and the proposed use will not cause any further impairment of flows, no matter how small (see also footnote 2).

If flows are met at all times, a county must ensure that wells will have neither an individual nor a cumulative adverse effect, factoring in the rate of growth in the county and projected changes in water supply due to climate change. While the comprehensive plan is supposed to address water resources as related to growth (see below), the plans are not updated frequently enough and are likely to be too cumbersome to serve as a proper safeguard for protection of water resources as anticipated by the GMA.

Finally, counties must also deny subdivision or building permit applications where an applicant intends to rely on permit-exempt wells in a manner inconsistent with Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002), and RCW 90.44.050 (wells are exempt from permitting "for single or group domestic uses in an amount not exceeding five thousand gallons a day."). Counties are therefore obligated to deny subdivision and building permit applications where the applicant proposes to rely on multiple exempt wells for a single project, as the exemption is not legally available for such uses.

To summarize, when a county is called upon to determine water availability in association with a subdivision or building permit, we envision that the following steps should apply:

- Applicant must demonstrate no closure of groundwater. If groundwater is closed, applicant must demonstrate full mitigation with an ample margin of safety. If connected, no permit absent actual water right or (perhaps) full mitigation with ample margin of safety.

- If surface water closure applies, applicant must demonstrate no connection to surface water and no impacts to surface water or other users with ample margin of safety.

[3] For basins that do not have an established instream flow rule, the proper measure is established base flows.

- If instream flow rule in place, applicant must demonstrate that instream flows are met throughout the year every year and that applicant will have no impact to instream flows or other users.

- If instream flow (or base flow where no instream rule) is not being met (or there has been curtailment), applicant must mitigate absent full demonstration of no connection between surface and groundwater (this is the only approach that incorporates a margin of safety because it is unlikely that a showing can be made that a single well is either "safe" or a problem).

- Applicant must demonstrate compliance with Campbell & Gwinn.

We hope that you find this helpful in your thinking about next steps in ensuring compliance with and implementation of the Washington Supreme Court's decision in Kittitas County v. Kittitas County Conservation. Please don't hesitate to contact us should you have any questions regarding the details of this letter. We look forward to the next opportunity to discuss this issue in detail and to move forward in ensuring full protection of Washington's water resources.

Sincerely,

Janette Brimmer
Jan Hasselman
Suzanne Skinner