MENTORLAWGROUP PLLC

Joe Mentor, Jr.
mentor@mentorlaw.com

July 13, 2018

Will Honea
Skagit County Senior Deputy Prosecutor
Courthouse Annex
605 South Third Street
Mount Vernon, WA 98273

RE: Individual Single-Family Residential Water Use Mitigation Template

Dear Mr. Honea:

Skagit County recently commissioned Associated Earth Sciences, Inc. (AESI) to develop a mitigation "template" for new water uses, which would allow the County to issue building permits for individual single-family homes in the Skagit River watershed. Presumably, the mitigation template would be available as an alternative means to obtain a new water supply outside the service area of a public water system, in a manner that complies with WAC 173-503, the Washington Department of Ecology's Skagit River Instream Flow Protection Rule, without causing impairment to instream flows established under the Rule. As you requested, this letter provides my legal review of the mitigation template.

I. Brief Answer

In accordance with state law, Skagit County must determine whether an adequate and reliable water supply is both legally and physically available prior to issuing a building permit for a single-family residence in the Skagit River Basin. This determination is independent of Ecology's duties under Washington's Water Code.

Skagit County's Code requires a building permit applicant for a single-family home to demonstrate the availability of at least 350 gallons per day (gpd), within applicable volume limits for the mainstem Skagit River (WAC 173-503-050) and, depending on the location of the proposed new water use, for a Skagit River tributary (SCC 14.24.350). Any new water use must not impair the instream flow established under WAC 173-503-040. This requirement can be satisfied by discharging water that is

otherwise legally and physically available into a groundwater body in hydraulic continuity with the Skagit River, in an amount equivalent to the amount consumptively used, as the proposed mitigation template purports to do. Rainwater, which is the primary source of supply for the mitigation template, is legally available as a mitigation water supply. A stormwater discharge into waters of the state that is not contaminated or potentially contaminated by industrial or commercial sources is not considered a "waste material."[1] Consequently, a state water discharge permit is not required for a discharge of stormwater or rainwater to groundwater as contemplated under the mitigation template.[2]

II. Background

A. Instream Flows and the State Water Code

RCW 90.22.010, first enacted in 1969, authorizes Ecology to establish regulations protecting instream flows. RCW 90.22.030 prohibits Ecology from granting a water right that conflicts with an instream flow regulation. The Water Resources Act of 1971 expanded the requirements for protecting instream flows. Section 2 of the 1971 Act declared a number of fundamental guiding principles for water resources administration. The Act mandated that base flows be retained as necessary "to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values."[3] The 1971 Act prohibits withdrawals of water "which would conflict therewith," except "in those situations where it is clear that overriding considerations of the public interest will be served."[4]

In 1979, the Legislature established instream flows as appropriative water rights. RCW 90.03.345 declares that minimum stream flows or lake levels under RCW 90.22.010 or RCW 90.54.040 "constitute appropriations within the meaning of the [state water code] with priority dates as of the effective dates of their establishment." All water withdrawals with junior priority dates – including exempt wells – are subject to interruption to protect instream flows. Ecology is required to condition a permit to protect minimum flows whenever an application for a permit to make beneficial use of public waters relates to a stream or other water body for which minimum flows have been adopted and are in effect at the time of approval. Ecology's authority to establish minimum flows is exclusive, and

---

[1] WAC 173-216-030(19).

[2] Compare WAC 173-216-040.

[3] RCW 90.54.020(3)(a).

[4] Id.

otherwise legally and physically available into a groundwater body in hydraulic continuity with the Skagit River, in an amount equivalent to the amount consumptively used, as the proposed mitigation template purports to do. Rainwater, which is the primary source of supply for the mitigation template, is legally available as a mitigation water supply. A stormwater discharge into waters of the state that is not contaminated or potentially contaminated by industrial or commercial sources is not considered a "waste material."[1] Consequently, a state water discharge permit is not required for a discharge of stormwater or rainwater to groundwater as contemplated under the mitigation template.[2]

II. Background

A. Instream Flows and the State Water Code

RCW 90.22.010, first enacted in 1969, authorizes Ecology to establish regulations protecting instream flows. RCW 90.22.030 prohibits Ecology from granting a water right that conflicts with an instream flow regulation. The Water Resources Act of 1971 expanded the requirements for protecting instream flows. Section 2 of the 1971 Act declared a number of fundamental guiding principles for water resources administration. The Act mandated that base flows be retained as necessary "to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values."[3] The 1971 Act prohibits withdrawals of water "which would conflict therewith," except "in those situations where it is clear that overriding considerations of the public interest will be served."[4]

In 1979, the Legislature established instream flows as appropriative water rights. RCW 90.03.345 declares that minimum stream flows or lake levels under RCW 90.22.010 or RCW 90.54.040 "constitute appropriations within the meaning of the [state water code] with priority dates as of the effective dates of their establishment." All water withdrawals with junior priority dates – including exempt wells – are subject to interruption to protect instream flows. Ecology is required to condition a permit to protect minimum flows whenever an application for a permit to make beneficial use of public waters relates to a stream or other water body for which minimum flows have been adopted and are in effect at the time of approval. Ecology's authority to establish minimum flows is exclusive, and

---

[1] WAC 173-216-030(19).

[2] Compare WAC 173-216-040.

[3] RCW 90.54.020(3)(a).

[4] Id.

no other state agency may establish minimum flows or other water levels for any stream or lake of the state.[5]

In addition to establishing minimum instream flows and lake levels, Ecology has the authority to close a stream to further appropriation, upon a determination that water is unavailable from the surface water source.[6] Water use from a groundwater source that is in hydraulic continuity with a closed stream or lake must be denied if the withdrawal will have any effect on the flow or level of the surface water of a stream or lake closed by rule to further appropriations.[7]

Water withdrawals that would conflict with base flows may be authorized only where Ecology makes a finding "that overriding considerations of the public interest will be served."[8] The "overriding considerations of the public interest" (OCPI) exception to the statutory prohibition against impairment of instream flows is a narrow exception to a general rule.[9] The provision is not a device for wide-ranging reweighing or reallocation of water through water reservations for numerous future beneficial uses."[10] Instead, the OCPI exception is available for use only in unusual circumstances, and only on a case-by-case basis.[11] The OCPI exception cannot be used to allow permanent withdrawals of water.[12]

On March 14, 2001, Ecology adopted Chapter 173-503 WAC, an administrative rule to establish an instream resources protection program for the Skagit River Basin. The Skagit Instream Flow Rule applies to waters within the Lower and Upper Skagit water resources inventory area (WRIAs 3 and 4), as defined in WAC 173-500-040, excluding only the Samish River Basin and several islands.[13] The 2001 rule established the Skagit River Mainstem as a stream management unit, upstream from the Skagit River mouth (including tidal fluctuation) to its headwaters.[14] The Rule established minimum stream flows for the Mainstem Skagit stream management unit, measured at the U.S. Geological Survey (USGS) stream gauge near Mt. Vernon. The Rule declared that future

[5] RCW 90.03.247.

[6] Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 94-95, 11 P.3d 726 (2000).

[7] Id.

[8] RCW 90.54.020(3)(a); Postema v. Pollution Control Hearings Bd., 142 Wn.2d at 81.

[9] Swinomish Indian Tribal Cmty. v. Ecology, 178 Wn.2d 571, 588, 311 P.3d 6 (2013).

[10] Id. at 585.

[11] Id.; Foster v. Ecology, 184 Wn.2d 465, 362 P.3d 959 (2015).

[12] Id.

[13] WAC 173-503-010.

[14] WAC 173-503-040(1).

consumptive water right permits would be expressly subject to established instream flows.[15] Likewise, the Rule prohibits the issuance of a new water right permit or certificate to withdraw groundwater that Ecology determines is in hydraulic continuity with surface water unless, Ecology determines the groundwater withdrawal would not interfere with stream flows during the period of stream closure or with maintenance of instream flows.[16] Ecology determined that up to 200 cubic feet per second (cfs) would be available for future appropriation, subject to instream flows established under the Rule.[17] Any water rights issued to appropriate water available under the Rule would be interruptible.[18] Likewise, any applications to appropriate public groundwater would be subject to minimum stream flows established under the Rule. After this amount was appropriated, the entire Skagit Basin is closed to further consumptive appropriations.[19] Nevertheless, the Skagit Basin remains open to "[n]onconsumptive uses which are compatible with the intent of [the instream flow rule]."[20]

Finally, the 2001 Rule included a policy statement for future permitting actions. This section of the Rule stated that new withdrawals of water that conflicted with the minimum flows established under the Rule would only be allowed as provided in RCW 90.54.020(3)(a), which allows withdrawals of water that conflict with established instream flows "in those situations where it is clear that overriding considerations of the public interest will be served."[21] Otherwise, the Rule expressed Ecology's policy to encourage the use of alternative sources of water, including reuse, artificial recharge and recovery, conservation, and acquisition of existing water rights.[22]

Skagit County appealed the Skagit Instream Flow Rule in 2003, but dismissed its appeal after Ecology issued an amended rule in 2006. In the amended rule, Ecology further divided the Skagit Basin into subbasin management units. Ecology used the OCPI exception in RCW 90.54.020(3)(a) as justification to establish a reservation of water in each of 25 subbasin management units for specified future uses, including exempt wells in rural areas and various municipal, domestic, irrigation, and stock watering uses. During the rulemaking process Ecology and the Washington Department of Fish and Wildlife

---

[15] WAC 173-503-040(5).

[16] WAC 173-503-060.

[17] WAC 173-503-050(1).

[18] WAC 173-503-050(2).

[19] WAC 173-503-050(3).

[20] WAC 173-503-070(2).

[21] WAC 173-503-080(1); RCW 90.54.020(3)(a).

[22] WAC 173-503-080(2).

(WDFW) explicitly found that the total quantity of the reservations was less than the amount that would have significant impacts on fish populations in the basin.[23] Nevertheless, the Swinomish Indian Tribal Community (Swinomish) challenged the amended rule two years later under the Administrative Procedure Act, contending that Ecology's use of OCPI to establish the reservations exceeded its statutory authority. The Superior Court hearing the case denied the Swinomish Tribe's petition.[24] Swinomish appealed the superior court decision to the Supreme Court. As explained below, the Washington Supreme Court reversed and invalidated the amended rule.[25] The Court directed Ecology to reinstate the 2001 version of the Skagit Water Management Rule into the Washington Administrative Code.[26]

Without the 2006 amendment, and with one exception, there are no specific limitations on water use in Skagit River tributary basins.[27] Instead, the Rule declares that 200 cfs of water is available for future appropriation, subject to interruption to protect minimum instream flow levels established under WAC 173-503-040.[28] The Rule also provides that Ecology will encourage the use of alternative sources of water to address interruptions and provide water for domestic uses, states, in pertinent part –

> [I]t is the policy of the department to preserve an appropriate minimum instream flow in all perennial streams and rivers as well as the water levels in all lakes in the Lower and Upper Skagit watershed (WRIA 3 and 4) by encouraging the use of alternative sources of water which include ... [a]rtificial recharge and recovery ....[29]

B. The Growth Management Act and Water Availability

1. Growth Management Act

In 1992, the Washington Legislature enacted the Growth Management Act (GMA), in an effort to combat urban sprawl and to protect important natural resources from

---

[23] Swinomish Indian Tribal Cmty. v.Ecology, 178 Wn.2d at 578.

[24] Id. at 576.

[25] Id. at 571.

[26] WAC 173-503 (recodified), Wash. St. Reg. 13-21-044 (October 9, 2013).

[27] See WAC 173-503-040 (Cultus Mountain tributaries).

[28] WAC 173-503-050. According to Ecology's most recent Skagit Reservation Accounting Report, approximately 164 cfs of water remains available -- on an interruptible basis -- from the Skagit River Basin. Dept. of Ecology, Skagit Reservation Accounting Report: April 14, 2001 – Dec. 31, 2010.

[29] WAC 173-503-080.

development impacts.[30] The GMA requires certain counties to plan for and accommodate future growth, primarily but not exclusively in designated urban areas.[31] Specifically, GMA requires each County and City that is subject to the Act to adopt a Comprehensive Plan and development regulations that are consistent with the Act. The GMA specifies thirteen planning goals, each expressing a different policy objective, to guide the development of comprehensive plans and development regulations.[32] One of the stated goals requires local governments that are subject to GMA to "[p]rotect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water."[33]

The GMA also requires each County under the Act to include it its Comprehensive Plan an element addressing each of the following subjects:

(1) land use;
(2) housing;
(3) capital facilities;
(4) utilities;
(5) rural;
(6) transportation;
(7) economic development; and
(8) parks and recreation.[34]

Among other requirements, the land use element must "provide for the protection of the quality and quantity of ground water used for public water supplies."[35] The rural element must protect critical areas, as provided in RCW 36.70A.060, and surface water

---

[30] RCW 36.70A.

[31] RCW 36.70A.020; RCW 36.70A.030; RCW 36.70A.110.

[32] Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 127, 118 P.3d 322 (2005). See RCW 36.70A.020; See also RCW 36.70A.480. In addition, RCW 36.70A.480 adds the goals and policies of the Shoreline Management Act, as set forth in RCW 90.58.020, as a fourteenth goal. RCW 36.70A.020 states the goals are not listed in order of priority.

[33] RCW 36.70A.020(10). As first enacted, the GMA planning goals provided guidance to growth management hearings boards to make invalidity determinations. A 1997 amendment to GMA required the hearings board to consider the planning goals not just in determining invalidity, but also in determining GMA compliance. *See* Wash. Laws of 1997, ch. 429, § 20 (amending RCW 36.70A.320(3)). These planning goals represent substantive mandates. *See e.g.*, King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 556-559, 14 P.3d 133 (2000) (preservation of agricultural land); Low Income Housing Inst. v. Lakewood, 119 Wn. App. 110, 114, P.3d 653, (2003)(affordable housing).

[34] RCW 36.70A.070(1)-(8).

[35] RCW 36.70A.070(1).

and groundwater resources.[36] Counties are required to periodically update their comprehensive plans and development regulations based on a schedule provided in the statute.[37]

The GMA requires all cities and counties in Washington to designate and protect critical areas.[38] Furthermore, the Act requires cities and counties to include the "best available science" in developing policies and development regulations to protect the functions and values of critical areas.[39] The Act defines "critical areas" as:

a. Wetlands;
b. Critical aquifer recharge areas for potable water;
c. Fish and wildlife habitat conservation areas;
d. Frequently flooded areas; and
e. Geologically hazardous areas.[40]

Finally, the GMA requires local governments to adopt development regulations that are consistent with its comprehensive plan.[41] GMA development regulations must prohibit development unless adequate public services and other essential services are concurrently available.[42] Public services include domestic water systems.[43]

Each County and City proposing to adopt a comprehensive plan or development regulation, or an amendment thereto, must notify the Department of Commerce of its intent to do so at least 60 days prior to final adoption. State agencies may provide comments on the proposal during the public review process prior to adoption. State agencies may comment on a draft plan, but the agencies' role is advisory only. Consequently, a state agency may offer comments on a draft comprehensive plan or development regulation, and may express concerns about the proposal, but may not offer an opinion that the comprehensive plan or development regulation is out of compliance with the GMA.[44] Nevertheless, a state agency may file a Petition with the Growth

---

[36] RCW 36.70A.070(5)(c)(iv).

[37] See RCW 36.70A.130.

[38] RCW 36.70A.170.

[39] RCW 36.70A.172(1).

[40] RCW 36.70A.030(5); See also WAC 365-190-080 (guidelines for designating critical areas).

[41] RCW 36.70A.040(3).

[42] RCW 36.70A.020(12); 36.70A.070(6)(c).

[43] RCW 36.70A.030(12).

[44] See Department of Commerce, Principles Governing State Agency Correspondence under the Growth Management Act, p. 2 (rev. 09/210), available online at https://deptofcommerce.app.box.com/s/zr2j98zi4u6ggn3k3isl3hhyj0kevf3m.

Management Hearings Board (Board) alleging that a County or City is not in compliance with the GMA.[45]

The GMA declares that comprehensive plans and development regulations are presumed valid upon adoption.[46] Although the Board must give deference to a County, the County's action must be consistent with the goals and requirements of the GMA.[47] The burden is on the petitioner in any hearing to demonstrate that any action taken by a County under the GMA is not in compliance with the Act.[48] The Board is charged with determining whether a County decision complies with GMA requirements.[49] If a petitioner challenges a comprehensive plan or development regulation, the Board, after a hearing, must issue a final order ruling on the County's compliance with the requirements of the GMA.[50] The Growth Management Board "shall find compliance" unless it determines that a County decision "is clearly erroneous in view of the entire record…and in light of the [GMA's] goals and requirements."[51]

When making a finding on compliance, the Board will look to whether the comprehensive plan or development regulations are consistent with the goals and requirements of the GMA.[52] The Board may find all or part of a comprehensive plan or development regulation to be noncompliant with the GMA.[53] Where the Board finds a comprehensive plan or development regulation not in compliance with the GMA, the Board can remand the plan or regulation for 180 days, within which time the agency or local government must comply with applicable requirements.[54] County plans and regulations, which are presumed valid upon adoption, remain valid during the remand period following a finding of noncompliance.[55] Unless the Board makes a determination

---

[45] RCW 36.70A.280(2).

[46] RCW 36.70A.320(1).

[47] King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d at 561.

[48] RCW 36.70A.320(2).

[49] RCW 36.70A.300(3); Lewis County v. W. Wash. Growth Mgmt. Hearings Bd., 157 Wn.2d 498 n. 7, 139 P.3d 1096.

[50] Town of Woodway v. Snohomish County, 172 Wn. App. 643, 653-54, 291 P.3d 278 (2013), aff'd 180 Wn.2d 165, 322 P.3d 1219 (2014).

[51] Clallam County v. Dry Creek Coal, 161 Wn. App. 366, 379, 255 P.3d 709 (2011) (quoting RCW 36.70A.320(3)).

[52] Lewis County, 157 Wn.2d at 498.

[53] RCW 36.70A.300.

[54] WAC 242-03-900.

[55] Town of Woodway v. Snohomish County, 180 Wn.2d 165, 178-79, 322 P.3d 1219 (2014).

of invalidity, a finding of noncompliance and an order of remand do not affect the validity of comprehensive plans and development regulations.[56]

2. Subdivision Act

Counties also have responsibilities under the Subdivision Act to ensure that adequate, reliable water supplies are available prior to authorizing the subdivision of land within unincorporated areas.[57] Specifically, the Act prohibits a permitting agency from approving a proposed land subdivision unless the agency finds that "[a]ppropriate provisions are made" for potable water supplies and public health and safety.[58] But approval of a subdivision is a two-step process under Washington law.[59] The statute does not state specifically at what point in the subdivision approval process potable water must be made available.

3. State Building Code

Counties also have responsibilities under RCW 19.27.097, enacted as part of the GMA, to ensure that adequate, reliable water supplies are available prior to issuing building permits.[60] Otherwise known as the State Building Code, Chapter 19.27 RCW requires building permit applicants to provide evidence of an adequate water supply for the intended use of the building. Evidence to satisfy the state requirement may consist of a water right permit, a letter from an approved water purveyor stating the purveyor's ability to provide water, or another form sufficient to verify the existence of an adequate water supply. An application for a water right will not satisfy the State requirement. The county or city may require that the applicant connect to an existing public water system if there is an existing system available which is willing and able to provide potable water with reasonable economy and efficiency.[61]

C. Evolving Instream Flow Case Law

In 1997, the Washington Court of Appeals for the first time reviewed an Ecology decision to condition a groundwater permit to protect instream flow water rights. In

---

[56] RCW 36.70A.300(4).

[57] RCW 58.17; Kittitas County v. E. Growth Mgmt. Hearings Bd.,172 Wn.2d 144, 178-79, 256 P.3d 1192 (2011).

[58] RCW 58.17.110(2).

[59] Knight v. City of Yelm, 173 Wn.2d 325, 335, 267 P.3d 973 (2011).

[60] Whatcom County v. Hirst, 186 Wn.2d 648, 657, 381 P.3d 1 (2016); Kittitas County v. E. Growth Mgmt. Hearings Bd.,172 Wn.2d 144, 178-79, 256 P.3d 1192 (2011).

[61] RCW 19.27.097(1).

Hubbard v. Department of Ecology, the Court of Appeals found that Ecology did not abuse its discretion by imposing a permit condition on a groundwater right to protect a minimum stream flow established in the agency's Okanogan River water management rule.[62] The *Hubbard* Court noted that, under the 1945 Groundwater Code, the rights of a surface water appropriator are senior to those of a subsequent user of groundwater that may affect the flow of the surface water.[63] Therefore, the Court upheld a provision in the Okanogan rule requiring Ecology to subject a groundwater permit to the same conditions as would apply to a junior surface water right "[i]f Ecology finds that there is 'significant hydraulic continuity' between surface water and the proposed underground water source … ."[64]

The *Hubbard* Court rejected the appellants' contention that the impact of their proposed water use so miniscule that it should be considered be significant. The Court noted that the appropriate question was "not … whether the proposed use will be significant, but whether there is a significant connection (hydraulic continuity) between the proposed groundwater source and the river."[65]

The Washington Supreme Court reached a similar result three years later in the landmark case *Postema v. Pollution Control Hearings Board.*[66] In *Postema*, the Supreme Court considered consolidated appeals of Ecology decisions denying 130 applications to appropriate groundwater in twelve watersheds across the state.[67] Many of the denials were based on Ecology's finding that the groundwater is in hydraulic continuity with surface water sources, and that new groundwater use would impair minimum stream flows which are not met a substantial part of the time. In addition, Ecology denied applications for appropriation from groundwater in hydraulic continuity with surface water sources that were closed to further appropriation.[68]

The *Postema* Court affirmed most, but not all, of Ecology's permit denials. The Court started its analysis by describing the common issues in the consolidated cases as "the impact of groundwater withdrawals on surface waters having minimum flow

---

[62] Hubbard v. Ecology, 86 Wn. App. 119, 127, 936 P.2d 27 (1997).

[63] Id. at 124 (citing WAC 173-549-060).

[64] Id. at 125 (citing WAC 173-549-060).

[65] Id. at 126.

[66] Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 11 P.3d 726 (2000).

[67] Postema, 142 Wn.2d at 74. In late 1995 and early 1996 Ecology issued approximately 600 water right decisions in an affect to batch process a backlog of pending applications. Slightly over 300 of the decisions were denials, of which 130 were appealed to the PCHB.

[68] Id. at 74.

requirements set by rule which are unmet a substantial part of the year, and on surface waters closed to further appropriation."[69] The *Postema* Court noted that "when Ecology determines whether to issue a permit for appropriation of public groundwater, Ecology must consider the interrelationship of the groundwater with surface waters, and must determine whether surface water rights would be impaired or affected by groundwater withdrawals."[70]

The *Postema* Court considered the proper test to determine impairment. The Court rejected the Pollution Control Hearings Board (PCHB) ruling that hydraulic continuity equates to impairment as a matter of law. Instead, the Court determined that impairment was a factual question, and that existing rights may be impaired where there is hydraulic continuity, depending upon the nature of the appropriation, and the source aquifer, and their relationship to each other. Nevertheless, the Court rejected the appellants' arguments that Ecology must show direct and measurable impact on surface water to establish impairment. Instead, the Court found that Ecology could rely on mathematical modelling, using the best available science, to determine impairment. Finally, the Court rejected appellants' arguments that the effect must be significant. The Court noted that the statutes do not authorize a *de minimis* impairment of an existing right.[71] Instead, the *Postema* Court concluded that a groundwater withdrawal must be denied if it is factually established that the withdrawal will have any effect on the flow or level of the surface water body.

Next, the *Postema* Court ruled that Ecology must deny a permit application if Ecology finds that a proposed withdrawal of groundwater in hydraulic continuity with a lake or stream that is closed to further appropriation. The Court recognized that a stream closure is not an appropriation of water. Rather, according to the Court, it is:

> [A] recognition that the water in the stream is insufficient to meet existing rights and provide adequate base flows. Thus, where a proposed withdrawal would reduce the flow in surface waters closed to further appropriations, denial is required because water is unavailable and withdrawal would be detrimental to the public welfare.[72]

According to the *Postema* Court, "[s]tream closures by rule embody Ecology's determination that water is not available for further appropriations."[73] The Court found

---

[69] Id. at 77.

[70] Id. at 80-81.

[71] Id. at 94-95.

[72] Postema, 142 Wn.2d at 94.

[73] Id.

that the question of water availability is "independent of the question whether a withdrawal would impair an existing right…."[74] The *Postema* Court held that "a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if it is established factually that the withdrawal will have any effect on the flow or level of the surface water." [75]

The Court explained that instream flow water rights were entitled to the same protection from impairment as other senior water rights.[76] The Court noted that "*minimum flows*, once established by rule, are *appropriations* which cannot be impaired by subsequent withdrawals."[77] The *Postema* Court held that Ecology must deny a permit application if it finds that the proposed source of groundwater is in hydraulic continuity with surface water and will impair the minimum flow.[78]

In *Swinomish Indian Tribal Community v. Ecology*, the Washington Supreme Court extended the principles announced in its *Postema* decision to prevent Ecology from allowing new groundwater uses in rural areas of Skagit County that otherwise would conflict with established minimum stream flows.[79] In *Swinomish*, the Supreme Court considered objections to Ecology's 2006 amendments to its Skagit River instream flow rule, which reserved water for future domestic uses that were inconsistent with previously-established minimum stream flows. Ecology justified its amended rule on a provision in the Water Resources Act that allowed for water withdrawals that conflicted with base flows where "overriding considerations of the public interest" would be served by the withdrawal.[80] The *Swinomish* Court characterized the "overriding considerations" provision as a "narrow exception" to the rule of strict priority.[81] Consequently, the Supreme Court rejected Ecology's interpretation of the so-called OCPI exception and invalidated the agency's amendment to its Skagit River water management rule. The *Swinomish* Court characterized Ecology's amended rule as an "end-run around the normal appropriation process does not accord with the prior appropriation doctrine and

---

[74] Id. at 95.

[75] Id.

[76] Id. at 81-82.

[77] Id. at 82. See also RCW 90.03.345 (stating minimum flow rules are appropriations with priority dates as of the effective date of the rule).

[78] Postema, 142 Wn.2d at 82.

[79] Swinomish Indian Tribal Cmty. v. Ecology, 178 Wn.2d 571, 311 P.3d 6 (2013).

[80] See RCW 90.54.020(3)(a).

[81] Swinomish Indian Tribal Cmty., 178 Wn.2d at 576.

the detailed statutes implementing the doctrine."[82] Furthermore, the Court rejected Ecology's attempt to aggregate future uses that cumulatively could cause impairment to the minimum stream flow, declaring that aggregation for purposes of avoiding the impairment analysis "is contrary to the basic principle of the prior appropriation doctrine that the first in time is the first in right."[83]

In *Foster v. Ecology*, the Washington Supreme Court ruled that Ecology exceeded its authority by approving the City of Yelm's water permit under the narrow OCPI exception.[84] Consequently, the Court reversed superior court and PCHB decisions affirming Ecology's approval of the Yelm permit. The Court held "withdrawal" of water, according to the statute, was water use that impaired a minimum flow established by rule and was not synonymous with the term "appropriation."[85] As previously noted, the Court ruled that the OCPI exception does not authorize a permanent appropriation of a legal water right that would cause permanent impairment of minimum flows.[86] Instead, any impairment of minimum flows otherwise authorized by the statute must be temporary.[87]

The *Foster* Court reiterated that the OCPI exception is not an alternative method for appropriating water. Application of the OCPI exception to authorize a permanent water withdrawal—using out-of-kind mitigation to produce an ecological benefit to offset impairment of an instream flow water right—"makes the sort of end-run around the appropriations process that we expressly rejected in *Swinomish.*"[88] According to the *Foster* Court, minimum flows established by administrative rule "function in most respects as any other water appropriation."[89] The Court, by reaffirming its *Swinomish* decision, confirmed that "the OCPI exception is not an alternative to the appropriation process, nor does it provide an exception to or the prior appropriation doctrine."[90]

---

[82] Id. at 590.

[83] Id. at 591.

[84] Foster v. Ecology, 184 Wn.2d 465, 362 P.3d 959 (2015).

[85] Id. at 474-475 ("[W]hen the legislature intends for the assignment of a permanent legal water right, it uses the term 'appropriation'; when it intends for only the temporary use of water, it uses the term 'withdrawal'."); ("[the term] 'withdrawal' refers to the physical act of removing water.").

[86] Foster, 184 Wn.2d at 474.

[87] Id. at 475.

[88] Id. at 475-476.

[89] Id. at 471.

[90] Id. at 477.

Finally, the *Foster* Court rejected the argument that Yelm's mitigation plan would mitigate the impairment by undertaking other actions to improve aquatic resource habitat that would create a net ecological benefit, despite the net depletion of stream flow. The Court reasoned that a mitigation plan that relies on out-of-kind habitat improvements does not mitigate the injury that occurs when a junior water right holder impairs a senior water right. According to the *Foster* Court, "[t]he water code … is concerned with the *legal* injury caused by impairment of senior water rights … does not turn on notions of '*ecological'* injury."[91] The Court concluded that a water user cannot "mitigate" by way of ecological benefit the legal injury to a senior water right caused by a new water withdrawal.[92]

D. Evolving Water Availability Case Law

In 1992, the Washington Attorney General issued a formal Opinion explaining that the local permitting agency—not the State—was responsible for making the water availability determination required under the State Building Code.[93] The Attorney General's Opinion stated that, in the absence of a water right permit decision, and if water is not supplied from a public water system, local government agencies issuing building permits have considerable discretion in the determination whether a water supply is adequate for purposes of RCW 19.27.097. The Attorney General explained, that a building permit applicant "must prove that he has a right to take … water."

In *Haas v. Clark County*, the Washington Court of Appeals ruled that the Subdivision Act's water availability requirements need only be met at final plat approval.[94] The court noted in a previous ruling that the approving authority is empowered to condition approval of a plat upon compliance with RCW 58.17.110.[95] The *Haas* Court reasoned that, since the Subdivision Act allowed for conditional approval, making proof of water availability a condition of final approval could satisfy the water availability requirements.

---

[91] Id. at 476 (emphasis added).

[92] Id. at 477.

[93] See AGO 1992 No. 17.

[94] See Haas v. Clark County, Nos. 19518-6-II, 21987-5-II, 93 Wn. App. 1066 (Jan. 22, 1999) (unpublished opinion) (denying a motion to publish the Haas opinion. An unpublished decision cannot be cited as precedent under Washington's Court Rules.).

[95] See also Miller v. Port Angeles, 38 Wn. App. 904, 909, 691 P.2d. 229 (1984), review denied, 103 Wn.2d 1024 (1985).

The Washington Supreme Court suggested a similar result in its 2011 decision in *Knight v. City of Yelm*.[96] In *Knight*, a City hearing examiner approved a developer's preliminary plat application but the hearing examiner included a condition requiring the applicant to demonstrate water availability "at final plat approval and/or prior to the issuance of any building permit … ."[97] The City Council approved the preliminary plat without explicitly requiring the City to show an adequate water supply at final plat approval. The City Council also decided that Knight lacked standing to appeal the hearing examiner's decision. Knight appealed to Superior Court under the Land Use Petition Act. At oral argument before the superior court, the parties agreed to drop the "/or" provision in the hearing examiner's condition, thereby requiring a demonstration of water availability before final plat approval.[98] The case was decided on the issue whether Knight had standing to appeal the City Council's decision, which the superior court found to be an erroneous interpretation of the law. On appeal, the Supreme Court noted that subdivision approval proceeds in two steps—preliminary plat approval and final plat approval. The Court ruled that Knight was sufficiently prejudiced by the City Council's decision to demonstrate standing for purposes of a Land Use Petition Act appeal.[99]

In 2007, three public interest groups appealed Kittitas County's subdivision ordinance, arguing that the ordinance was inconsistent with the GMA's water availability requirements. In *Kittitas County v. Eastern Washington Growth Management Hearings Board*, the Washington Supreme Court ruled that Kittitas County's subdivision regulations failed to protect water resources as required by the GMA.[100] Specifically, the Supreme Court found that the County's subdivision regulations were inconsistent with the GMA's goal "to protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water."[101] The Court held that a County may not permit subdivision applicants to evade compliance with water permitting requirements.[102]

After the *Kittitas County* and *Knight* decisions it became clear that a local government must determine both legal *and* physical water availability prior to making a

---

[96] Knight v. City of Yelm, 173 Wn.2d 325, 344-45, 267 P.3d (2011).

[97] Id. at 331.

[98] Id. at 333.

[99] Id. at 342.

[100] Kittitas County v. E. Washington Growth Mgmt. Hearings Bd., 172 Wn.2d 144, 256 P.3d 1193 (2011).

[101] RCW 36.70A.020(10).

[102] Kittitas County, 172 Wn.2d at 180.

land use decision. Generally, local governments continued to rely on Ecology water management rules that provide exemptions from regulation for permit-exempt water withdrawals.[103] This practice was challenged in a case in which the Court reviewed Whatcom County's development regulations, which relied on Ecology's Nooksack Water Management Rule as evidence of water availability for permit-exempt wells. Whatcom County allowed subdivision and building permit applicants to rely on permit-exempt wells except in places where Ecology determined—by Rule—that water was unavailable. Ecology's Nooksack Rule closed certain parts of the Nooksack Basin to new permits, but the Rule's closure and minimum flow requirements did not apply to permit-exempt wells.[104] Consequently, the County assumed that water was "presumptively available" for permit-exempt wells throughout the Nooksack Basin.[105]

In *Whatcom County v. Hirst,* the Supreme Court rejected this approach, ruling instead that the GMA imposed obligations on the County that were independent of Ecology's obligations under the water code.[106] These include an independent obligation to determine legal and physical availability of water, even from permit exempt wells. The Court reasoned that permit-exempt groundwater withdrawals could cause impairment to Ecology's minimum stream flows, notwithstanding the fact that permit-exempt wells were not subject to regulation under the Rule.[107]

In *Hirst,* the Supreme Court announced that the responsibility of Counties under the GMA to protect water resources is independent from Ecology's responsibility to protect water resources under the Water Code.[108] The standard by which Counties must make this determination is unclear. The GMA requires a County to designate critical areas based on the "best available science."[109] In contrast, there is no clear standard to determine groundwater availability.[110] The GMA does not define the requirements to plan for the protection of water resources, nor does it explain how the requirements are to be met.[111] The closest the statutes or courts have come to a standard is the *Hirst* Court's

---

[103] There are several such rules in place throughout the state, all of which were adopted prior to 2001.

[104] Hirst, 186 Wn.2d at 665.

[105] Id.

[106] Whatcom County v. Hirst, 186 Wn.2d 648, 665, 381 P.3d 1 (2016).

[107] Id.

[108] Id. at 668.

[109] See RCW 36.70A.172.

[110] RCW 36.70A.070(1).

[111] Hirst, 188 Wn.2d at 661.

interpretation of RCW 19.27.097 and RCW 58.17.100, where the Court stated that "[t]hrough these statutes, the GMA requires counties to assure that water is both factually and legally available."[112]

E. ESSB 6091 -- Legislative Response to Hirst and Foster Decisions

The Legislature made several attempts to respond to the *Hirst* and *Foster* decisions. Despite repeated efforts, the Legislature came to an impasse, and adjourned before enacting the Capital Budget for FY 2017. As a result, capital projects throughout the state were not funded at the beginning of the fiscal year. Communities everywhere were affected by the impasse, even if they were not affected by the *Hirst* or *Foster* decisions.

Legislators and stakeholders met throughout the interim in an effort to break the impasse. Finally, in December 2017, negotiators reached a compromise agreement, the final version of which is embodied in ESSB 6091, a bill signed into law on January 19, 208.[113] The bottom line is that ESSB 6091 does not address water supply problems in the Skagit Basin, even though Ecology has a water management rule in place. So, Skagit County is left with a question that no other County in the State faces, namely how to comply with GMA requirements to address water availability in light of the *Hirst* and *Foster* decisions, without assistance from changes in the law provided through subsequent legislation. Recognizing these circumstances, Skagit County is considering the proposal to provide a mitigation template for single-family homeowners.

F. Skagit County Code Requirements

1. Unified Development Code (GMA)

In addition to requirements resulting from WAC 173-503 to protect mainstem Skagit River flows, Skagit County imposes restrictions on new development in certain tributaries of the Skagit River. Skagit County Code 14.24.340 (SCC), enacted as part of the County's Unified Development Code, designates ten Skagit River tributaries as "Surface Water Source Limited Streams" (SWSL), and requires applicants within one-half mile of each stream to provide mitigation for new groundwater development. Furthermore, SCC 14.24.350 designates 55 Skagit River tributaries as "flow sensitive basins" and imposes groundwater withdrawal limits for each tributary basin.

2. Skagit County Health Code

Skagit County's Health Code, SCC 12.48, also includes water availability requirements for building permit applicants. Under SCC 12.48.230, each applicant for a

---

[112] Id. at 674–75.

[113] ESSB 6091, Ch. 1. 2008 Wash. Sess. Laws, included with this letter as Attachment A).

building permit must provide evidence of an adequate water supply for the intended use of the building. The County Health Code also defines the term "adequate water supply" to mean a water supply capable of supplying at least 350 gallons per day (gpd) for each home.[114]

III. Review of Proposed Single-Family Mitigation Template

There have been numerous proposals over the last several years to provide landscape-scale mitigation for new residential development in rural areas of the Skagit River Basin for an individual single-family residence. In contrast, this template provides a mitigation opportunity for an individual home. The template relies on the replacement of water used for consumptive purposes to avoid causing impairment to flows established under Ecology's Skagit River instream flow rule. The primary source of mitigation water is rainwater, collected on the roof of each home. In addition, a new user would be required to secure a backup water supply in case rainwater was not sufficient, specifically by contracting to obtain a supplemental water either by truck, or by delivery from a nearby public water system. Mitigation water would be stored in a water tank and released into an infiltration system on a daily basis, year-round, in an amount equal to the estimated daily consumptive use of water.

The Skagit River Water Management Rule does not require mitigation water year-round. Instead, the rule only requires mitigation during times when instream flow levels are not met. Theoretically, an applicant could provide adequate mitigation for a new consumptive use by offsetting the new use only during those periods when flow levels are not met.

For a larger project, the project sponsor could actively manage the Mitigation Project based on flow conditions measured at the U.S. Geological Survey's Skagit River stream gauge near Mt. Vernon. In 2014, the Upper Skagit Indian Tribe (USIT) proposed to develop a mitigation project for new domestic water uses in the Fisher Creek subbasin. The USIT mitigation project would have discharged mitigation water only when measured flows were inadequate to meet instream flow levels as provided under WAC 173-503-040, measured at the mainstem Skagit River gauge at Mt. Vernon. The USIT proposed to operate the mitigation project by utilizing an automated system linked via satellite telemetry, supervisory control and data acquisition (SCADA), or other similar means to coordinate mitigation project water releases in real time to the USGS stream gauge for the Skagit River at Mount Vernon.[115]

---

[114] SCC 12.48.030.

[115] Upper Skagit Tribe, Mitigation Plan, 2014.

While theoretically possible, real-time management may not be practical for a smaller project, specifically for an individual single-family residence. The first challenge is to anticipate the time delay inherent in a groundwater pathway, and the ability to provide flow augmentation in real time where the project discharges only indirectly into the impaired water body. The second challenge is the cost of installing a real-time connection to the Mt. Vernon stream gauge. The technology exists, but the costs might be prohibitive for a single residence.

Instead, the proposed mitigation template would simply release stored water every day of the year, on a daily basis, equivalent to the amount consumptively used on a particular day. The proposal relies on industry standard estimates for its consumptive use calculations.[116] Under the template a water user's consumptive use would be estimated as 10 percent of total water use, as measured at a point-of-use meter. The point-of-use meter would be connected to a metered discharge from the mitigation storage tank, calibrated to the consumptive use estimate.

The Washington courts have made it clear that any amount of diminution in flow when flows are not met constitutes impairment. In fact, Washington courts have expressly rejected the notion that *de minimus* uses are ignored for purposes of impairment. But the case law, statutes, and regulatory practices also make it clear the amount of water that is consumptively used – without a corresponding return flow or other offset - is considered to cause impairment. Assuming the calculations are accurate, it is appropriate for the County to conduct its impairment analysis based on the amount of water consumptively used, not the total diversion.

The next issue to consider is whether the permit applicant has a legal right to mitigation water. Stormwater is a public resource and therefore constitutes "waters of the State."[117] But the capture of stormwater absent beneficial use does not require a water right.[118] Beneficial use is a term of art under the water code.[119] Stormwater management does not constitute "beneficial use" for purposes of the water code.[120]

---

[116] The proposed template adheres to the County Health Code requirement that a building permit applicant provide 350 gpd. SCC 12.48.110. Recently, Ecology issued a guidance document suggesting 60 gpd per capita. See *ESSB 6091: Streamflow Restoration, Recommendations for Water Use Estimates* (Ecology Publication No. 18-11-007), included with this letter as Attachment B). Presumably the mitigation template suggests a higher number to comply with the County Health Code, and to provide a margin of error to avoid impairment of the Skagit River inflow.

[117] Airport Communities Coalition v. Ecology, PCHB No. 01-160 (Aug. 12, 2002).

[118] Airport Communities Coalition, PCHB No. 01-160 at 57.

[119] Ecology v. Grimes, 121 Wn.2d 459, 468, 852 P. 2d 1044 (1993).

[120] Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 613, 90 P. 3d 659 (2004).

The distinction between stormwater management and beneficial use of water depends on three primary factors, outlined by the Washington Supreme Court in *Port of Seattle v. Pollution Control Hearings Board*.[121] The first consideration is whether a stormwater management project causes a change to existing hydrology. The consumptive use of stormwater for irrigation, mining or domestic use would change existing hydrology by causing a diminishment of the available water supply. Conversely, managing stormwater to avoid peak flows – or to mitigate low flows – does not subtract water from the streamflow or groundwater source and therefore would not be considered beneficial use of water.[122]

The second factor is whether a water management proposal requires the diversion of water from a stream or withdrawal of groundwater. If so, a water right is required. Conversely, the retention of stormwater before it enters a natural watercourse or groundwater aquifer is not considered a diversion from a natural water body for which a water right is required.[123]

The third factor is whether the proponent of a stormwater management project is seeking to prevent future interference by later appropriators, either to ensure that water is available for capture into the stormwater management facility or to prevent downstream users from diverting stored water after its release into a natural water body.[124]

By using rainwater as the primary mitigation water source, a project proponent will essentially rely on stormwater. Nevertheless, Ecology has distinguished rainwater from other water sources, primarily under the rationale that rainwater is collected before entering a natural water body. Thus, rainwater is regulated as stormwater, although often rooftop collection is treated differently than runoff from a land surface.[125]

Ecology does not require a permit for the "on-site storage and/or beneficial use of rooftop or guzzler collected rainwater . . . ."[126] Ecology's policy statement explains that –

> To qualify as rooftop collected rainwater, the roof collecting the rainwater must be part of a fixed structure above the ground with a primary purpose

---

[121] Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 90 P. 3d 659 (2004).

[122] Port of Seattle, 151 Wn.2d at 614-15.

[123] Port of Seattle, 151 Wn.2d at 615.

[124] Port of Seattle, 151 Wn.2d at 615.

[125] See Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 616-17, 90 P.3d 659 (2004).

[126] Ecology Water Resources Program, *Policy/Interpretive Statement Regarding Collection of Rainwater for Beneficial Use*, POL-1017 (2009), included with this letter as Attachment C).

> other than the collection of rainwater for beneficial use. A guzzler is a device used to catch and store rainwater to provide drinking water for wildlife, livestock or birds.[127]

Stormwater cannot be put to beneficial use without a water right permit. Nevertheless, streamflow augmentation that develops stormwater storage to provide and to control releases to replicate the natural steam flow conditions, is not considered a beneficial use of water. Furthermore, under Ecology Guidance, the use of rainwater, even for a consumptive use, is not considered beneficial use of water that would otherwise require a water right permit.

The final issue considered in this letter is whether the proposed template gives rise to concern about water quality. The Clean Water Act requires the U.S. Environmental Protection Agency (EPA) to develop regulations for permitting of stormwater discharges under its National Pollution Discharge and Elimination System (NPDES) program. For purposes of the Clean Water Act, "stormwater" means "storm water runoff, snow melt runoff, and surface runoff and drainage."[128] The NPDES program applies to stormwater discharges from municipal separate storm sewer systems and from industrial sources. The term pollutant is used broadly under both federal and state statutes and subsequent case law includes virtually every kind of waste material. A discharge of water that is higher temperature, or which contains lower dissolved oxygen than the receiving body is considered the discharge of a pollutant for which an NPDES permit or a state waste discharge permit is required.[129]

An NPDES permit is required to discharge pollutants from a point source into surface waters of the United States.[130] "Groundwater resources are not considered "waters of the United States" for purposes of NPDES permitting requirements.[131] The State Water Pollution Control Act applies to waters the state, defined as "lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington."[132] Nevertheless, a stormwater discharge into waters of the state that is not contaminated or potentially contaminated by industrial or commercial sources is not considered a "waste

---

[127] Id.

[128] 40 C.F.R. §122.26(b)(13).

[129] 33 U.S.C. § 1362(6);

[130] 33 U.S.C. § 1342; Chapter 90.48 RCW.

[131] 33 U.S.C. § 1362(7); Exxon v. Train, 554 F.2d 1310 (5th Cir. 1977); Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 989-90 (E.D. Wash. 1994); Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc., 962 F. Supp. 1312 (D. Or. 1997).

[132] RCW 90.48.020; WAC 173-216-030(2).

material."[133] Consequently, a state water discharge permit is not required for a discharge of stormwater or rainwater to groundwater as contemplated under the mitigation template.[134]

IV. Conclusion

Skagit County is responsible for determining whether a proposed water supply provides an adequate and reliable water supply for a building permit applicant's intended purposes for a building.[135] Following the Supreme Court's decision in *Hirst*, this requirement is independent of Ecology's responsibilities under the State Water Code. This means that Skagit County must independently determine whether a building permit applicant can demonstrate legal and physical water availability.

For an individual single-family residence, Skagit County's Code requires an applicant to demonstrate the availability of at least 350 gpd for a single-family residence, within applicable volume limits for the mainstem Skagit River (WAC 173-503-050) and, depending on the location of the proposed new water use, for a Skagit River tributary (SCC 14.24.350). The new water use must not cause impairment to the instream flow established under WAC 173-503-040. This requirement can be satisfied by discharging water that is otherwise legally and physically available into a groundwater body in hydraulic continuity with the water body in hydraulic continuity with the Skagit River, in an amount equivalent to the amount consumptively used, as the proposed mitigation template purports to do.

This concludes my analysis.

Sincerely,

MENTOR LAW GROUP, PLLC

Joe Mentor, Jr.

---

[133] WAC 173-216-030(19).

[134] Compare WAC 173-216-040.

[135] RCW 19.27.097.

ATTACHMENT A

ESSB 6091, Ch. 1, 2018 Wash. Session Laws

CHAPTER 1

[Engrossed Substitute Senate Bill 6091]

WATER AVAILABILITY

AN ACT Relating to ensuring that water is available to support development; amending RCW 19.27.097, 58.17.110, 90.03.247, and 90.03.290; adding a new section to chapter 36.70A RCW; adding a new section to chapter 36.70 RCW; adding a new chapter to Title 90 RCW; creating a new section; providing an expiration date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

PART 1

Sec. 101. RCW 19.27.097 and 2015 c 225 s 17 are each amended to read as follows:

(1)(a) 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. ((~~In addition to other authorities, the county or city may impose conditions on building permits requiring connection to an existing public water system where the existing system is willing and able to provide safe and reliable potable water to the applicant with reasonable economy and efficiency.~~)) An application for a water right shall not be sufficient proof of an adequate water supply.

(b) In a water resource inventory area with rules adopted by the department of ecology pursuant to section 202 or 203 of this act and the following water resource inventory areas with instream flow rules adopted by the department of ecology under chapters 90.22 and 90.54 RCW that explicitly regulate permit-exempt groundwater withdrawals, evidence of an adequate water supply must be consistent with the specific applicable rule requirements: 5 (Stillaguamish); 17 (Quilcene-Snow); 18 (Elwha-Dungeness); 27 (Lewis); 28 (Salmon-Washougal); 32 (Walla Walla); 45 (Wenatchee); 46 (Entiat); 48 (Methow); and 57 (Middle Spokane).

(c) In the following water resource inventory areas with instream flow rules adopted by the department of ecology under chapters 90.22 and 90.54 RCW that do not explicitly regulate permit-exempt groundwater withdrawals, evidence of an adequate water supply must be consistent with section 202 of this act, unless the applicant provides other evidence of an adequate water supply that complies with chapters 90.03 and 90.44 RCW: 1 (Nooksack); 11 (Nisqually); 22 (Lower Chehalis); 23 (Upper Chehalis); 49 (Okanogan); 55 (Little Spokane); and 59 (Colville).

(d) In the following water resource inventory areas with instream flow rules adopted by the department of ecology under chapters 90.22 and 90.54 RCW that do not explicitly regulate permit-exempt groundwater withdrawals, evidence of an adequate water supply must be consistent with section 203 of this act, unless the applicant provides other evidence of an adequate water supply that complies with chapters 90.03 and 90.44 RCW: 7 (Snohomish); 8 (Cedar-Sammamish); 9 (Duwamish-Green); 10 (Puyallup-White); 12 (Chambers-Clover); 13 (Deschutes); 14 (Kennedy-Goldsborough); and 15 (Kitsap).

(e) In water resource inventory areas 37 (Lower Yakima), 38 (Naches), and 39 (Upper Yakima), the department of ecology may impose requirements to satisfy adjudicated water rights.

(f) Additional requirements apply in areas within water resource inventory area 3 (Lower Skagit-Samish) and 4 (Upper Skagit) regulated by chapter 173-503 WAC, as a result of *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013).

(g) In other areas of the state, physical and legal evidence of an adequate water supply may be demonstrated by the submission of a water well report consistent with the requirements of chapter 18.104 RCW.

(h) For the purposes of this subsection (1), "water resource inventory areas" means those areas described in chapter 173-500 WAC as of the effective date of this section.

(2) In addition to other authorities, the county or city may impose additional requirements, including conditions on building permits requiring connection to an existing public water system where the existing system is willing and able to provide safe and reliable potable water to the applicant with reasonable economy and efficiency.

(3) Within counties not required or not choosing to plan pursuant to RCW 36.70A.040, the county and the state may mutually determine those areas in the county in which the requirements of subsection (1) of this section shall not apply. The departments of health and ecology shall coordinate on the implementation of this section. Should the county and the state fail to mutually determine those areas to be designated pursuant to this subsection, the county may petition the department of enterprise services to mediate or, if necessary, make the determination.

(((~~(3)~~))) (4) Buildings that do not need potable water facilities are exempt from the provisions of this section. The department of ecology, after consultation with local governments, may adopt rules to implement this section, which may recognize differences between high-growth and low-growth counties.

(5) Any permit-exempt groundwater withdrawal authorized under RCW 90.44.050 associated with a water well constructed in accordance with the provisions of chapter 18.104 RCW before the effective date of this section is deemed to be evidence of adequate water supply under this section.

NEW SECTION. **Sec. 102.** A new section is added to chapter 36.70A RCW to read as follows:

For the purposes of complying with the requirements of this chapter relating to surface and groundwater resources, a county or city may rely on or refer to applicable minimum instream flow rules adopted by the department of ecology under chapters 90.22 and 90.54 RCW. Development regulations must ensure that proposed water uses are consistent with RCW 90.44.050 and with applicable rules adopted pursuant to chapters 90.22 and 90.54 RCW when making decisions under RCW 19.27.097 and 58.17.110.

NEW SECTION. **Sec. 103.** A new section is added to chapter 36.70 RCW to read as follows:

For the purposes of complying with the requirements of this chapter, county development regulations must ensure that proposed water uses are consistent with RCW 90.44.050 and with applicable rules adopted pursuant to chapters

90.22 and 90.54 RCW when making decisions under RCW 19.27.097 and 58.17.110.

Sec. 104. RCW 58.17.110 and 1995 c 32 s 3 are each amended to read as follows:

(1) The city, town, or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine: (a) If appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds, and shall consider all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) whether the public interest will be served by the subdivision and dedication.

(2) A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) the public use and interest will be served by the platting of such subdivision and dedication. If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication. Dedication of land to any public body, provision of public improvements to serve the subdivision, and/or impact fees imposed under RCW 82.02.050 through 82.02.090 may be required as a condition of subdivision approval. Dedications shall be clearly shown on the final plat. No dedication, provision of public improvements, or impact fees imposed under RCW 82.02.050 through 82.02.090 shall be allowed that constitutes an unconstitutional taking of private property. The legislative body shall not as a condition to the approval of any subdivision require a release from damages to be procured from other property owners.

(3) If the preliminary plat includes a dedication of a public park with an area of less than two acres and the donor has designated that the park be named in honor of a deceased individual of good character, the city, town, or county legislative body must adopt the designated name.

(4) If water supply is to be provided by a groundwater withdrawal exempt from permitting under RCW 90.44.050, the applicant's compliance with RCW 90.44.050 and with applicable rules adopted pursuant to chapters 90.22 and 90.54 RCW is sufficient in determining appropriate provisions for water supply for a subdivision, dedication, or short subdivision under this chapter.

PART 2

NEW SECTION. **Sec. 201.** The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Department" means the department of ecology.

(2) "Lead agency" has the same meaning as defined in RCW 90.82.060.

(3) "Water resource inventory area" or "WRIA" means a water resource inventory area established in chapter 173-500 WAC as it existed on the effective date of this section.

NEW SECTION. **Sec. 202.** (1) Unless requirements are otherwise specified in the applicable rules adopted under this chapter or under chapter 90.22 or 90.54 RCW, potential impacts on a closed water body and potential impairment to an instream flow are authorized for new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050 through compliance with the requirements established in this section.

(2) In the following water resource inventory areas with instream flow rules adopted by the department under chapters 90.22 and 90.54 RCW that do not explicitly regulate permit-exempt groundwater withdrawals and that have completed a watershed plan adopted under chapter 90.82 RCW, the department shall work with the initiating governments and the planning units described in chapter 90.82 RCW to review existing watershed plans to identify the potential impacts of exempt well use, identify evidence-based conservation measures, and identify projects to improve watershed health: 1 (Nooksack); 11 (Nisqually); 22 (Lower Chehalis); 23 (Upper Chehalis); 49 (Okanogan); 55 (Little Spokane); and 59 (Colville).

(3) In the water resource inventory areas listed in subsection (2) of this section, the lead agency shall invite a representative from each federally recognized Indian tribe that has a usual and accustomed harvest area within the water resource inventory area to participate as part of the planning unit.

(4)(a) In collaboration with the planning unit, the initiating governments must update the watershed plan to include recommendations for projects and actions that will measure, protect, and enhance instream resources and improve watershed functions that support the recovery of threatened and endangered salmonids. Watershed plan recommendations may include, but are not limited to, acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure, which includes, but is not limited to, such projects as floodplain restoration, off-channel storage, and aquifer recharge. Qualifying projects must be specifically designed to enhance streamflows and not result in negative impacts to ecological functions or critical habitat.

(b) At a minimum, the watershed plan must include those actions that the planning units determine to be necessary to offset potential impacts to instream flows associated with permit-exempt domestic water use. The highest priority recommendations must include replacing the quantity of consumptive water use during the same time as the impact and in the same basin or tributary. Lower priority projects include projects not in the same basin or tributary and projects that replace consumptive water supply impacts only during critical flow periods. The watershed plan may include projects that protect or improve instream resources without replacing the consumptive quantity of water where such projects are in addition to those actions that the planning unit determines to be necessary to offset potential consumptive impacts to instream flows associated with permit-exempt domestic water use.

(c) Prior to adoption of the updated watershed plan, the department must determine that actions identified in the watershed plan, after accounting for new projected uses of water over the subsequent twenty years, will result in a net

ecological benefit to instream resources within the water resource inventory area.

(d) The watershed plan may include:

(i) Recommendations for modification to fees established under this subsection;

(ii) Standards for water use quantities that are less than authorized under RCW 90.44.050 or more or less than authorized under subsection (5) of this section for withdrawals exempt from permitting;

(iii) Specific conservation requirements for new water users to be adopted by local or state permitting authorities; or

(iv) Other approaches to manage water resources for a water resource inventory area or a portion thereof.

(e) Any modification to fees collected under subsection (5) of this section or standards for water use quantities that are less than authorized under RCW 90.44.050 or more or less than authorized under subsection (5) of this section for withdrawals exempt from permitting may not be applied unless authorized by rules adopted under this chapter or under chapter 90.54 RCW.

(5) Until an updated watershed plan is approved and rules are adopted under this chapter or chapter 90.54 RCW, a city or county issuing a building permit under RCW 19.27.097(1)(c), or approving a subdivision under chapter 58.17 RCW in a watershed listed in subsection (2) of this section must:

(a) Record relevant restrictions or limitations associated with water supply with the property title;

(b) Collect applicable fees, as described under this section;

(c) Record the number of building permits issued under chapter 19.27 RCW or subdivision approvals issued under chapter 58.17 RCW subject to the provisions of this section;

(d) Annually transmit to the department three hundred fifty dollars of each fee collected under this subsection;

(e) Annually transmit an accounting of building permits and subdivision approvals subject to the provisions of this section to the department;

(f) Until rules have been adopted that specify otherwise, require the following measures for each new domestic use that relies on a withdrawal exempt from permitting under RCW 90.44.050:

(i) An applicant shall pay a fee of five hundred dollars to the permitting authority;

(ii) An applicant may obtain approval for a withdrawal exempt from permitting under RCW 90.44.050 for domestic use only, with a maximum annual average withdrawal of three thousand gallons per day per connection.

(6) Rules adopted under this chapter or under chapter 90.54 RCW may:

(a) Rely on watershed plan recommendations and procedures established in this section to authorize new withdrawals exempt from permitting under RCW 90.44.050 that would potentially impact a closed waterbody or a minimum flow or level;

(b) Rely on projects identified in the watershed plan to offset consumptive water use; and

(c) Include updates to fees based on the planning unit's determination of the costs for offsetting consumptive water use.

(7)(a) If a watershed plan that meets the requirements of this section is not adopted in water resource inventory area 1 (Nooksack) by February 1, 2019, the department must adopt rules for that water resource inventory area that meet the requirements of this section by August 1, 2020.

(b) If a watershed plan that meets the requirements of this section is not adopted in water resource inventory area 11 (Nisqually) by February 1, 2019, the department must adopt rules for that water resource inventory area that meet the requirements of this section by August 1, 2020.

(c) The department must adopt rules that meet the requirements of this section for any of the following water resource inventory areas that do not adopt a watershed plan that meets the requirements of this section by February 1, 2021: 22 (Lower Chehalis); 23 (Upper Chehalis); 49 (Okanogan); 55 (Little Spokane); and 59 (Colville).

(8) This section only applies to new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050 in the following water resource inventory areas with instream flow rules adopted under chapters 90.22 and 90.54 RCW that do not explicitly regulate permit-exempt groundwater withdrawals: 1 (Nooksack); 11 (Nisqually); 22 (Lower Chehalis); 23 (Upper Chehalis); 49 (Okanogan); 55 (Little Spokane); and 59 (Colville) and does not restrict the withdrawal of groundwater for other uses that are exempt from permitting under RCW 90.44.050.

NEW SECTION. **Sec. 203.** (1) Unless requirements are otherwise specified in the applicable rules adopted under this chapter or chapter 90.22 or 90.54 RCW, potential impacts on a closed water body and potential impairment to an instream flow are authorized for new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050 through compliance with the requirements established in this section.

(2)(a) In the following water resource inventory areas with instream flow rules adopted by the department under chapters 90.22 and 90.54 RCW that do not explicitly regulate permit-exempt groundwater withdrawals and that have either not adopted a watershed plan, or adopted a partial watershed plan, under chapter 90.82 RCW, the department shall establish watershed restoration and enhancement committees in the following water resource inventory areas: 7 (Snohomish); 8 (Cedar-Sammamish); 9 (Duwamish-Green); 10 (Puyallup-White); 12 (Chambers-Clover); 13 (Deschutes); 14 (Kennedy-Goldsborough); and 15 (Kitsap).

(b) The department shall chair the watershed restoration and enhancement committee and invite the following entities to participate:

(i) A representative from each federally recognized Indian tribe that has reservation land within the water resource inventory area;

(ii) A representative from each federally recognized Indian tribe that has a usual and accustomed harvest area within the water resource inventory area;

(iii) A representative from the department of fish and wildlife, appointed by the director of the department of fish and wildlife;

(iv) A representative designated by each county within the water resource inventory area;

(v) A representative designated by each city within the water resource inventory area;

(vi) A representative designated by the largest irrigation district within the water resource inventory area;

(vii) A representative designated by the largest publicly owned water purveyor providing water within the water resource inventory area that is not a municipality;

(viii) A representative designated by a local organization representing the residential construction industry within the water resource inventory area;

(ix) A representative designated by a local organization representing environmental interests within the water resource inventory area; and

(x) A representative designated by a local organization representing agricultural interests within the water resource inventory area.

(3) By June 30, 2021, the department shall prepare and adopt a watershed restoration and enhancement plan for each watershed listed under subsection (2)(a) of this section, in collaboration with the watershed restoration and enhancement committee. Except as described in (h) of this subsection, all members of a watershed restoration and enhancement committee must approve the plan prior to adoption.

(a) The watershed restoration and enhancement plan should include recommendations for projects and actions that will measure, protect, and enhance instream resources and improve watershed functions that support the recovery of threatened and endangered salmonids. Plan recommendations may include, but are not limited to, acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure, which includes but is not limited to such projects as floodplain restoration, off-channel storage, and aquifer recharge. Qualifying projects must be specifically designed to enhance stream flows and not result in negative impacts to ecological functions or critical habitat.

(b) At a minimum, the plan must include those actions that the committee determines to be necessary to offset potential impacts to instream flows associated with permit-exempt domestic water use. The highest priority recommendations must include replacing the quantity of consumptive water use during the same time as the impact and in the same basin or tributary. Lower priority projects include projects not in the same basin or tributary and projects that replace consumptive water supply impacts only during critical flow periods. The plan may include projects that protect or improve instream resources without replacing the consumptive quantity of water where such projects are in addition to those actions that the committee determines to be necessary to offset potential consumptive impacts to instream flows associated with permit-exempt domestic water use.

(c) Prior to adoption of the watershed restoration and enhancement plan, the department must determine that actions identified in the plan, after accounting for new projected uses of water over the subsequent twenty years, will result in a net ecological benefit to instream resources within the water resource inventory area.

(d) The watershed restoration and enhancement plan must include an evaluation or estimation of the cost of offsetting new domestic water uses over the subsequent twenty years, including withdrawals exempt from permitting under RCW 90.44.050.

(e) The watershed restoration and enhancement plan must include estimates of the cumulative consumptive water use impacts over the subsequent twenty years, including withdrawals exempt from permitting under RCW 90.44.050.

(f) The watershed restoration and enhancement plan may include:

(i) Recommendations for modification to fees established under this subsection;

(ii) Standards for water use quantities that are less than authorized under RCW 90.44.050 or more or less than authorized under subsection (4) of this section for withdrawals exempt from permitting;

(iii) Specific conservation requirements for new water users to be adopted by local or state permitting authorities; or

(iv) Other approaches to manage water resources for a water resource inventory area or a portion thereof.

(g) After adoption of a watershed restoration and enhancement plan, the department shall evaluate the plan recommendations and initiate rule making, if necessary, to incorporate recommendations into rules adopted under this chapter or under chapter 90.22 or 90.54 RCW. Any modification to fees collected under subsection (4) of this section or standards for water use quantities that are less than authorized under RCW 90.44.050 or more or less than authorized under subsection (4) of this section for withdrawals exempt from permitting may not be applied unless authorized by rules adopted under this chapter or under chapter 90.54 RCW.

(h) If the watershed restoration and enhancement committee fails to approve a plan by June 30, 2021, the director of the department shall submit the final draft plan to the salmon recovery funding board established under RCW 77.85.110 and request that the salmon recovery funding board provide a technical review and provide recommendations to the director to amend the final draft plan, if necessary, so that actions identified in the plan, after accounting for new projected uses of water over the subsequent twenty years, will result in a net ecological benefit to instream resources within the water resource inventory area. The director of the department shall consider the recommendations and may amend the plan without committee approval prior to adoption. After plan adoption, the director of the department shall initiate rule making within six months to incorporate recommendations into rules adopted under this chapter or under chapter 90.22 or 90.54 RCW, and shall adopt amended rules within two years of initiation of rule making.

(4)(a) Until a watershed restoration and enhancement plan is approved and rules are adopted under subsection (3) of this section, a city or county issuing a building permit under RCW 19.27.097(1)(d), or approving a subdivision under chapter 58.17 RCW in a watershed listed in subsection (2)(a) of this section must:

(i) Record relevant restrictions or limitations associated with water supply with the property title;

(ii) Collect applicable fees, as described under this section;

(iii) Record the number of building permits issued under chapter 19.27 RCW or subdivision approvals issued under chapter 58.17 RCW subject to the provisions of this section;

(iv) Annually transmit to the department three hundred fifty dollars of each fee collected under this subsection;

(v) Annually transmit an accounting of building permits and subdivision approvals subject to the provisions of this section to the department;

(vi) Until rules have been adopted that specify otherwise, require the following measures for each new domestic use that relies on a withdrawal exempt from permitting under RCW 90.44.050:

(A) An applicant shall pay a fee of five hundred dollars to the permitting authority;

(B) Except as provided in (b) of this subsection, an applicant may obtain approval for a withdrawal exempt from permitting under RCW 90.44.050 for domestic use only, with a maximum annual average withdrawal of nine hundred fifty gallons per day per connection; and

(C) An applicant shall manage stormwater runoff on-site to the extent practicable by maximizing infiltration, including using low-impact development techniques, or pursuant to stormwater management requirements adopted by the local permitting authority, if locally adopted requirements are more stringent.

(b) Upon the issuance of a drought emergency order under RCW 43.83B.405, the department may curtail withdrawal of groundwater exempt from permitting under RCW 90.44.050 and approved under this subsection (4) to no more than three hundred fifty gallons per day per connection for indoor use only. Notwithstanding the limitation to no more than three hundred fifty gallons per day per connection for indoor use only, an applicant may use groundwater exempt from permitting to maintain a fire control buffer during a drought emergency order.

(5) Rules adopted under this chapter or chapter 90.54 RCW may:

(a) Rely on watershed restoration and enhancement plan recommendations and procedures established in this section to authorize new withdrawals exempt from permitting under RCW 90.44.050 that would potentially impact a closed waterbody or a minimum flow or level;

(b) Rely on projects identified in the watershed restoration and enhancement plan to offset consumptive water use; and

(c) Include updates to fees based on the watershed restoration and enhancement committee's determination of the costs for offsetting consumptive water use.

(6) This section only applies to new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050 in the following water resource inventory areas with instream flow rules adopted under chapters 90.22 and 90.54 RCW that do not explicitly regulate permit-exempt groundwater withdrawals: 7 (Snohomish); 8 (Cedar-Sammamish); 9 (Duwamish-Green); 10 (Puyallup-White); 12 (Chambers-Clover); 13 (Deschutes); 14 (Kennedy-Goldsborough); and 15 (Kitsap) and does not restrict the withdrawal of groundwater for other uses that are exempt from permitting under RCW 90.44.050.

NEW SECTION. **Sec. 204.** (1) The department shall initiate two pilot projects to measure water use from all new groundwater withdrawals for domestic purposes exempt from permitting under RCW 90.44.050 in the areas described in this section. The pilot projects must be conducted to determine the overall feasibility of measuring water use for all new groundwater withdrawals. The department must purchase and provide meters to be used in the pilot projects. The pilot projects must be conducted in the area under the Dungeness water rule, chapter 173-518 WAC, within water resource inventory area 18 and

the area in which the Kittitas county water bank program operates within water resource inventory area 39.

(2) At a minimum, the pilot project must address the following:

(a) Initial and on-going costs, including costs to local government and the department;

(b) Technical, practical, and legal considerations that must be addressed;

(c) The costs and benefits of a water use measurement program relying on individual meters versus a water management program that estimates permit-exempt groundwater withdrawals; and

(d) Measures to protect the privacy of individual property owners and ensure accurate data collection.

(3) The department shall report on the pilot project results in the report to the legislature submitted under section 205 of this act. The department shall include recommendations to the legislature, including estimated program costs for expanding the pilot projects to other basins.

NEW SECTION. **Sec. 205.** The department shall submit a report to the legislature by December 31, 2020, and December 31, 2027, in compliance with RCW 43.01.036, that includes the following elements:

(1) Progress in completing and adopting watershed plans under section 202 of this act and watershed restoration and enhancement plans under section 203 of this act;

(2) A description of program projects and expenditures;

(3) An assessment of the streamflow restoration and enhancement benefits from program projects;

(4) A listing of other efforts or actions taken associated with streamflow restoration and enhancement, projects to benefit instream resources, and other directly related watershed improvements conducted in coordination with the restoration and enhancement planning process;

(5) The total number of new withdrawals exempt from permitting under RCW 90.44.050 authorized in each water resource inventory area under provisions of sections 202 and 203 of this act, and estimates of consumptive water use impacts associated with the new withdrawals; and

(6) A description of potential or planned projects, including projected costs and anticipated streamflow, water supply, and watershed health benefits.

NEW SECTION. **Sec. 206.** (1) The watershed restoration and enhancement account is created in the custody of the state treasurer. All receipts from fees paid pursuant to sections 202 and 203 of this act must be deposited into the account. The account may also receive those moneys as may be appropriated by the legislature for the purpose of funding restoration and enhancement projects as identified in sections 202 and 203 of this act. Expenditures from the account may be used only for the costs of administering this act, including implementing watershed planning projects under section 202 of this act and watershed restoration and enhancement projects under section 203 of this act, and collecting data and completing studies necessary to develop, implement, and evaluate watershed restoration and enhancement projects under this act. Only the director or the director's designee may authorize expenditures from the account. The account is subject to allotment procedures under chapter 43.88 RCW, but an appropriation is not required for expenditures.

(2) Fee revenues collected under sections 202 and 203 of this act must be used exclusively within the water resource inventory area in which the fee originated. The restriction in this subsection does not apply to moneys in the watershed restoration and enhancement account that do not originate from fees collected under sections 202 and 203 of this act.

NEW SECTION. **Sec. 207.** (1) The watershed restoration and enhancement taxable bond account is created in the custody of the state treasurer. All receipts from direct appropriations from the legislature or moneys directed to the account from any other source must be deposited in the account. The account is intended to fund projects using taxable bonds. Expenditures from the account may be used only as provided for in this section. Only the director or the director's designee may authorize expenditures from the account. The account is subject to allotment procedures under chapter 43.88 RCW, but an appropriation is not required for expenditures.

(2) Expenditures from the watershed restoration and enhancement taxable bond account may be used to assess, plan, and develop projects that include acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure, which includes, but is not limited to, projects such as floodplain restoration, off-channel storage, and aquifer recharge, or other actions designed to provide access to new water supplies with priority given to projects in watersheds developing plans as directed by sections 202 and 203 of this act and watersheds participating in the pilot project in section 204 of this act.

NEW SECTION. **Sec. 208.** (1) The watershed restoration and enhancement bond account is created in the custody of the state treasurer. All receipts from direct appropriations from the legislature or moneys directed to the account from any other source must be deposited in the account. The account is intended to fund projects using tax exempt bonds. Expenditures from the account may be used only as provided for in this section. Only the director or the director's designee may authorize expenditures from the account. The account is subject to allotment procedures under chapter 43.88 RCW, but an appropriation is not required for expenditures.

(2) Expenditures from the watershed restoration and enhancement bond account may be used to assess, plan, and develop projects that include acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure, which includes, but is not limited to, projects such as floodplain restoration, off-channel storage, and aquifer recharge, or other actions designed to provide access to new water supplies with priority given to projects in watersheds developing plans as directed by sections 202 and 203 of this act and watersheds participating in the pilot project in section 204 of this act.

PART 3

NEW SECTION. **Sec. 301.** (1) A joint legislative task force on water resource mitigation is established to review the treatment of surface water and groundwater appropriations as they relate to instream flows and fish habitat, to develop and recommend a mitigation sequencing process and scoring system to address such appropriations, and to review the Washington supreme court

decision in *Foster v. Department of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015).

(2) The task force must consist of the following members:

(a) Two members from each of the two largest caucuses of the senate, appointed by the president of the senate;

(b) Two members from each of the two largest caucuses of the house of representatives, appointed by the speaker of the house of representatives;

(c) A representative from the department, appointed by the director of the department;

(d) A representative from the department of fish and wildlife, appointed by the director of the department of fish and wildlife;

(e) A representative from the department of agriculture, appointed by the director of the department of agriculture;

(f) One representative from each of the following groups, appointed by the consensus of the cochairs of the task force:

(i) An organization representing the farming industry in Washington;

(ii) An organization representing Washington cities;

(iii) Two representatives from an environmental advocacy organization or organizations;

(iv) An organization representing municipal water purveyors;

(v) An organization representing business interests;

(vi) Representatives of two federally recognized Indian tribes, one invited by recommendation of the Northwest Indian fisheries commission, and one invited by recommendation of the Columbia river intertribal fish commission.

(3) One cochair of the task force must be a member of the majority caucus of one chamber of the legislature, and one cochair must be a member of the minority caucus of the other chamber of the legislature, as those caucuses existed as of the effective date of this section.

(4) The first meeting of the task force must occur by June 30, 2018.

(5) Staff support for the task force must be provided by the office of program research and senate committee services. The department and the department of fish and wildlife shall cooperate with the task force and provide information as the cochairs reasonably request.

(6) Within existing appropriations, the expenses of the operations of the task force, including the expenses associated with the task force's meetings, must be paid jointly and in equal amounts by the senate and the house of representatives. Task force expenditures are subject to approval by the house executive rules committee and the senate facility and operations committee. Legislative members of the task force are reimbursed for travel expenses in accordance with RCW 44.04.120. Nonlegislative members are not entitled to be reimbursed for travel expenses if they are elected officials or are participating on behalf of an employer, governmental entity, or other organization. Any reimbursement for other nonlegislative members is subject to chapter 43.03 RCW.

(7)(a) By November 15, 2019, the joint legislative task force must make recommendations to the legislature in compliance with RCW 43.01.036.

(b) Recommendations of the joint legislative task force must be made by a sixty percent majority of the members of the task force. The representatives of the departments of fish and wildlife, ecology, and agriculture are not eligible to vote on the recommendations. Minority recommendations that achieve the

support of at least five of the named voting members of the task force may also be submitted to the legislature.

(8) The department shall issue permit decisions for up to five water resource mitigation pilot projects. It is the intent of the legislature to use the pilot projects to inform the legislative task force process while also enabling the processing of water right applications that address water supply needs. The department is authorized to issue permits in reliance upon water resource mitigation of impacts to instream flows and closed surface water bodies under the following mitigation sequence:

(a) Avoiding impacts by: (i) Complying with mitigation required by adopted rules that set forth minimum flows, levels, or closures; or (ii) making the water diversion or withdrawal subject to the applicable minimum flows or levels; or

(b) Where avoidance of impacts is not reasonably attainable, minimizing impacts by providing permanent new or existing trust water rights or through other types of replacement water supply resulting in no net annual increase in the quantity of water diverted or withdrawn from the stream or surface water body and no net detrimental impacts to fish and related aquatic resources; or

(c) Where avoidance and minimization are not reasonably attainable, compensating for impacts by providing net ecological benefits to fish and related aquatic resources in the water resource inventory area through in-kind or out-of-kind mitigation or a combination thereof, that improves the function and productivity of affected fish populations and related aquatic habitat. Out-of-kind mitigation may include instream or out-of-stream measures that improve or enhance existing water quality, riparian habitat, or other instream functions and values for which minimum instream flows or closures were established in that watershed.

(9) The department must monitor the implementation of the pilot projects, including all mitigation associated with each pilot project, approved under this section at least annually through December 31, 2028.

(10) The pilot projects eligible for processing under this section, based on criteria as of the effective date of this section, include:

(a) A city operating a group A water system in Kitsap county and water resource inventory area 15, with a population between 13,000 and 14,000;

(b) A city operating a group A water system in Pierce county and water resource inventory area 10, with a population between 9,500 and 10,500;

(c) A city operating a group A water system in Thurston county and water resource inventory area 11, with a population between 8,500 and 9,500;

(d) A nonprofit mutual water system operating a group A water system in Pierce county and water resource inventory area 12, with between 10,500 and 11,500 service connections; and

(e) An irrigation district located in Whatcom county and water resource inventory area 1, solely for the purpose of processing changes of water rights from surface water to groundwater, and implementing flow augmentation to benefit instream flows.

(11) Water right applicants eligible to be processed under this pilot project authority must elect to be included in the pilot project review by notifying the department by July 1, 2018. Once an applicant notifies the department of its intent to be processed under this pilot project authority, subsection (8) of this

section applies to final decisions issued by the department, even if such a final decision is issued after the expiration of this section.

(12) By November 15, 2018, the department must furnish the task force with information on conceptual mitigation plans for each water resource mitigation pilot project application.

(13) To ensure that the processing of pilot project applications can inform the task force process in a timely manner, the department must expedite processing of applications for water resource mitigation pilot projects. The applicant for each pilot project must reimburse the department for the department's costs of processing the applicant's application.

(14) The water resource mitigation pilot project authority granted to the department does not affect or modify any other procedural requirements of chapter 90.03, 90.44, or 90.54 RCW that apply to the processing of such applications.

(15) The joint legislative task force expires December 31, 2019.

(16) This section expires January 1, 2029.

Sec. 302. RCW 90.03.247 and 2003 c 39 s 48 are each amended to read as follows:

(1) Whenever an application for a permit to make beneficial use of public waters is approved relating to a stream or other water body for which minimum flows or levels have been adopted and are in effect at the time of approval, the permit shall be conditioned to: (a) Protect the levels or flows; or (b) require water resource mitigation of impacts to instream flows and closed surface water bodies for water resource mitigation pilot projects authorized under section 301 of this act.

(2) No agency may establish minimum flows and levels or similar water flow or level restrictions for any stream or lake of the state other than the department of ecology whose authority to establish is exclusive, as provided in chapter 90.03 RCW and RCW 90.22.010 and 90.54.040. The provisions of other statutes, including but not limited to ((~~RCW 77.55.100 and~~)) chapter 43.21C RCW, may not be interpreted in a manner that is inconsistent with this section. In establishing such minimum flows, levels, or similar restrictions, the department shall, during all stages of development by the department of ecology of minimum flow proposals, consult with, and carefully consider the recommendations of, the department of fish and wildlife, the department of ((~~community, trade, and economic development~~)) commerce, the department of agriculture, and representatives of the affected Indian tribes. Nothing herein shall preclude the department of fish and wildlife, the department of ((~~community, trade, and economic development~~)) commerce, or the department of agriculture from presenting its views on minimum flow needs at any public hearing or to any person or agency, and the department of fish and wildlife, the department of ((~~community, trade, and economic development~~)) commerce, and the department of agriculture are each empowered to participate in proceedings of the federal energy regulatory commission and other agencies to present its views on minimum flow needs.

Sec. 303. RCW 90.03.290 and 2001 c 239 s 1 are each amended to read as follows:

(1) When an application complying with the provisions of this chapter and with the rules of the department has been filed, the same shall be placed on record with the department, and it shall be its duty to investigate the application, and determine what water, if any, is available for appropriation, and find and determine to what beneficial use or uses it can be applied. If it is proposed to appropriate water for irrigation purposes, the department shall investigate, determine and find what lands are capable of irrigation by means of water found available for appropriation. If it is proposed to appropriate water for the purpose of power development, the department shall investigate, determine and find whether the proposed development is likely to prove detrimental to the public interest, having in mind the highest feasible use of the waters belonging to the public.

(2)(a) If the application does not contain, and the applicant does not promptly furnish sufficient information on which to base such findings, the department may issue a preliminary permit, for a period of not to exceed three years, requiring the applicant to make such surveys, investigations, studies, and progress reports, as in the opinion of the department may be necessary. If the applicant fails to comply with the conditions of the preliminary permit, it and the application or applications on which it is based shall be automatically canceled and the applicant so notified. If the holder of a preliminary permit shall, before its expiration, file with the department a verified report of expenditures made and work done under the preliminary permit, which, in the opinion of the department, establishes the good faith, intent, and ability of the applicant to carry on the proposed development, the preliminary permit may, with the approval of the governor, be extended, but not to exceed a maximum period of five years from the date of the issuance of the preliminary permit.

(b) For any application for which a preliminary permit was issued and for which the availability of water was directly affected by a moratorium on further diversions from the Columbia river during the years from 1990 to 1998, the preliminary permit is extended through June 30, 2002. If such an application and preliminary permit were canceled during the moratorium, the application and preliminary permit shall be reinstated until June 30, 2002, if the application and permit: (i) Are for providing regional water supplies in more than one urban growth area designated under chapter 36.70A RCW and in one or more areas near such urban growth areas, or the application and permit are modified for providing such supplies, and (ii) provide or are modified to provide such regional supplies through the use of existing intake or diversion structures. The authority to modify such a canceled application and permit to accomplish the objectives of (b)(i) and (ii) of this subsection is hereby granted.

(3) The department shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied: PROVIDED, That where the water applied for is to be used for irrigation purposes, it shall become appurtenant only to such land as may be reclaimed thereby to the full extent of the soil for agricultural purposes. But where there is no unappropriated water in the proposed source of

supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public, it shall be duty of the department to reject such application and to refuse to issue the permit asked for.

(4) If the permit is refused because of conflict with existing rights and such applicant shall acquire same by purchase or condemnation under RCW 90.03.040, the department may thereupon grant such permit. Any application may be approved for a less amount of water than that applied for, if there exists substantial reason therefor, and in any event shall not be approved for more water than can be applied to beneficial use for the purposes named in the application. In determining whether or not a permit shall issue upon any application, it shall be the duty of the department to investigate all facts relevant and material to the application. After the department approves said application in whole or in part and before any permit shall be issued thereon to the applicant, such applicant shall pay the fee provided in RCW 90.03.470: PROVIDED FURTHER, That in the event a permit is issued by the department upon any application, it shall be its duty to notify the director of fish and wildlife of such issuance.

(5) The requirements of subsections (1) and (3) of this section do not apply to water resource mitigation pilot projects for which permits are issued in reliance upon water resource mitigation of impacts to instream flows and closed surface water bodies under section 301 of this act.

NEW SECTION. **Sec. 304.** The legislature intends to appropriate three hundred million dollars for projects to achieve the goals of this act until June 30, 2033. The department of ecology is directed to implement a program to restore and enhance stream flows by fulfilling obligations under this act to develop and implement plans to restore stream flows to levels necessary to support robust, healthy, and sustainable salmon populations.

NEW SECTION. **Sec. 305.** Sections 201 through 208 and 301 of this act constitute a new chapter in Title 90 RCW.

NEW SECTION. **Sec. 306.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 307.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

Passed by the Senate January 18, 2018.
Passed by the House January 18, 2018.
Approved by the Governor January 19, 2018.
Filed in Office of Secretary of State January 19, 2018.

CHAPTER 2

[Substitute Senate Bill 6090]
CAPITAL BUDGET

AN ACT Relating to the capital budget; making appropriations and authorizing expenditures for capital improvements; amending RCW 28B.10.027, 28B.20.725, and 28B.30.750; reenacting and

ATTACHMENT B

ESSB 6091: Streamflow Restoration, Recommendations for Water Use Estimates (Ecology Publication No. 18-11-007)

ESSB 6091 – Streamflow Restoration

Recommendations for Water Use Estimates

This document provides the Department of Ecology's recommendations for estimating water use by permit-exempt domestic wells in compliance with the provisions in Engrossed Substitute Senate Bill (ESSB) 6091. The methods described are not rigid requirements, and planning units and watershed restoration and enhancement committees can modify these methods based on credible, location-specific information with Ecology concurrence. Ultimately, restoration plans and plan updates will be judged by two tests: that the total quantity of water consumed by permit-exempt domestic wells is offset, and that a "net ecological benefit" is provided over the subsequent 20 years. Any methods used must be sufficient to allow Ecology to make that determination.

General approach

Permit-exempt domestic wells may be used to supply houses, and in some cases other Equivalent Residential Units (ERUs) such as small apartments. For the purposes of this document, the terms "house" or "home" refer to any permit-exempt domestic groundwater use, including other ERUs.

Interpretation of Law Requirements

Sections 202 and 203 of ESSB 6091 contain several provisions regarding how watershed restoration and enhancement plans and updated watershed plans are to offset or account for projected water use.

Specifically, sections 202(4)(b) and 203 (3)(b) state,

> *At a minimum, the [watershed] plan must include those actions that the planning units determine to be necessary to offset potential impacts to instream flows associated with permit- exempt domestic water use. The highest priority recommendations must include replacing the quantity of consumptive water use during the same time as the impact and in the same basin or tributary. Lower priority projects include projects not in the same basin or tributary and projects that replace consumptive water supply impacts only during critical flow periods.*

Timeframe: To evaluate and offset potential consumptive impacts from permit-exempt domestic wells, a timeframe over which new domestic use will be considered must be designated. Since a "subsequent twenty years" is referenced throughout other sections of ESSB 6091 (such as sections 202(4)(c), 203 (3)(c), 203(3)(d), and 203(3)(e)), Ecology interprets the timeframe for 202(4)(b) and 203 (3)(b) to be the next twenty years.

Scope of "water use": Ecology interprets all projected water use referenced in sections 202(4)(c), 203(3)(c), 203(3)(d), and 203(3)(e) to refer to only consumptive permit-exempt domestic groundwater water use (as opposed to water use associated with municipalities, for example). Ecology's Initial Policy Interpretations publication provides additional explanation.

Consumptive use: Water Resources Program Policy 1020 (1991) states, "Consumptive water use causes diminishment of the source at the point of appropriation," and that, "Diminishment is defined as to make smaller or less in quantity, quality, rate of flow, or availability." This guidance document is focused on estimating only quantity diminishment, so for the purposes described here, consumptive

water use is considered water that is evaporated, transpired, consumed by humans, or otherwise removed from an immediate water environment due to the use of permit-exempt domestic wells.

Subbasins: ESSB 6091 is written in the context of Water Resources Inventory Area (WRIA)-wide mitigation, so Ecology interprets the words "same basin or tributary" to refer to subareas or subbasins as opposed to entire WRIAs. For the purposes of this document, the term "subbasin" is equivalent to the words "same basin or tributary" as used in sections 202(4)(b) and 203 (3)(b). Planning groups must delineate subbasins within WRIAs, and these subbasins must be suitably sized to allow meaningful determinations of whether mitigation is in-time and in-place in the context of highest priority and lower priority projects, without being so small that they are unwieldly (e.g. a WRIA might be divided into eight subbasins). In some instances, subbasins may not correspond exactly with hydrologic basin delineations (i.e. watershed divides).

Estimating the Number of Future Permit-Exempt Domestic Wells

Plans and plan updates must describe the consumptive use of permit-exempt domestic wells over the next 20 years. There are numerous ways to make such predictions for WRIAs or subbasins. The first two methods described below rely on building permit data and population data, and both of these tend to provide fairly robust results. Ideally, both of these methods will be applied or some hybrid of the two, and the results compared. The third method mentioned is an analysis of Ecology's well log data, however, results relying on those data tend to be less reliable.

One method for predicting future permit-exempt domestic wells involves conducting a Geographic Information System (GIS) analysis of county building permits, zoning, and parcel information. Once these data have been segregated into WRIAs or subbasins, single-family building permit data can be evaluated to determine the number of building permits issued over some previous time period (e.g. the past 10 years). Those results can then be used to project permit-exempt domestic wells over the subsequent 20- year period, based on assumptions regarding how many of those building permits translate into permit- exempt domestic wells, zoning restrictions, information on undeveloped parcels, etc.

Another method of predicting future permit-exempt domestic wells relies on population data. The Washington State Office of Financial Management (OFM) website provides estimates of past and current populations by WRIA, and projected future household populations on a county basis. One way to predict future populations is to look at populations for two different years (e.g. 2007 and 2017), then use that rate of increase to predict future populations. Upon request, OFM can also prepare 2000-2017 small area estimates. Therefore planning groups can provide OFM GIS shapefiles for their subbasins, then a similar method can be used to predict future populations for individual subbasins. An alternate method of using the OFM data is to use current populations for a given subbasin or WRIA as a base, then increase that number based on county population projections. This latter method requires subjectivity, however, since all of the WRIAs span two or more counties, and this method requires looking at projections for multiple counties, then inferring a reasonable assumptions for each subbasin or WRIA.

- OFM population by WRIA 2000 through 2017 is available at: https://www.ofm.wa.gov/washington-data-research/population-demographics/population-estimates/small-area-estimates-program
- OFM projected growth rate by county 2010–2050 by one-year intervals is available at: https://ofm.wa.gov/sites/default/files/public/dataresearch/pop/GMA/projections17/gma_2017_1yr_2050.xlsx

Once future WRIA populations have been estimated, those populations that will be served by community water systems and municipalities must be removed. This can be done relying on available information on the distribution/growth rate patterns of populations served by water systems. Finally, future populations that will be served by permit-exempt domestic wells can be divided by the average number of people per household currently (U.S. Census Bureau Quick Facts) to estimate the number of future permit-exempt domestic wells.

A third potential method relies on spatial data for well reports (logs) available from Ecology (https://ecology.wa.gov/Research-Data/Data-resources/Geographic-Information-Systems-GIS/GIS-data). Wells in this data set with a "W" in the Well type field correspond with water supply wells. Those data can be analyzed using GIS to determine the number of recorded water supply wells for two past years (e.g. 2007 and 2017), then those data can be used to predict the rate of well increase into the future. However, the reliability of estimates for future wells using this method will likely be less reliable.

Total Water Use versus Consumptive Water Use

Estimates of water use by future permit-exempt domestic wells must account for the portion of water that is consumptively used. To do this, water use estimates should be divided into indoor and outdoor water use, then those estimates adjusted to account the portion of water that will return to the hydrologic system.

In general, most houses on permit-exempt domestic wells are connected to individual septic systems. For those houses, indoor water that is discharged via septic system mostly returns to the groundwater system, and the water used outdoors is mainly lost to evapotranspiration. The percentage of water consumed (lost to the atmosphere) during these processes is a function of climate, soil type, aspect, etc., and varies across the state.

A reasonable assumption for much of Washington is that about 10 percent of indoor domestic water use is consumed, and about 80 percent of outdoor domestic water use is consumed (Culhane and Nazy, 2015). A consumptive use rate of 10 percent for indoor domestic use is in keeping with recent groundwater models constructed by the U.S. Geological Survey (USGS) for the Kitsap peninsula (Frans and Olsen, 2016) and the Chamokane Creek basin (Ely and Kahle, 2012). However, the USGS has used various percentages for outdoor consumptive use. For the Kitsap peninsula model, the consumptive use rate for outdoor use was assumed to be 90 percent. By contrast, USGS reports for the Chambers-Clover watershed in Pierce County (Johnson et al., 2011) and the Spokane Valley-Rathdrum Prairie Aquifer (Hsieh et al., 2007) assumed landscape irrigation efficiency of 60 percent.

If houses are connected to sewer systems that discharge water outside of or near the mouth of a watershed, it can be assumed that 100 percent of the indoor water use consumptive.

Watershed planning groups can use assumptions other than 10 percent and 80 percent for indoor and outdoor water consumption, respectively, if justification is provided. However, ultimately, Ecology will need to use these results to determine whether the total quantity of water consumed by permit-exempt domestic wells will be matched, and whether a "net ecological benefit" will be provided over the next 20 years. Therefore, substitutions of different percentages need to have Ecology concurrence.

Performing Consumptive Water Use Analyses

ESSB 6091 requires offsetting the quantity of water consumptively used by future domestic permit-exempt wells during the subsequent 20-year period somewhere within the WRIA. Within this requirement, the law establishes higher and lower priority projects to provide this offset. The discussion below begins with basin-wide or lower priority projects analyses, since the method described constitutes the base level of analysis. Next, consumptive water use analyses for higher priority projects are discussed, and more information is provided regarding basin-wide calculations.

In reality, there does not need to be a strict dichotomy between lower and higher priority projects as described in 202(4)(b) and 203 (3)(b), and some projects may fall in between. For example, acquisition of a water right that addresses consumption in the same subbasin may be deemed a "medium" priority, since while it provides offsets in the same subbasin, it also mitigates for impacts only during critical times. In that instance, analyses as described for both low priority and high priority projects would be necessary in order for Ecology to have adequate information to determine whether there will be a "net ecological benefit."

When developing or updating watershed plans, all planning groups will have the option of recommending limits on the numbers of wells or the amounts of water those wells can pump within a specific subbasin or entire WRIA, in order to reduce the amount of water use impacts that must be offset. As such, it may be helpful for planning units to generate more than one estimate of consumptive water use, using different sets of assumptions for outdoor water use, so that this information will be available when developing watershed plan alternatives.

1. Basin-wide and Lower Priority Project Analyses – Sections 202(4)(b) and 203 (3)(b)

The law requires that somewhere within the WRIA watershed plans offset the WRIA-wide annual consumptive domestic water supply uses that will occur over the subsequent 20-year period. The law also requires that lower priority projects—those that do not occur in the same basin or tributary—replace consumptive domestic water supply uses somewhere within the WRIA during critical flow periods over the subsequent 20-year period. To evaluate whether these requirements will be met, it is necessary to estimate the total annual consumptive quantity of future permit-exempt domestic withdrawals. These annual quantities can be estimated by looking at the anticipated increases in population and/or permit-exempt domestic wells, then making a series of assumptions regarding indoor and outdoor consumptive water use. The following describes steps to produce those estimates.

A. Consumption due to Indoor Water Use

To estimate the impacts of indoor water use, the population to be served by future permit-exempt domestic wells can be multiplied by assumed water use. A 2016 study by the Water Research Foundation (DeOreo, et al., 2016) determined an average per capita water use of 59 gallons per day (gpd) in homes provided municipal water in 23 areas across the U.S. and Canada. This result is based on actual flow monitoring and survey responses from 737 homes. The 59 gpd average is down 15.4 percent from results found during a 1999 American Water Works Association Research Foundation study (Mayer and DeOreo, 1999). Some homes supplied by Tacoma Water were monitored for the 2016 report, producing an average 51 gpd per capita indoor water use. Bearing in mind that homes supplied municipal water are more likely to be fitted with water saving appliances, an assumption of 60 gpd per capita seems reasonable when estimating water use for permit exempt wells.

To produce a result in acre feet per year (AF/YR), estimated daily water use can be multiplied by 365 days per year, then converted to units of AF/YR, then multiplied by an assumed amount of water use that is consumptive. Different assumptions apply to homes connected to sewer systems versus those on septic systems. If homes are connected to sewer systems that discharge water outside of or near the mouth of a watershed, the assumption is that indoor water use is 100 percent consumptive. If homes are connected to septic systems, the estimated total annual water use for permit-exempt domestic wells can be multiplied by an assumed consumptive use factor, such as 10 percent, since most of this water will return to the ground via septic systems.

B. Consumption due to Outdoor Water Use

Under RCW 90.44.050, there is a maximum limit of one-half acre for outdoor watering associated with permit-exempt domestic wells. However, the average outdoor water use area in any given area may be less. One method of estimating future outdoor water use is based on an estimate of the average outdoor watering area for existing homes on permit-exempt domestic wells. Such analyses can be conducted using GIS and satellite imagery, and can be rigorous or as simple as scanning images to get a qualitative sense of the outdoor lawn/garden areas associated with existing homes. If planning units or watershed restoration and enhancement committees choose not to perform this level of analysis, an alternative would be to simply assume one-half acre of outdoor watering area associated with future permit-exempt domestic wells.

Once an outdoor water use area has been selected, future permit-exempt domestic outdoor water use can be estimated using an assumed crop type (e.g. pasture/turf grass) and relying on crop use estimates for nearby station(s), such as those available in Appendix A in the Washington Irrigation Guide (WAIG) (U.S. Department of Agriculture, 1997). This number can then be multiplied by an assumed consumptive use factor, such as 80 percent, to estimate the amount of water per house consumptively used outdoors.

Use of Other Data

In some instances, additional location-specific information may exist to supplement or replace portions of the method. One example would be actual water use data for small- to medium-sized water systems within a county. Depending on the nature and distribution of such data, extrapolations might be used to either verify or modify the above estimates. However, one caution is that water system estimates may be low if users pay fees that include built in incentives to conserve water.

In all instances, any significant variances from the above methods need to be well documented with reasons why the changes are justified.

Method Example

Assuming the methods described in 1A and 1B are used, an estimate of the consumptive water use for future permit-exempt domestic withdrawals might look like the following:

Household Consumptive Indoor Water Use (HCIWU):

Depending on the methods used to predict the number of future permit-exempt domestic wells (see page 2), the population using wells may already have been determined. If an estimate of the number of future permit-exempt domestic wells relied on county building permit data or Ecology's water-well report spatial data, that number of wells can be multiplied by an average number of people per

household to estimate increased population. Estimates of average household numbers are available from the U.S. Census Bureau or OFM, however, some inference will be required to convert these from a county to a WRIA basis.

For the example here, it will be assumed that there are 2.5 people per household. Given that assumption, and assuming per capita water use of 60 gpd and that only 10 percent of indoor water use is consumptive, an example of a consumptive indoor water use per house calculation in acre-feet per year (AF/YR) would be:

HCIWU = 60 gpd X 2.5 people per house X 365 days X 0.00000307 AF/gal. X 10% cons. use = 0.017 AF/YR

Household Consumptive Outdoor Water Use (HCOWU):

To estimate consumptive outdoor water use per household, domestic lawn/garden irrigation requirements can be estimated using information for a nearby station found in Appendix A of the Washington Irrigation Guide (WAIG) (U.S. Department of Agriculture, 1997). For a hypothetical pasture/turf grass example, the WAIG monthly net irrigation requirements (inches) might look something like:

	May	June	July	August	September
Irrig. requirements (in.)	0.63	2.72	4.11	2.75	0.90

At this point, an average outdoor watering area needs to be included in the calculations. Here, for example purposes, 0.4 acres of outdoor watering area will be assumed. The conversion of inches per month to cubic feet per month therefore requires multiplying by:

Irrig. Requirements (in.) = 0.4 acres X 43,560 sq ft/acre X 1 ft/12 in X 7.48 gal./cubic foot =10,861 gal.

For this example, the calculations would look like:

	May	June	July	August	Sept.	Total
Irrig. requirements (in.)	0.63	2.72	4.11	2.75	0.90	11.11
Irrig. requirements assuming 0.4 acres (gal.)	6,842	29,542	44,639	29,868	9,775	**120,666**

Therefore, assuming the consumptive loss associated with outdoor water use is 80 percent, the estimated total consumptive outdoor water use per house during the irrigation season would be:

HCOWU = 120,666 gallons X 0.00000307 AF/gal. X 80% consumptive use = 0.3 AF

Basin-wide Household Consumptive Water Use (BHCWU):

Consumptive water use by future permit-exempt domestic wells for a WRIA or subbasin can then be estimated by:

BHCWU = number of houses served by permit-exempt domestic wells X (HCIWU + HCOWU)

2. Highest Priority Projects – Sections 202(4)(b) and 203 (3)(b)

ESSB 6091 states that the highest priority recommendations must replace the estimated 20-year quantity of consumptive domestic water use in-time and in the same basin or tributary. Estimating the timing of groundwater impacts on streams can be complicated due to potential lags between when

wells are pumped and when pumping impacts propagate to rivers or streams. If a shallow well pumps an unconfined aquifer directly adjacent to a stream, the effects of pumping can be almost instantaneous. However, if a well pumps a confined aquifer some distance from a stream, smaller effects can occur down gradient and over much longer periods.

In order to analyze timing of the effects of groundwater pumping, the hydrogeology and locations of wells must be taken into account. In addition, the timing and magnitude of pumping may need consideration. However, unless a well is completed in bank storage right next to a stream, pumping groundwater at 50 gallons per minute (gpm) for one hour per day (say, for lawn watering) may have approximately the same effect as pumping a well at 5 gpm for 10 hours per day.

In all situations, the place to start the analysis will be to construct a conceptual groundwater model that factors in the hydrogeology, geographic distribution, and depths of the wells. In water resources terms, conceptual groundwater models generally include spatial delineations of recharge and discharge areas, identification of pathways from unsaturated zones through saturated zones to groundwater receptors, and analyses and estimates of time scales of flow and effects of groundwater pumping. A conceptual groundwater model can provide a basic framework with which to evaluate different types of groundwater pumping.

In some instances, the next level of analysis could involve applying a simple analytical model such as USGS STRMDEPL08 (Reeves, 2008), which is capable of estimating streamflow depletion by a nearby pumping well. However, since analytical models cannot deal with many spatially distributed wells simultaneously, at best the results of a limited number of analytical model runs could be used to refine a the conceptual model. If a numerical groundwater model (e.g. USGS MODFLOW) is available, this can be used to provide much more reliable estimates. However, such models are expensive and require significant time to develop and use.

No matter what level of hydrogeologic analysis is performed, for high priority projects some technical basis must be provided to determine whether a project will replace consumptive water use during the same time as the groundwater pumping impacts within that basin or tributary. In addition to the analyses described in this section, analyses associated with highest priority projects also need to include the same sorts of consumptive water use estimates as described in Item 1 above.

3. WRIA-Wide Calculations – Sections 202(4)(c), 203(3)(c), 203(3)(d), and 203(3)(e)

Ecology interprets all projected water use referenced in sections 202(4)(c), 203(3)(c), 203(3)(d), and 203(3)(e), to refer to only consumptive permit-exempt domestic groundwater water use (as opposed to water use associated with municipalities, for example). Ecology's Initial Policy Interpretations document provides additional explanation. To make determinations prescribed in the law that meet these requirements, the total consumptive permit-exempt domestic groundwater use for the entire WRIA must be projected over the subsequent 20-year period.

References

Culhane, T., and Nazy, D., 2015. Permit-Exempt Domestic Well Use in Washington State. Washington State Department of Ecology, Water Resources Program, Publication No. 15-11-006. https://fortress.wa.gov/ecy/publications/SummaryPages/1511006.html

DeOreo, et al., 2016. Residential End Uses of Water, Version 2. Water Research Foundation, Report #4309b. Executive summary available at: http://www.circleofblue.org/wp-content/uploads/2016/04/WRF_REU2016.pdf

Frans, L.M., and T.D. Olsen, 2016. Numerical Simulation of the Groundwater-Flow System of the Kitsap Peninsula, West-Central Washington. U.S. Geological Survey, Scientific Investigations Report 2016–5052, p. 63. https://pubs.usgs.gov/sir/2016/5052/sir20165052.pdf

Hsieh, P.A., et al., 2007. Ground-Water Flow Model for the Spokane Valley-Rathdrum Prairie Aquifer, Spokane County, Washington, and Bonner and Kootenai Counties, Idaho. U.S. Geological Survey Scientific Investigations Report 2007–5044, p. 78. https://pubs.usgs.gov/sir/2007/5044/pdf/sir20075044.pdf

Johnson, K.H., Savoca, M.E., and Clothier, B., 2011 Numerical Simulation of the Groundwater-Flow System in the Chambers–Clover Creek Watershed and Vicinity, Pierce County, Washington U.S. Geological Survey, Scientific Investigations Report 2011–5086, p. 108. https://pubs.usgs.gov/sir/2011/5086/pdf/sir20115086.pdf

Mayer, P.W. and DeOreo, W.B. 1999. Residential end uses of water. American Water Works Association Research Foundation. p. 310.

Natural Resource Conservation Service, 1997. Washington Irrigation Guide (WAIG). U.S. Department of Agriculture. https://www.nrcs.usda.gov/wps/portal/nrcs/detail/wa/technical/engineering/?cid=nrcs144p2_036314

Reeves, H.W., 2008, STRMDEPL08—An Extended Version of STRMDEPL with Additional Analytical Solutions to Calculate Streamflow Depletion by Nearby Pumping Wells: U.S. Geological Survey Open-File Report 2008–1166, p. 22. https://mi.water.usgs.gov/software/groundwater/strmdepl08/

Department of Ecology, 1991. Water Resources Program, Guidance 1020, Consumptive and Nonconsumptive Water Use. Washington State, Department of Ecology, p. 3. https://fortress.wa.gov/ecy/wrx/wrx/fsvr/ecylcyfsvrxfile/WaterRights/wrwebpdf/pol1020.pdf

Contacts

Our regional managers (see map to find your local office) can answer implementation and basin-specific questions:

- Northwest region: Ria Berns
  425-649-7270, ria.berns@ecy.wa.gov
- Southwest region: Mike Gallagher
  360-407-6058,
  mike.gallagher@ecy.wa.gov
- Eastern region: Keith Stoffel
  509-329-3464, keith.stoffel@ecy.wa.gov
- Central region: Trevor Hutton
  509-454-4240,
  trevor.hutton@ecy.wa.gov

General methodology questions can be directed to:

- Tom Culhane, Program Development and Operations Support Section
  360-407-7679, tom.culhane@ecy.wa.gov

Accommodation Requests

To request ADA accommodation including materials in a format for the visually impaired, call Ecology at 360-407-7668 or visit https://ecology.wa.gov/accessibility. People with impaired hearing may call Washington Relay Service at 711. People with speech disability may call TTY at 877-833-6341.

ATTACHMENT C

Ecology Water Resources Program, *Policy/Interpretive Statement Regarding Collection of Rainwater for Beneficial Use*, POL-1017 (2009)

POL 1017 **WATER RESOURCES PROGRAM POLICY REGARDING COLLECTION OF RAINWATER FOR BENEFICIAL USE**

Resource Contact: Policy and Planning Section Effective Date: October 09, 2009

References: RCW 90.03; RCW 90.54

Purpose: To 1) clarify that a water right is not required for on-site storage and use of rooftop or guzzler collected rainwater, and (2) identify the Department of Ecology's intent to regulate the storage and use of rooftop or guzzler collected rainwater if and when the cumulative impact of such rainwater harvesting is likely to negatively affect instream values or existing water rights.

Application: This Interpretive Statement applies to the water right permit requirement in RCW 90.03 and the authority to regulate rainwater harvesting systems.

This policy supersedes any previous Policy/Interpretive Statement, Focus Sheet or other stated Ecology viewpoint with which it may conflict.

After carefully considering existing legal authorities, Ecology has determined that existing law may be reasonably interpreted not to require a permit for the on-site storage and use of rooftop or guzzler collected rainwater. This Interpretive Statement clarifies Ecology's current interpretation.

The Department's Rooftop/Guzzler Collected Rainwater Policy

The on-site storage and/or beneficial use of rooftop or guzzler collected rainwater is not subject to the permit process of RCW 90.03. If and when the department determines that rooftop or guzzler rainwater harvesting systems are likely to negatively affect instream values or existing water rights, local restrictions may be set in place to govern subsequent new systems. To qualify as rooftop collected rainwater, the roof collecting the rainwater must be part of a fixed structure above the ground with a primary purpose other than the collection of rainwater for beneficial use. A guzzler is a device used to catch and store rainwater to provide drinking water for wildlife, livestock or birds.

Jay J. Manning, Director
Department of Ecology

Special Note: Water Resource Program policies and procedures are used to guide and ensure consistency among water resources program staff in the administration of laws and regulations. These policies and procedures are not formal administrative regulations that have been adopted through a rule-making process. In some cases, the policies may not reflect subsequent changes in statutory law or judicial findings, but they are indicative of the department's practices and interpretations of laws and regulations at the time they are adopted. If you have any questions regarding a policy or procedure, please contact the department.