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White Paper: Water Resource Management and the Growth Management Act

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Issue

The Revised Code of Washington (RCW) is silent with respect to specific County authority to regulate the appropriation of public waters. In recent decisions, the Western Washington Growth Management Hearings Board (WWGMHB) interpreted RCW 36.70A.030 (5)(b) such that it does not preclude a county responsibility for management of water use, not just in management of land use. In order to comply with the GMA, the WWGMHB required Jefferson County to enact restrictions on water withdrawals to reduce the impacts from seawater intrusion. This interpretation makes it unclear and perplexing as to authorities and interrelationships between RCW 36.70A, the Growth Management Act, and RCW 90.03, 90.44, and RCW 90.48, each of which provides specific authority to the Department of Ecology to regulate withdrawals of public waters.

The only specific language in the RCW indicating the legislature's intent for counties in managing water is found in RCW 19.27.097. This section, that was amended upon adoption of the GMA, states that "proof of potable water" must be provided to counties prior to the issuance of a building permit. However, the statute is not explicit in stating what role counties have in approving potable water, it only provides some general information as to what is acceptable documentation.

State guidance documents to implement both RCW 36.70A.030(5)(b) and RCW 19.27.097 have been published by the State Department of Ecology and Department of Health. Neither guidance document contains specific direction to counties that it is the county's role to regulate water withdrawals. However, neither guidance document was upheld by the WWGMHB as sufficient guidance to achieve GMA compliance.

Further complicating this issue is the passage of ESSB 5028 in 2003, which forbids the Department of Ecology from limiting or conditioning statutory water rights exemptions for water quality considerations. On the face of it, this new law provides explicit instructions from the legislature to the Department of Ecology that are contradictory to the WWGMHB rulings issued to Jefferson County.

Therefore, the legislature should amend RCW 36.70A and RCW 19.27.097, to clarify the legislative intent of the GMA in regards to water appropriation decisions and County and State responsibilities. Potentially RCW 90.03, RCW 90.44 and RCW 90.48 would need to be amended to clearly define authorities and interrelationships between the statutes.

Legal Background

The following contain the relevant sections of the RCW related to the issue.

RCW 36.70A.020 The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations:

“(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.”

RCW 36.70A.030(5): “Critical areas” include the following areas and ecosystems: (a) wetlands, (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

RCW 18.104.040 The Department of Ecology has the power:

(4) “To adopt rules, in consultation with the department of health and the technical advisory group created in RCW [18.104.190](#), governing licensing and well construction as may be appropriate to carry out the purposes of this chapter. The rules adopted by the department may include, but are not limited to:” . . . (g) “Limitations on well construction in areas identified by the department as requiring intensive control of withdrawals in the interests of sound management of the ground water resource;”

RCW 18.104.040 The Department of Ecology has the power:

(5) “To require the operator in the construction of a well and the property owner in the maintenance of a well to guard against waste and contamination of the ground water resources;”

RCW 18.104.043 (1) “If requested in writing by the governing body of a local health district or county, the department by memorandum of agreement may delegate to the governing body the authority to administer and enforce the well tagging, sealing, and decommissioning portions of the water well construction program.”

RCW 18.104.043 (4) “With regard to the portions of the water well construction program delegated under this section, the local governing agency shall exercise only the authority delegated to it under this section.”

RCW 19.27.097(1): “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.”

RCW 90.03.010: “The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right.”

RCW 90.44.020: “This chapter regulating and controlling ground waters of the state of Washington shall be supplemental to chapter [90.03](#) RCW, which regulates the surface waters of the state, and is enacted for the purpose of extending the application of such surface water statutes to the appropriation and beneficial use of ground waters within the state.”

RCW 90.44.050: “After June 6, 1945, no withdrawal of public ground waters 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 ground waters 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 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”

RCW 90.44.130: “The department shall have jurisdiction over the withdrawals of ground water and it shall have the jurisdiction to limit withdrawals by appropriators of ground water so as to enforce the maintenance of a safe sustaining yield from the ground water body.”

ESSB 5028 amends RCW 90.48 “3) The department may not abrogate, supersede, impair, or condition the ability of a water right holder to fully divert or withdraw water under a water right permit, certificate, statutory exemption, or claim granted or recognized under chapter 90.03, 90.14, or 90.44 RCW through the authority granted to the department in this chapter.”

History

Jefferson County was appealed in 2001 following an update to its critical areas ordinance. The primary issue was that areas of recharge to aquifers were not adequately protected

through zoning, land use provisions and maximizing recharge to aquifers. Instead the WWGMHB ruled that additional protections reducing the withdrawal of water were needed to comply with the Act because water withdrawals were causing aquifer degradation from seawater intrusion. In the Final Decision and Order, the Hearings Board stated:

“it is obvious that both the Act and the County’s own CP require Jefferson County to protect not only those places where freshwater enters the ground, but also the aquifers that they feed .” FDO, No. 01-2-0015, January 10th, 2002

“We are not persuaded by the County’s arguments that it has no authority to impose some form of water conservation measures, limiting the number of new wells allowed or other measures to reduce the withdrawal of groundwater from individual wells if that withdrawal would disrupt the seawater/freshwater balance and lead to greater seawater intrusion. The exemption of RCW 90.44.050 does not limit a local jurisdiction from complying with its mandate for protection of groundwater quality and quantity under the GMA.” FDO, No. 01-2-0015, January 10th, 2002

This language led to the requirement that Jefferson County include seawater intrusion areas as Critical Aquifer Recharge Areas (CARAs), and regulate water withdrawals to comply with the requirement to protect aquifer recharge areas.

“Within 180 days, develop and adopt protection standards for CARAs, based on BAS, to prevent further groundwater degradation from seawater intrusion” FDO, No. 01-2-0015, January 10th, 2002

Please refer to the following cases for a complete history.

http://www.gmhb.wa.gov/western/western_decisions/ww2001/01-15%20FDO.htm

http://www.gmhb.wa.gov/western/western_decisions/ww2001/01-15%20Compliance%20Order.htm

Analysis

The primary issue raised by this decision is the limits of the GMA, and interrelationship between the GMA and water law. It is clear that the State Department of Ecology has the authority to regulate all water withdrawals, including typically “exempt” water withdrawals of less than 5,000 gallons per day for residential use (see RCW 18.104.040(4)g). The Department of Ecology has been reluctant to exercise this authority, with the only use to date in the Methow Basin. It is not clear what authority has been provided to Counties to restrict water withdrawals, other than broad statements found in GMA goal 10 (RCW 36.70A.020(10)), and in the need to protect “areas with a critical recharging effect on aquifers used for potable water” as critical areas (RCW

36.70A.030(5)(b)). From these broad statements of intent, the WWGMHB determined the intent was to also regulate water withdrawals, despite no specific direction to this matter from the legislature.

A guidance document was published by the Department of Ecology to provide direction to counties to implement RCW 36.70A.030(5)(b), entitled “Guidance Document for the Establishment of Critical Aquifer Recharge Area Ordinances”, dated July 2000, accessed online at <http://www.ecy.wa.gov/pubs/97030.pdf>). Nothing in this document indicates that the Department of Ecology intended that seawater intrusion was to be addressed in a Critical Aquifer Recharge Areas Ordinance. However, in Jefferson County’s case, the WWGMHB ruled that following the published state guidance document was not sufficient for GMA compliance.

Because water resources and land use decisions are intertwined, it is not unreasonable to attempt to manage growth and water simultaneously. However, at this time, the authority is lacking for counties to address many issues that are needed to properly manage water resources. For example, counties have only limited specific authority to restrict well drilling. RCW 19.27.097 states, “In addition to other authorities, the county or city may impose conditions on building permits requiring connection to an existing public water system”.

Beyond the authority in RCW 19.27.097, counties have only clear authority to regulate well drilling provided in RCW 18.104.043 (1), which states, “the department by memorandum of agreement may delegate to the governing body the authority to administer and enforce the well tagging, sealing, and decommissioning portions of the water well construction program”. This statute contains language in RCW 18.104.043 (4) that also draws a clear line as to how much authority shall be provided to counties in regards to well drilling regulation and oversight. RCW 18.104.043 (4) states, “With regard to the portions of the water well construction program delegated under this section, the local governing agency shall exercise only the authority delegated to it under this section.”

Without specific authority provided in either the water law statutes or the GMA, it is likely that counties will face lengthy legal battles over whether or not authority to restrict groundwater withdrawals exists. Unfortunately, these legal battles will take valuable resources away from other aspects of GMA where there is clear authority and clear need.

RCW 19.27.097 was also added as a part of the passage of the GMA. Although this section states that “proof of potable water” must be provided to counties prior to the issuance of a building permit, it provides limited specific direction as to what that proof is in cases involving individual water supplies. The statute provides only general guidance as to what is acceptable documentation, allowing counties “flexibility.” However, in Department of Ecology correspondence, the agency interprets the language providing authority and responsibility for counties to fully regulate individual water supplies. Guidance documents published by the State Departments of Ecology and Health to implement RCW 19.27.097 state that although counties make the final determination, that

the Department of Ecology retains authority over decisions regarding well interference, which is a core determination in seawater intrusion situations. The guidance document has not been adopted by rule into the Washington Administrative Code, which allows for the agency to interpret the statute loosely and not necessarily consistent with the published guidance document.

The guidance document, entitled Guidelines for Determining Water Availability for New Buildings, can be accessed online at: <http://www.ecy.wa.gov/pubs/9327.pdf>

Even further complicating the matter is the recently adopted provisions found in ESSB 5028, “ The department [Ecology] may not abrogate, supersede, impair, or condition the ability of a water right holder to fully divert or withdraw water under a water right permit, certificate, statutory exemption, or claim granted or recognized under chapter 90.03, 90.14, or 90.44 RCW.” This new language puts the order by the WWGMHB in direct conflict with the intent of the legislature. However, the language in ESSB 5028 only directs the Department of Ecology, and is specific to amending RCW 90.48. Thus, the ruling made by the WWGMHB under RCW 36.70A is not necessarily in conflict, because it is directive toward Jefferson County. The WWGMHB ruling is only in conflict with the intent of the new legislative amendments.

Recommendations:

- 1) Add clear language as to the intent of the GMA in regards to water appropriation.

The legislature may find the intent of the GMA is to require counties to manage water withdrawals that are currently not adequately managed under existing laws. If so, it should be clear what the roles of the state and counties are, and how potentially conflicting laws are to be implemented. Primarily, the GMA should provide counties with specific authority to regulate water appropriations. RCW 90.44 would also have to be amended to reflect the shared responsibility.

One model that might be worth exploring is to provide clear authority to counties similar to the delegation of powers in RCW 18.104.043. The delegation language allows the State agencies and counties to enter into specific voluntary agreements that define clear portions of state responsibility to be delegated. The experience between the State Department of Ecology and counties participating in the delegation agreement under the RCW 18.104.043 is positive from the state agency perspective, county perspective, and generally from the regulated community.

On the other hand, if the legislature finds the intent of the GMA is to **NOT** require counties to manage water withdrawals, then language should be added to the GMA to make it clear that such is the case, as the current language has been interpreted differently.

2) Add clear language to RCW 19.27.097 that **REQUIRES** the Department of Ecology and/or Department of Health to adopt guidance documentation by rule into the Washington Administrative Code. Until such guidance documentation is adopted by rule, it is clear that the Hearings Boards have the prerogative to ignore the guidance documents. There must be assurances to counties that ordinances developed following state guidance documents will be found compliant with the Act.