

May 25, 2018

The Honorable Chris Branch
The Honorable Andy Hover
The Honorable Jim DeTro
Board of Commissioners for Okanogan County
c/o Ms. Laleña Johns, Clerk of the Board
123 5th Ave N Ste. 150
Okanogan, Washington 98840

Dear Commissioners Branch, DeTro, and Hover:

**Subject: Comments on proposed Okanogan County Code (OCC) 17A.400
Overlays-Water Availability Study Areas.**

Sent via email to: cbranch@co.okanogan.wa.us; andy.hover@co.okanogan.wa.us;
jdetro@co.okanogan.wa.us; ljohns@co.okanogan.wa.us; planning@co.okanogan.wa.us

Thank you for the opportunity to comment on the proposed OCC 17A.400 Overlays-Water Availability Study Areas. We strongly support efforts by staff and the Board of County Commissioners to address the availability of water, to protect senior water rights holders, and to protect instream flows. We appreciate your consideration of proposed OCC 17A.400. We do have some suggestions to clarify proposed OCC 17A.400.

Futurewise works throughout Washington State to support land-use policies that encourage healthy, equitable and opportunity-rich communities, and that protect our most valuable farmlands, forests, and water resources. We have members across Washington State including Okanogan County.

Please clarify 17A.400.020 Authority

ESSB 6091, also known also known as the Laws of 2018, ch. 1, amended the Planning Enabling Act to require that “[f]or 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.”¹ RCW 19.27.097 governs water availability determinations for buildings permits. RCW 58.17.110 governs water availability for long and short subdivisions. RCW 90.44.050 provides in full that:

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

¹ Laws of 2018, ch. 1 § 103 accessed on May 24, 2018 at: <http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/6091-S.SL.pdf>.

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: PROVIDED, HOWEVER, That the department from time to time may require the person or agency making any such small withdrawal to furnish information as to the means for and the quantity of that withdrawal: PROVIDED, FURTHER, That at the option of the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.

In *Five Corners Family Farmers v. State*, the Washington State Supreme Court explained RCW 90.44.050, writing “[i]n effect, the statute prohibits withdrawal of public groundwaters until the Department of [Ecology] grants a permit to do so and then sets forth a number of exceptions to this general rule.”² So by requiring Okanogan County to comply with RCW 90.44.050, the Laws of 2018, ch. 1 § 103 requires the County to determine if a well proposed as the water source for a subdivision or building permit requires a water right permit or qualifies for an exception. The Laws of 2018, ch. 1 § 103 also requires Okanogan County to comply with instream flow rules when deciding applications for subdivisions and building permits. These requirements apply whether the well serving the building permit or subdivision is permit-exempt or requires a State of Washington Department of Ecology water right permit.

It is also important to recognize that the *Whatcom County v. Hirst* decision did not create any new law. In 1992, the Washington State Attorney General issued an official Attorney General Opinion explaining that RCW 19.27.097 and RCW 58.17.110 requires applicants for building permits for buildings that need potable water and subdivision applicants to provide evidence of a physically available and legally available water supply when the proposed water supply is a surface or ground water source.³

While proposed OCC 17A.400.020 recognizes the County’s duty to determine legal and physical water availability for permit-exempt wells, the County also has the duty to do the same for wells that require a water right permit, they are included in RCW 90.44.050, and to determine if a use qualifies for a permit-exempt well. If a surface water supply is proposed, the county must also determine if water is legally and physically available. We recommend that OCC 17A.400.020 be modified to reflect these requirements and the duty the County has to adopt development regulations meeting the requirements of Laws of 2018, ch. 1 § 103.

² *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 306 – 07, 268 P.3d 892, 898 (2011).

³ Attorney General Opinion (AGO) 1992 No. 17 pp. 5 – 7 of 8 accessed on May 25, 2018 at: <http://www.atg.wa.gov/ago-opinions/requirement-adequate-water-supply-building-permit-issued>.

Proposed OCC 17A.400.020 refers to ESSB 6091 as though it is self-enforcing. But the Laws of 2018, ch. 1 § 103 requires the county to adopt development regulations to enforce some aspects of the law. Our recommended additions are underlined and our recommended deletions are struck through.

17A.400.020 Authority

In response to the *Whatcom-Hirst* decision, 186 Wn.2d 648, 381 P.3d 1 (2016),~~(citation)~~ Okanogan County has assumed greater responsibility in determining the legal and physical availability of surface water from diversions and groundwater drawn from permit exempt wells as defined in RCW 90.44.050 for use as a potable water supply for building applications in accordance with RCW 19.27.097 and subdivision applications in accordance with RCW 58.17.110 and whether a development qualifies for a permit-exempt well. All decisions made regarding the availability of surface water or groundwater through permit exempt wells will be determined in accordance with the applicable in-stream flow rule as current or hereinafter amended, the regulations adopted to comply with and/or ESSB 6091, and OCC 20 as adopted or heretofore amended.

Do not lock in the existing zoning regulations in the Water Availability Study Area Overlays. See proposed OCC 17A.400.030 Permitted uses, proposed OCC 17A.400.040 Conditional uses, proposed OCC 17A.400.060 Lot area and width, proposed OCC 17A.400.070 Density, proposed OCC 17A.400.080 Property line setbacks, proposed OCC 17A.400.090 Height, proposed OCC 17A.400.100 Lot coverage, and proposed OCC 17A.400.110 Parking.

Proposed OCC 17A.400.030, OCC 17A.400.040, OCC 17A.400.060, OCC 17A.400.070, OCC 17A.400.080, OCC 17A.400.090, OCC 17A.400.100, and OCC 17A.400.110 lock in the zoning as it exists when a Water Availability Study Area Overlay is adopted. But Okanogan County is in the process of updating its comprehensive plan and development regulations and may adopt the new provisions by the end of the year. We recommend that the phrase “in place at the time of adoption of the overlay zone” be deleted from proposed OCC 17A.400.030, OCC 17A.400.040, OCC 17A.400.060, OCC 17A.400.070, OCC 17A.400.080, OCC 17A.400.090, OCC 17A.400.100, and OCC 17A.400.110. That will allow the County’s new zoning to go into effect when it is adopted by the Board of County Commissioners instead of keeping the out of date zoning in effect.

Clarify when water availability study area overlays will be adopted. See proposed OCC 17A.400.120A.

Instream flows are not being met in Okanogan County during low water periods. In the Okanogan basin, “[e]ighty-two irrigation rights based on permits issued after adoption of WAC 173-549 are curtailed at some time during most years when the adopted flows are not

met.⁴ Ecology also “regularly sends out Orders alerting water right holders they will shut off in favor of instream flows for the Methow and Okanogan Rivers.”⁵ Given that instream flows are not being met and the holders of existing water rights are being curtailed, new wells will aggravate these instream water shortages. Surface water and ground water are hydraulically connected in both the Methow and Okanogan basins.⁶ The reduced instream flows from the new wells will then require additional cutbacks by the current interruptible water rights holders, reducing their incomes.

Curtailments will increase in the future. In the Methow, the current water supply and demand forecasts show “a higher magnitude of curtailment events during May, August, and September, with consistently higher frequency in June and July.” A “[h]igh magnitude of curtailment events are forecasted for May while they were absent for the historical period.”⁷ In the Okanogan basin, the forecast shows that the frequency of curtailments will increase during the mid to late irrigation season.⁸ These future curtailments of water right holders will be worsened by increased development that reduces instream flows below the adopted minimum flows.

To reduce the adverse impacts of these curtailments on farmers and ranchers, the County must adopt a water availability overlay if there is information showing a water shortage or lack of information showing that water is available. Although given the extensive data on water available in Okanogan County, a lack of information will likely be very rare. Therefore, we recommend that proposed OCC 17A.400.120A be modified to read as follows with our additions underlined and our deletions struck through.

A water availability study overlay shall ~~may~~ be adopted by the Okanogan Board of County Commissioners, upon findings that sufficient information is known to ~~exists~~ to support the conclusion that inadequate water supplies exist to support additional density or intensity of uses that require potable water supplies; or, that insufficient information exists to support the approval of subdivisions or other land use activities that require potable water supplies

⁴ State of Washington Department of Ecology Water Resources Program, *Focus on Water Availability Okanogan Watershed, WRLA 49* p. 2 (Pub'n No.: 11-11-053: Aug. 2012) underlining added and accessed on May 24, 2018 at: <https://fortress.wa.gov/ecy/publications/summarypages/1111053.html> and enclosed with this letter.

⁵ State of Washington Department of Ecology Letter to Okanogan County on the Scope of the EIS for the Amended Okanogan County Zoning Ordinance p. 2 (Nov. 13, 2015) and enclosed with this letter.

⁶ Christopher P. Konrad, Brian W. Drost, and Richard J. Wagner, *Hydrogeology of the Unconsolidated Sediments, Water Quality, and Ground-Water/Surface-Water Exchanges in the Methow River Basin, Okanogan County, Washington* p. 55 (U.S. Geological Survey Water-Resources Investigations Report 03-4244: 2003, prepared in cooperation with Okanogan County) accessed on May 25, 2018 at:

<https://pubs.usgs.gov/wri/wri034244/pdf/wri034244rev1.1.pdf>; ENTRIX, Inc., *Level 1 Watershed Technical Assessment Final Report Okanogan River Watershed Resource Inventory Area 49* p. 2-24 (Sept. 2006) accessed on May 25, 2018 at: <https://fortress.wa.gov/ecy/publications/documents/0911039.pdf>.

⁷ S.A. Hall, J.C. Adam, M. Barik, J. Yoder, M.P. Brady, D. Haller, M.E. Barber, C.E. Kruger, G.G. Yorgey, M. Downes, C.O. Stockle, B. Aryal, T. Carlson, G. Damiano, S. Dhungel, C. Einberger, K. Hamel-Reiken, M. Liu, K. Malek, S. McClure, R. Nelson, M. O'Brien, J. Padowski, K. Rajagopalan, Z. Rakib, B. Rushi, W. Valdez *Columbia River Basin Long-Term Water Supply and Demand Forecast 2016 Legislative Report* p. 126 (Washington State University State of Washington Water Research Center and Office of Columbia River State of Washington Department of Ecology, Publication No. 16-12-001: Dec. 2016) accessed on May 25, 2018 at: <https://fortress.wa.gov/ecy/publications/SummaryPages/1612001.html>.

⁸ *Id.* at p. 131.

provided through surface water diversions or groundwater withdrawals from wells permitted in accordance with RCW 90.44.050.

Clarify that all wells used as water supplies in an overlay must be consistent with the instream flow rules. See proposed OCC 17A.400.120D.

As was discussed above, Laws of 2018, ch. 1 § 103 also requires Okanogan County to comply with instream flow rules when deciding applications for subdivisions and building permits. This requirement applies whether the well serving the building permit or subdivision is permit-exempt or requires an Ecology water right permit. Proposed OCC 17A.400.120D does not require a showing that a well that requires an Ecology water right permit complies with the instream flow rules or is senior to those rules. Proposed OCC 17A.400.120D also does not address surface water withdrawals as it must.

Proposed OCC 17A.400.120D.2 requires that a permit-exempt well has to be approved in accordance with the applicable in- stream flow rules as current or hereinafter amended. Instream flow rules only apply to water rights junior to the instream flow rule, that is permit-exempt wells that are drilled and put to beneficial use after the amendment. So, it is better to just say the wells have to comply with the applicable instream flow rules. New instream flow rules or amendments would not apply to existing wells that have been put to beneficial use before they are adopted.

Also, it may take more than two years to obtain additional water to supply new uses or to remedy the lack of information. So, we recommend that the Board of County Commissioners be given the authority to set a duration longer than two years for a Water Availability Study Area Overlay. Our recommended additions are underlined and our recommended deletions are struck through.

D. Building Permits

Building permits for residential structures may be issued in an adopted water availability study area when:

- 1) The application does not propose to use a permit exempt well as defined in RCW 90.44.050 as the source of potable water and if a surface water withdrawal or well requiring a water right permit is proposed, that water right is senior to the applicable instream flow rules, or
- 2) The use of a permit exempt well as defined in RCW 90.44.050 as the source of potable water has been approved in accordance with OCC Title 20-~~1~~, the applicable in- stream flow rules as current or hereinafter amended, and the county development regulations adopted in compliance with/er ESSB 6091.

E. 2-year Review

A water availability study area adopted in accordance with the provisions of this chapter shall expire 2 years after the date of adoption unless renewed by ordinance by the legislative authority of Okanogan County unless the Board of Commissioners adopted a difference expiration date.

Okanogan County is required to adopt countywide development regulations in compliance with ESSB 6091 now

ESSB 6091, also known also known as the Laws of 2018, ch. 1, amended the Planning Enabling Act to require that “[f]or 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.”⁹ ESSB 6091 went into effect on January 19, 2018.¹⁰ So Okanogan County is out of compliance with Laws of 2018, ch. 1 § 103 and other provisions of the Act. We urge the County to come into compliance as soon as practical. This will better protect existing water rights holders and instream flows.

These development regulations must include the following regulations to comply with ESSB 6091. For the Methow basin, Laws of 2018, ch. 1 § 101(1)(b), requires that 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: ... [WRIA] 48 (Methow)” So, the county must comply with and adopt development regulations requiring compliance with the reservation requirements in the instream flow rule, the prohibition on new water uses once the reservation is exhausted or in areas that do not have reservations, the limitations on new uses that may use the residential reservations including the “single domestic”¹¹ use requirement, the *Campbell and Gwinn* limitation of one permit-exempt well system per development, the 5,000 gallons per day per system requirement which are in RCW 90.44.050, and the instream flow rule’s other applicable requirements.¹²

Okanogan County’s development regulations must also include the requirements for the Okanogan basin, WRIA 49, from Laws of 2018, ch. 1 § 201(5):

(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;

⁹ Laws of 2018, ch. 1 § 103.

¹⁰ Laws of 2018, ch. 1 § 307.

¹¹ The *Campbell & Gwinn* decision stated that a single domestic use “is a single use, by a single home ...” *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4, 10 (2002). In contrast “a group use” is water use by several homes or a multiunit residence. In the *Campbell & Gwinn* decision the supreme court concluded that the 20-lot development was a group domestic use despite the fact that an individual well was proposed for each lot. *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 4 & 14, 43 P.3d 4, 6 & 11 (2002).

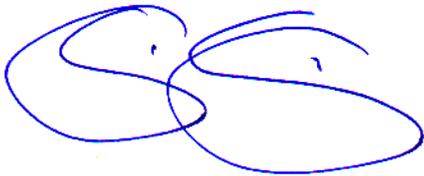
¹² WAC 173-548-030; *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 21, 43 P.3d 4, 15 (2002); Laws of 2018, ch. 1 § 103.

- (c) Record the number of building permits issued under chapter 34.27 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.

In addition, the development regulations applicable to the Okanogan basin must also require compliance with the *Campbell and Gwinn* limitation of one permit-exempt well system per development and the 5,000 gallons per day per system requirement both of which are in RCW 90.44.050.¹³

Thank you for considering our comments. If you require additional information, please contact me at 206-343-0681 Ext. 118 or tim@futurewise.org.

Very Truly Yours,



Tim Trohimovich, AICP, WSBA No. 22367

Director of Planning & Law

Enclosures

¹³ Laws of 2018, ch. 1 § 103.