



June 27, 2013

Kathy Kershner
Whatcom County Council President
311 Grand Avenue
Bellingham, WA 98225-4082

SUBJECT: Growth Management Hearings Board Case No. 12-2-0013 Final Decision and Order -
Analysis, Problems, and Recommendations

Dear Kathy:

The Growth Management Hearings Board ("GMHB") has recently found the Rural Element of the County's comprehensive plan out of compliance with the Growth Management Act (GMA) for failing to protect surface and groundwater resources. *See Hirst et al., v. Whatcom County, (Case No. 12-2-0013 Final Decision and Order June 7, 2013)*. In its Final Decision and Order ("FDO") in this case, GMHB directed the County to implement specific measures to protect water quantity and quality to safeguard rural character. While the County has determined to appeal this decision, the outcome of the appeal cannot be known at this point, and parts or even all of the FDO may be upheld.

Water districts and the properties we serve are likely to be highly affected by the comprehensive plan policies and development regulations ultimately implemented pursuant to the FDO and the ensuing litigation. After discussion of these issues at our meeting on June 26, 2013, the Water Districts Caucus concluded that the County should take reasonable steps to strengthen its compliance with the GMA on water resource issues, even while the appeal is under way.

ANALYSIS

The GMA requires that the Rural Element of the County's comprehensive plan must include measures protecting surface and groundwater resources and the FDO addresses RCW 36.70A.070(5)(c)(iv) specifically. While the GMHB's decision was targeted to this subsection of the GMA and found the Rural Element of the County's comprehensive plan out of compliance with this requirement, it is vitally important to recognize that the GMA includes multiple requirements to plan for both protection and provision of water.

While 36.70A RCW addresses land use planning, the GMA contains no language modifying other statutes or enactments that govern surface and groundwater resources. Therefore, the GMA must be harmonized with other state statutes including those concerning water resources and water resource planning. These statutes related to water resources provide the County with the tools necessary for GMA compliance. Federal and state enactments which directly affect water resource planning in Whatcom County include at least these examples:

Water Code. RCW 90.03. This chapter sets out the procedures for establishing surface water rights under state law based on the prior appropriation doctrine. Under this policy, water rights are awarded to the party who first duly appropriates water and can only be given legal certainty through adjudication, a court process to establish the extent and validity of existing water rights. Court decrees promulgated through adjudication have the force of law. Allocation of water rights requires a determination that water is available to appropriate without impairing the rights of prior appropriators.

Groundwater Code. RCW 90.44. This chapter extends the application of the surface water statutes in Chapter 90.03 RCW to the appropriation and beneficial use of groundwater within the state. This chapter exempts certain limited withdrawals of groundwater from permit requirements.

“...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:” RCW 90.44.050.

Water Resources Act. RCW 90.54. This chapter calls for comprehensive water resource planning and provides for the Department of Ecology (DOE) to establish instream flow rules. RCW 90.54.050. DOE adopted an instream flow rule for WRIA 1 in 1985 (WAC 173-501). As a result of the rule, most of the Nooksack River and its tributaries are either restricted or fully or partially closed to further appropriations.

Endangered Species Act (ESA). Puget Sound Chinook and other species have been listed as “Threatened” under ESA. This federal law requires development of a recovery plan in response to listing. In the case of Puget Sound Chinook, the recovery plan was developed through the “Shared Strategy,” in which federal, state, tribal and local governments collaborated with local stakeholders to develop plans for recovery. The resulting Puget Sound Salmon Recovery Plan calls out the following goals:

- Delisting of species. This is the actual requirement of ESA and pertains specifically to the Evolutionarily Significant Unit (ESU). In reference to salmon, the ESU refers to North Fork Chinook and South Fork Chinook – wild fish, in other words.

- Obtaining a harvestable surplus of fish, allowing restoration of the meaningful exercise of tribal fishing rights. This goal is supplemental to ESA, and is intended to implement the federal trust responsibility to the Tribes. According to the National Marine Fisheries Service (NMFS), this goal can be met primarily met with hatchery fish.

This undertaking and its relationship to water resource planning has proven especially complex.

The Puget Sound Salmon Recovery Plan indicates two state laws designed to implement protection and recovery of the listed species:

- Salmon Recovery Act. RCW 77.85. Under this statute, the County served as Lead Entity (replaced by the Salmon Recovery Board in 2004), presiding over a Citizens' Habitat Committee that recommended projects to improve fish habitat. In June 2005, this process produced the WRIA 1 Salmonid Recovery Plan, which deferred to the Watershed Management Plan – discussed below - for establishing instream flow requirements.
- Watershed Planning Act. RCW 90.82. The County has operated under this statute as Lead Agency since 1998. A central feature of the Watershed Planning Act is the establishment of a Planning Unit responsible for directing planning and approving a Watershed Management Plan, which is then submitted to the County Council for adoption. The WRIA 1¹ Planning Unit included local governments and a broad range of stakeholders in an open and inclusive process that addressed water quantity, water quality, habitat and instream flows. The WRIA 1 Planning Unit approved and the Council adopted the WRIA 1 Watershed Management Plan in 2005. A supplemental planning document, the Detailed Implementation Plan, was similarly approved and adopted in 2007.

PROBLEMS

The process of responding to the myriad requirements of these and other federal and state requirements has been and continues to be exceptionally intricate, costly and time-consuming. The County's numerous actions taken under these statutes and enactments would constitute important "measures" as contemplated under RCW 36.70A.070(5)(c)(iv), but are not clearly called out in the County's comprehensive plan.

Another problem is that the County is no longer complying with the Watershed Planning Act.

- Watershed planning is now being directed by a Joint Board, which has no role in watershed planning under RCW 90.82.
- The Joint Board has absorbed Planning Unit functions.
- The Joint Board is not a separate legal entity but nonetheless has its own budget derived from monies appropriated prior to 2003. This violates the County Charter on lapsed appropriations.

¹ The Department of Ecology (DOE) has organized the state into Water Resource Inventory Areas or WRIAs. Most of Whatcom County is in WRIA 1.

- The Planning Unit is designated as the entity responsible for directing watershed planning in RCW 90.82 and adopted watershed plans, but has not met since June 30, 2009.
- Stakeholders who were intended to be involved in the process have been excluded.

Under the Watershed Planning Act, the Planning Unit is the cornerstone of local response to ESA requirements, responsible for developing plans to address water quantity, water quality, habitat and instream flows – but the Planning Unit has been rendered inoperative in WRIA 1. Actions taken in violation of the Watershed Planning Act cannot constitute legitimate measures to protect water resources under GMA.

RECOMMENDATIONS

The County must coordinate planning for land use and water resources to ensure that these programs are cohesive under applicable laws. To accomplish that integration, comprehensive plan policies must be revised to make them fully consistent with state law on water resources.

These policies must include realistic statements that mirror the actual complexity of what is required to determine water availability and protect water resources. Existing policies which make assumptions or include statements not well grounded in fact should be eliminated.

The policies must signify the connection between planning for land use and planning for water resources, and accurately reflect the processes establishing these relationships.

The new policies should state that the County will protect its water resources consistent with the GMA by adequately funding and fulfilling its responsibilities under the Watershed Planning Act, Salmon Recovery Act, Water Resources Act, Groundwater Code and further applicable provisions of Title 90 RCW and other laws.

The new County comprehensive plan policies should emphasize knowledge and solution based decision making as necessary to achieve meaningful water resource protection and water availability. Processes emanating from state laws on water resource planning must be embedded within new County comprehensive plan policies. County actions taken pursuant to these laws must be clearly identified as “measures” within the meaning of that term under GMA.

A process consistent with existing state water resource laws should be identified in the new County comprehensive plan policies for achieving the above described objectives. This process should be based upon a fully funded and functioning Planning Unit. Part of the described process should include a policy statement that the Planning Unit will be restored, properly funded and allowed to carry out its full function under the Watershed Planning Act.

The finding set forth in RCW 90.82.010, cited below, should be incorporated as one or more County comprehensive plan policies.

“The legislature finds that the local development of watershed plans for managing water resources and for protecting existing water rights is vital to both state and local interests. The local development of these plans serves vital local interests by placing it in the hands of people: Who have the greatest knowledge of both the

resources and the aspirations of those who live and work in the watershed; and who have the greatest stake in the proper, long-term management of the resources. The development of such plans serves the state's vital interests by ensuring that the state's water resources are used wisely, by protecting existing water rights, by protecting instream flows for fish, and by providing for the economic well-being of the state's citizenry and communities. Therefore, the legislature believes it necessary for units of local government throughout the state to engage in the orderly development of these watershed plans."

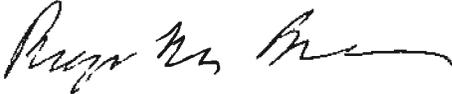
All elements of the comprehensive plan must be brought into harmony with the new water resource policies.

The County must provide the leadership for this process.

- Parties holding meaningful water rights of their own have a built-in conflict of interest which no amount of good intentions can cure. It is essential to the credibility of the process that leadership come from an entity without direct legal interests of its own to protect.
- In addition to having been designated Lead Agency under the Watershed Planning Act, the County has vast experience dealing with controversial issues such as land use and - very important – no significant water rights of its own.
- Finally, because only the County can bring its own Comprehensive Plan into GMA compliance, it must lead the effort at the Planning Unit to accomplish the objectives of Watershed Planning.

Recently, the County Executive publicly endorsed return of the Planning Unit and a policy resolution calling for restoration of the Planning Unit has been introduced and is scheduled for action on July 9, 2013. The policy resolution, however, was introduced before the GMHB issued the subject FDO. The policy resolution should be revised to recognize the importance of a functional Planning Unit in addressing the issues raised in the FDO. Proposed changes to the policy resolution are shown in the attached redline version.

Sincerely,



Roger M. Brown
Water Districts Caucus Planning Unit Representative

cc: Councilmembers
Jack Louws
Karen Frakes
Dan Gibson
Sam Ryan
Chris Brueske
Planning Commission
Water Districts Caucus
Acme Water District #18

Birch Bay Water and Sewer District
Columbia Valley Water District
Glacier Water District
Lake Whatcom Water and Sewer District
Point Roberts Water District #4
Samish Water District
Whatcom County Water District #2
Whatcom County Water District # 7
Whatcom County Water District # 13

PROPOSED BY: BRENNER

SPONSORED BY: BRENNER, KNUTZEN, KREMEN

INTRODUCED: MAY 21, 2013

RESOLUTION NO. 2013-_____

**RESOLUTION RESTORING THE WRIA 1 PLANNING UNIT TO ASSIST THE WHATCOM
COUNTY COUNCIL REGARDING WATER RESOURCES**

WHEREAS, in 1998, the Washington State Legislature adopted ESHB 2514, 90.82 RCW, the Washington State Watershed Planning Act (WPA); and

WHEREAS, RCW 90.82.005 states, "The purpose of this chapter is to develop a more thorough and cooperative method of determining what the current water resource situation is in each water resource inventory area of the state and to provide local citizens with the maximum possible input concerning their goals and objectives for water resource management and development"; and

WHEREAS, RCW 90.82.005 states, "The legislature finds that the local development of watershed plans for managing water resources and for protecting existing water rights is vital to both state and local interests. The local development of these plans serves vital local interests by placing it in the hands of people: Who have the greatest knowledge of both the resources and the aspirations of those who live and work in the watershed; and who have the greatest stake in the proper, long-term management of the resources. The development of such plans serves the state's vital interests by ensuring that the state's water resources are used wisely, by protecting existing water rights, by protecting instream flows for fish, and by providing for the economic well-being of the state's citizenry and communities. Therefore, the legislature believes it necessary for units of local government throughout the state to engage in the orderly development of these watershed plans"; and

WHEREAS, RCW 90.82.030 (1) states, "All WRIA planning units established under this chapter shall develop a process to assure that water resource user interests and directly involved interest groups at the local level have the opportunity, in a fair and equitable manner, to give input and direction to the process"; and

WHEREAS, on May 5, 1998, Whatcom County Council unanimously adopted Resolution 1998-024 whereby Whatcom County affirmed its duty under RCW 90.82 to serve as "watershed planning lead agency" among the initiating governments; and

WHEREAS, on December 22, 1999, the WRIA 1 Planning Unit ("Planning Unit") was formed through adoption of the Watershed Management Project Planning Unit Process and Procedural Agreement. The Planning Unit included a broad range of water resource user interests and directly involved interest groups. Governmental participants included Whatcom County, PUD No. 1 of Whatcom County, the City of Bellingham, the State Department of Ecology, the Small Cities Caucus, the Water Districts Caucus, the Diking and Drainage Districts Caucus and the Port of Bellingham. Non-governmental participants included the following caucuses: agriculture, fishers, forestry, land development, environmental, private well owners and non-municipal water systems; and

WHEREAS, in March, 2000 the Planning Unit approved WRIA 1 Watershed Management Project Scope of Work document, which specified that the scope of planning in WRIA 1 included water quantity, water quality, habitat and instream flows, as provided in RCW 90.82.060(6); and

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WHEREAS, in 2005 the Planning Unit approved, and Whatcom County adopted, the WRIA 1 Watershed Management Plan (WMP); and

WHEREAS, in 2007 the Planning Unit approved and Whatcom County adopted the WRIA 1 Detailed Implementation Plan (DIP), which was required pursuant to RCW 90.82.043; and

WHEREAS, both the WMP and DIP called for the Planning Unit to continue functioning to address without limitation instream flows and WMP updates; and

WHEREAS, Whatcom County Council has consistently recognized that review and approval of watershed plans and plan amendments shall be conducted by the Planning Unit in a continuous improvement process in the manner provided for by the Council-adopted WMP and DIP; and

WHEREAS, the Planning Unit has not met since June 30, 2009 and is consequently unable to carry out its role as contemplated in the adopted WMP and DIP; and

WHEREAS, the Growth Management Hearings Board (Case No. 12-2-0013 Final Decision and Order June 7, 2013) has directed the County to implement specific measures to protect water quantity and quality; and

WHEREAS, said Final Decision and Order (FDO) specified a Compliance Due date of December 4, 2013. The FDO specified a due date of December 18, 2013 for a Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record; and

WHEREAS, restoration of a properly funded and fully functioning Planning Unit will assist the County in responding to the FDO and GMA requirements for protection of water resources; and

WHEREAS, Whatcom County Charter states in Section 2.20 (c) that the legislature has the power to “establish, abolish, combine and divide by ordinance, non-elective administrative offices and executive departments and to establish their powers and responsibilities”; and

WHEREAS, Whatcom County Charter states in Section 2.20 (d) that the legislature has the power to “adopt by ordinance comprehensive plans, including improvement plans for the present and future development of the county,” and further, that “The enumeration of particular legislative powers shall not be construed as limiting the legislative powers of the County Council.”

NOW, THEREFORE BE IT RESOLVED:

Section 1: Finding. The Council finds that the Planning Unit is the advisory board established and responsible for development of WRIA 1 water resource plans under RCW 90.82, including without limitation, development of instream flow recommendations, and which is fully representative of the interests of local citizens in WRIA 1.

Section 2: Council Authority. The County Council has sole authority under Chapter 90.82 to approve and adopt by ordinance WRIA 1 water resource plans and plans necessary for implementation thereof.

Section 3: Request for Information. The County Council requests that the County Executive report regularly to the Whatcom County Council, the legislative branch of the WRIA 1 Lead Agency on the status of the Planning Unit.

Section 4: Cooperation and Leadership of County Officials. It is the policy of the County Council that Whatcom County shall support the Planning Unit as necessary to fulfill all its functions and obligations. It is also the policy of the County Council that fulfillment of the Planning Unit's functions and obligations under the Watershed Planning Act will support County compliance with its GMA responsibilities pertaining to water resources.

Section 5: Governance and Structure. The County Council supports a Planning Unit that meets regularly and conducts all meetings under the Open Public Meetings Act. It is the policy of the County Council that the Planning Unit shall review its adopted governance structure and operating rules as it deems necessary, so as to maintain a process to assure that water resource user interests and directly involved interest groups at the local level have the opportunity, in a fair and equitable manner, to give input and direction to the process.

Section 6: Review and Approval of Watershed Plans. The County Council requests that the Planning Unit regularly review and approve assessments of the current water resource situation, including but not limited to water availability, instream flow, water quality and habitat. As provided in the Watershed Planning Act, amendments to the WMP will be submitted to Whatcom County Council for approval.

Section 7: Coordinate with salmon recovery board. The County Council requests that the Planning Unit review the progress of salmon recovery efforts and provide input to the salmon recovery board.

Section 8: Review and Comment on Water Resource Issues. The Whatcom County Council finds that the Planning Unit, by virtue of its expertise, experience and inclusiveness, can add significant value for the Council and Executive by providing review and recommendations of water resources issues that come before the Council, including water resource issues relating to compliance with the GMA. The Council requests that the Planning Unit provide such review.

APPROVED this _____ day of _____, 2013

ATTEST:

**WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON**

Dana Brown-Davis, Clerk of the Council

Kathy Kershner, Council Chair

APPROVED AS TO FORM:

Civil Deputy Prosecutor