

## **“Water Availability”**

### **Memorandum to the WRIAA 1 Planning Unit from the Land-Use Caucus**

**November 29, 2018**

On January 18, 2018, in response to the Washington State Supreme Court’s so-called “Hirst” decision, a remand to the Growth Management Hearings Board, the Legislature passed ESSB 6091, originally titled, “Water Availability”, and now titled, “Streamflow Restoration”.

The act addresses the use of permit-exempt domestic groundwater wells for the provision of domestic water for the purpose of issuing building permits to property owners. It has been codified as Chapter 90.94 RCW.

#### **90.94.020**

#### **Authorization for new domestic groundwater withdrawals exempt from permitting with a potential impact on a closed water body and potential impairment to an instream flow...**

(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.”

This sentence grants relief to rural property owners desperate to use permit-exempt wells for water for homebuilding or development.

The following section assigns a task to the Department of Ecology:

(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**) (2)...

The critical phrase in this passage is “potential impacts of exempt well use”.

It is clear that impact cannot be greater than use, and that the choice of projects and actions must be based on this principle.

Note that “identify” is used three times in the second subsection above, that conservation measures are to be “evidence based”, and that “projects” are to be used to “improve watershed health”.

DOE contracted with RH2 Engineering to “**Calculate Potential Impacts**” and “Estimate DGWPE domestic water use per connection using Ecology guidance”, to measure use, the difference between withdrawal and return, as its “Task 1”. Employing that protocol, RH2 concluded that the *quantity of consumptive use* to be offset, the *impact*, is 647 acre feet per year.

Continuing, with (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... 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.”

This leads us to RH2 Engineering’s “**Task 2: Identify Projects and Actions**”, stamped and signed by RH2 Engineering principals and employees as though it consists solely as their work.

Water Resources Program Work Assignment (RH2111) with the Department of Ecology, signed by Richard Ballard of RH2 and Mary Verner of DOE, “Task 2” contains a long list of tasks concerning “...projects and actions”. Paragraph 2.6 reads, “Prepare a technical memorandum summarizing the Task 2 methods and findings. Include uncertainty analysis if applicable.”

The Deliverable is “Technical memorandum summarizing the Task 2 analysis...”

There is no instruction in the work assignment concerning the inclusion of language concerning the Update-approval process for the Watershed Management Plan. The “RH2 Engineering Memorandum”, however, contains a great amount of language about the process. It reads, “Nooksack participants developed a diagram to describe the process for developing and approving the update of the Watershed Management Plan for WRIA 1 consistent with the requirements of Chapter 90.94 RCW and the 2016 WRIA 1 Interlocal Agreement. This diagram is included as Appendix E.”

The term "Nooksack participants" is ambiguous and lacks specification. It is not clear that all or any of them have a legal role to play in the WRIA1 Watershed Management Plan Update approval.

Since this language falls outside RH2 engineering's Task 2 contract language, and outside its area of expertise, it seems likely this language was included in the Technical Memorandum by *others without attribution and without legal authority.*

The Memorandum should be edited to remove any reference to the approval process, in order to correct the record.

(Note: Domestic use of water is a beneficial use (**90.54.020**). The water belongs to the people (**90.03.010**). DOE manages the water for the people, using rule-making, which is a carefully orchestrated administrative process. A watershed management plan that limits use must be consistent with specific RCWs, including 90.94. Any limit less than the statutory limit would require the department of Ecology to engage in rule-making.)

Whatcom County is Lead Agency under 90.82 and under 90.94. The "lead agency" in 90.94 "has the same meaning as defined in RCW 90.82.060." RCW 90.82.060,(8) reads, " As used in this section, "lead agency" means the entity that coordinates staff support of its own or of other local governments and receives grants for developing a watershed plan."

Yet the Draft Plan Update document "compiled by" Whatcom County ("5.1 Governance and Administration" section, Line 1073) states, "Water resources in WRIA 1 are cooperatively managed by members of the WRIA 1 WMB..." when that is unequivocally the statutory role of Whatcom County as the sole "lead agency for WRIA 1."

The "Board" cannot fulfill that function, since, under the 2016 ILA, it cannot act on its own as an entity, cannot receive or expend funds, or hire staff, according to the ILA under which it was created. The watershed Management Board is ostensibly a successor to the Joint Administrative Board, a board created in 2000 by ILA by the initiating governments to provide administrative functions only.

This board is not a sub-agency of government and has no statutory powers or authority.

The Washington State Auditor's office, in two MCAG dissolution actions, has determined that the Joint Administrative Board is not an entity and that there is no successor organization to its prior form. It has no record of a "Watershed Management Board" in Whatcom County

In considering the approval process for the "WRIA 1 Watershed Management Plan Update", it might be instructive to review Whatcom County Deputy Prosecutor Dan Gibson's advice to the Planning Unit in the December 22, 1999 meeting"

He said: "...If the ig's expect to have a vote, as I read RCW they must do so as members of the Planning Unit."

"On the issue of plan approval, if the parties want a vote, they do so as members of the Planning Unit. They might identify themselves as ig's within broader context of the Planning Unit. It is the PU that approves or disapproves the plan. It then moves forward to County Council."

And, "In the process, as it has developed here, there seems to have been a wedge driven between the IGs and the Planning Unit. The law makes no distinction in terms of plan approval. Plan approval is made by the Planning Unit. Ig's are perceived to be members of the Planning Unit. One cannot avoid section 90.82.130 of the statute, which calls for approval of the plan by the Planning Unit and not by some other group."

"So, to the extent ig's have a voice and are clearly given a large and significant voice, in fact veto power must be done in the context of the Planning Unit."

It should be remembered that RCW 90.94 does not amend RCW 90.82.

The WRIA1 Watershed Management Plan Update, then, after having been determined to be in proper form by the Planning Unit, is to be approved by the WRIA 1 Planning Unit and submitted to the Whatcom County Council for approval. The Nooksack Tribe, The Lummi Nation, and the City of Bellingham, who chose not to participate, do not vote. The Initiating Governments vote as part of the WRIA 1 Planning Unit. The Watershed Management Board has no statutory role to play+ in the Watershed Management Plan Update, in the context of RCW 90.82.