

January 6, 2019

Memorandum to WRIA 1 Process Participants and Other Interested Parties

In a process that began on January 19, 2018, with the passage of ESSB 6091, the WRIA 1 Planning Unit has worked in a deliberative manner to approve and recommend an update to the 2005 WRIA 1 Watershed Management Plan in accordance with the dictates of the statute, which required completion of the update by February 1, 2019. The law stated:

(RCW 90.94.020 (2)) "...the department [of Ecology] 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."

That work began with the activities of a "Watershed Staff Team", which met privately and without public notice, reporting to the "WRIA 1 Management Team" before it reported, if at all, to the WRIA 1 Planning Unit. (The Management Team reports to the "Watershed Management Board".)

RH2 Engineering, hired by Ecology to quantify potential impacts and identify projects, repeatedly failed to meet deadlines to produce memoranda necessary to the work of the Planning Unit, while the volume of the output of the WST expanded beyond all reason to include "policy proposals" and a "net ecological effects" assessment based not on data but on unverified, uncalibrated model results.

The staff-generated "Working Draft" of the "WRIA 1 Watershed Plan Update" (the latest 114-page version of which was never submitted to the Planning Unit) was initially presented by staff to the Planning Unit too late for reasonable consideration.

On December 7, 2018, "Planning Unit Members" received an email from Gary Stoyka stating, in part,

"...staff will not be making further revisions to the current plan update. The WST will be recommending a proposed compilation package that includes drafts of the plan update, technical reports WST comments a summary of positions on policy issues, and a brief narrative...and send **this to Ecology for their consideration in rulemaking.**"

The WRIA 1 Management Team has seized the role of the bona fide Planning Unit, assuming for itself powers not supported by statute.

At its December 12, 2018 meeting, the Planning Unit voted not to approve the draft update presented by staff, but to continue working on the 6091 Plan Update. The lead agency has not responded by calling a meeting for that purpose .

The WRIA 1 Planning Unit, then is left to proceed on its own, without the support required by statute, in an effort to produce a properly-composed Update and to present it to the Whatcom County Council.

Our caucus proposes to continue working with other caucuses in the Planning Unit to produce the Update product. We have every intention of following the law in the public interest.

Remember: RCW 90.94.020 (4)(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."

And, RCW 90.82.020(6), "WRIA plan", or "plan" means the product of the **planning unit** including any rules adopted in conjunction with the product of the planning unit."

It is our position that:

- The WRIA 1 Watershed Management Board ('board'), the Management Team, and the Watershed Staff Team ('staff teams') possess no legal authority, separately or together, to engage in watershed planning, in the preparation of Watershed Management Plans or Updates, or to "manage" water resources in WRIA 1. [AGO 2009 No. 6](#): "4. The Interlocal Cooperation Act is not an independent source of agency authority."
- The 'board', with or without 'staff teams', is not a legal entity under the Interlocal Cooperation Act.
- The 'board', with or without 'staff teams', is not an agency or sub-agency of government.
- The 'board', with or without 'staff teams', has no statutory basis: it cannot make policy, or approve plans, under state or local law including under the Whatcom County Charter.
- "Initiating governments" is not a legal entity. It is not an agency or sub-agency of government. The "initiating governments" participate only as members of the WRIA 1 Planning Unit in Watershed Management Plan development and approval.

The WRIA 1 Planning Unit retains its authority to complete the Watershed Management Plan Update, and we assert that there is sufficient time remaining to do so.

- We assert that the potential impact of domestic use cannot be greater than the consumptive use, and that domestic use is both beneficial and lawful.
- We further argue that the potential impact of the quantity of water consumed by permit-exempt domestic groundwater wells in WRIA 1 is that potential impact which results from the quantity consumed by domestic, or so-called "indoor use" only: 15.4 gallons per day per household or 37 acre-feet per year for all of WRIA 1.

The basis for this position rests in the statutes:

RCW 90.94.020 (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.

And,

(8) "This section only applies to new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050. "

RCW [90.44.050](#) - Permit to withdraw.

"After June 6, 1945, no withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: EXCEPT, HOWEVER, That any withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, **or for single or group domestic uses in an amount not exceeding five thousand gallons a day**, or as provided in RCW [90.44.052](#), or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter."

Clearly, "domestic use" is distinct from "...watering of a lawn or a noncommercial garden not exceeding one-half acre in area."

Representative Vincent Buys, who participated in the drafting of ESSB 6091, states that the drafters' intent was specific, to differentiate the exempt "domestic" use from the exempt "watering" use. A plain reading of the statute supports his assertion.

Ecology, then, erred in its guidance in combining domestic, or indoor use, and watering, or outdoor, use. ([AGO 2009 No. 6](#)):

"(Question) 1. Does RCW 90.44.050 restrict groundwater withdrawals without a permit for law and noncommercial gardening purposes to a subpart of the 5,000 gallon-per-day limit imposed up single or group domestic use, and thus also limit those domestic uses of the exemption to a remainder? (Brief Answer) 1. In response to your first question, the use for watering lawns and noncommercial gardens is not included within the 5,000 gallon-per-day limit for single or group domestic uses."

Correctly applied, the potential impact of DGWPE on streamflows is much smaller than that which RH2 Engineering's Technical memorandum 1 identified to be offset, 647.51 acre-feet per year.

RH2 Engineering Task 2 project list might be retained in its present form, whereby the large (combined) offset amounts would provide substantial net ecological benefit, delivering ecological effect in a quantifiable manner.

The Watershed Management Plan Update, then, should be simplified to reflect that much-smaller potential impact. It might be expanded, however, in a way suggested by the statute:

RCW 90.94.020 (4)(a) "...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."

This leads us to suggest the inclusion of projects and actions into the Watershed Management Plan by agencies and entities unrelated to this process, both to consider the net ecological benefit and ecological effects of those actions and projects, and to enable the coordination of actions by a broad range of participants in WRIA 1 and not merely those directly involved in the process. In that way, the NEB of those actions and projects would be accorded proper weight in assessments of watershed health

Accompanying this memorandum is a draft of our simplified WRIA 1 Watershed Management Plan Update: "Authorized Exempt Groundwater Withdrawals, Domestic", that our caucus is introducing to the Planning Unit for use at its January 10, 2019 meeting.

Land Use Caucus