

NO. 50567-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MIKE HAMILTON; HAMILTON CORNER I, LLC,

Appellants (Petitioners)

v.

**POLLUTION CONTROL HEARINGS BOARD;
WASHINGTON STATE DEPARTMENT OF ECOLOGY;
CITY OF NAPA VINE,**

Respondents

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS	<u>Page</u>
1. INTRODUCTION	1
2. ASSIGNMENTS OF ERROR	2
3. ISSUES RELATED TO ASSIGNMENTS OF ERROR	3
4. STATEMENT OF THE CASE	4
4.1 Origins of Groundwater Certificate 1726	4
4.2 Application to Change Groundwater Certificate 1726	6
4.3 Publication of Notice for Napavine’s Application	7
4.4 Preliminary Permit for Change of Certificate 1726	8
4.5 Report of Examination to Change Certificate 1726	9
4.6 Administrative Appeal	10
4.7 Appeal to Superior Court	11
4.8 Due Process and Constitutional Rights Violations	12
5. SUMMARY OF ARGUMENT	12
6. ARGUMENT	15
6.1 The PCHB had jurisdiction under	15
RCW 43.21B.110(1)(d) to address Petitioners’ Appeal of Ecology’s 2/5/16 letter.	
6.2 The PCHB had jurisdiction to address Petitioners’	18
Appeal of Ecology’s 2/5/16 letter as an “as applied” constitutional challenge.	
6.3 As an appeal of a summary judgment dismissal,	19
Appellants’ evidence is entitled to a standard that assumes facts in favor of the dismissed party.	

	<u>Page</u>
6.4 Appellants’ rights were violated due to Ecology’s failures to perform duties required by law:	22
6.4.1 Ecology’s failure to use the “duty to investigate” standard to review Napavine’s application, as required by RCW 90.03.290(1), is a statutory violation, and has resulted in a deprivation of Appellants’ due process rights.	24
6.4.2 Ecology’s failure to require Napavine to correct its application by obtaining Appellants’ signatures renders the application defective, and deprives Appellants of their due process rights.	28
6.4.3 Upon cancellation of Napavine’s Preliminary Permit in 2011 by operation of RCW 90.03.290(2), Ecology had no authority to continue processing Napavine’s application.	30
6.4.4 Ecology and Napavine’s failure to publish complete and correct legal descriptions for the notice of Napavine’s change application and its subsequent amendments, have rendered Napavine’s application and ROE defective, and has resulted in a deprivation of Appellants’ due process rights.	35
6.4.5 Ecology’s failure to provide any direct or due process notice to Appellants of agency actions concerning changes to Water Certificate 1726 is a violation of Appellants’ due process rights.	41
6.5 Ecology is required by RCW 90.03.270 and its own Department Guidelines to return Napavine’s defective application back to the applicant for correction.	47
7. ATTORNEY FEE PROVISIONS	48
8. CONCLUSION	49

APPENDIX – cited pages from the Administrative Record

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Table of Cases:</i>	
<i>Asotin County Port Dist. v. Clarkston Cmty. Corp.</i> , 1 Wn. App. 1007, 472 P.2d 554 (1970)	39-41
<i>Carlstrom v. State</i> , 103 Wn.2d 391, 694 P.2d 1 (1985)	41-42
<i>City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)	14
<i>Department of Ecology v. Adsit</i> , 103 Wn.2d 698, 694 P.2d 1065 (1985)	41
<i>Department of Ecology v. Acquavella</i> , [In Re Determination of Rights to Use of Surface Waters Etc.] 100 Wn.2d 651, 674 P.2d 160 (1983)	41
<i>Eastlake Community Council v. Roanoke Assoc.</i> , 82 Wn.2d 475, 513 P.2d 36 (1973)	30, 35
<i>Fort v. Dep’t of Ecology</i> , 133 Wn.App 90, 135 P.3d 515 (2006)	14
<i>In re Puget Sound Power & Light Co.</i> , 28 Wn.App. 615, 625 P.2d 723 (1981)	41-42
<i>Jensen v. Department of Ecology</i> , 102 Wn.2d 109, 685 P.2d 1068 (1984)	41-42
<i>Lauer v. Pierce County, et al.</i> , 173 Wn.2d 242, 267 P.3d 988 (2011)	29-30
<i>Madison v. McNeal</i> , 171 Wash. 669,19 P.2d 97 (1933).....	40
<i>Michael v. Mosquera-Lacy</i> , 165 Wn.2d 595, 200 P.3d 695 (2009).....	19
<i>Mission Springs, Inc., v. City of Spokane</i> , 134 Wn.2d 947, 954 P.2d 250 (1998)	49

	<u>Page</u>
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306, 94 L.Ed. 865, 70 S. Ct. 652 (1950)	41, 43
<i>Pierce County v. Evans</i> , 17 Wn. App. 201, 563 P.2d 1263 (1977)	38-40
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004)	14
<i>Sheep Mountain Cattle Co. v. Dep't of Ecology</i> , 45 Wn. App. 427, 726 P.2d 55 (1986)	41-42
<i>Skagit Hill Recycling, Inc., v. Skagit County</i> , 162 Wn. App. 308, 253 P.3d 1135 (2011)	19
<i>Wenatchee Reclamation Dist. v. Mustell</i> , 102 Wn.2d 721, 684 P.2d 1275 (1984)	41-42
 <i>Laws, Statutes, Regulations, Civil Rules:</i>	
42 U.S.C. § 1983	49
RCW 4.84.350	49
RCW 43.21B.110	1, 12, 15, 16-17
RCW 43.21B.310(4)	15
Chapter 90.03 RCW	1, 23, 48
RCW 90.03.250 – 90.03.340	6
RCW 90.03.270	11, 14, 17, 26-27, 29, 47-48
RCW 90.03.280	37-39, 42
RCW 90.03.290	6, 8, 21, 23-24, 27, 30-32, 34, 46-48
RCW 90.03.380	5, 20, 25
Chapter 90.44 RCW	1, 23
RCW 90.44.020	23
RCW 90.44.060	6
RCW 90.44.100	6, 8, 21, 32, 37-39, 45-46
RCW 90.44.250 - 90.44.340	6
RCW 4.84.350	49

	<u>Page</u>
Chapter 508-12 WAC	1, 11
WAC 508-12-080 – 508-12-210	23
WAC 508-12-130	29
WAC 508-12-220.....	23
WAC 508-12-400	11, 16
RAP 18.1	48

Other Authority:

Pollution Control Hearings Board Decisions

Devine v. Ecology, PCHB No. 09-075 and 09-082,
Order Granting Summary Judgment, (4/9/10)28-29, 46

Hagman v. Dept. of Ecology, PCHB No. 14-016c,
Order on Motions, 12/13/1415-16

Rasmussen v. Puget Sound Clean Air Agency,
PCHB No. 12-091, Order on Motions, 1/14/1318

Steensma v. Dep’t of Ecology, PCHB No. 11-053,
Order Granting Summary Judgment to Ecology, 9/8/11.....16-17

1. INTRODUCTION

Appellants bring this appeal to redress due process violations that are resulting in the taking of their water rights. The Department of Ecology and the City of Napavine are in the process of transferring Appellants' water rights under Groundwater Certificate 1726 to the City, but have done so without the consent of Appellants and without having provided any actual or direct notice to Appellants that their water rights were being applied for transfer to Napavine, and without paying compensation to Appellants.

There has been a long series of errors by Ecology in reviewing and processing Napavine's application to transfer Certificate 1726 which violate multiple statutes in the Water Code at Chapter 90.03 RCW; violate Regulation of Groundwaters at Chapter 90.44 RCW; are noncompliant with Chapter 508-12 WAC; and violate Appellants' constitutional rights.

Respondents' contend they have no obligation to correct the errors because Appellants did not protest a 2007 newspaper publication or appeal a 2012 Report posted on Ecology's website, despite no direct or due process notification of these actions having ever been provided to Appellants. If the Trial Court and Pollution Control Hearings Board's decisions are allowed to stand, this will set a chilling precedent that will open the door to water right transfer schemes that take the property of

unsuspecting water right holders without due process notice or compensation.

2. ASSIGNMENTS OF ERROR

- 2.1 The PCHB erred by determining Ecology's February 5, 2016 letter did not relate to the issuance or modification of a permit or certificate and was not reviewable under RCW 43.21B.110(1)(d).
- 2.2 The PCHB erred by failing to review Petitioners' appeal of Ecology's February 5, 2016 letter as an "as applied" constitutional challenge to review procedural and due process defects.
- 2.3 The Trial Court erred by deciding that Petitioners were not entitled to relief under RCW 34.05.570(3)-(4) from the PCHB's Order on Summary Judgment.
- 2.4 The Trial Court erred by failing to find that Ecology violated the constitutional rights of Petitioners through its failures to perform duties required by law to be performed:
 - 2.4.1 The Trial Court erred in determining Ecology's "good faith" acceptance of Napavine's water transfer/change application was proper, instead of its "duty to investigate" the application as required by RCW 90.03.290(1).
 - 2.4.2 The Trial Court erred by determining Ecology's acceptance of Napavine's water transfer/change application which failed to contain Petitioners' signatures did not render the City's application void or invalid.
 - 2.4.3 The Trial Court erred by determining the cancellation of Napavine's Preliminary Permit in 2011, by operation of RCW 90.03.290(2), did not terminate Ecology's authority to continue processing Napavine's application.

2.4.4 The Trial Court erred by determining the erroneous legal descriptions in both the 2007 newspaper publication to change/transfer Certificate 1726 and the 2012 web-posting of the Report of Examination provided sufficient legal notice to Petitioners and granted agency authority for the actions that the notices claimed to describe.

2.4.5 The Trial Court erred by determining that Ecology and Napavine had no duty to provide due process notice to Petitioners to inform them their water rights under Certificate 1726 were being considered for change and transfer to the City of Napavine.

2.5 The Trial Court erred by failing to grant the relief Petitioners sought under RCW 34.05.570(4): an Order to Ecology to return Napavine’s defective application back to the applicant, as required by RCW 90.03.270.

3. ISSUES RELATED TO ASSIGNMENTS OF ERROR

3.1. Did the PCHB have jurisdiction under RCW 43.21B.110(1)(d) to address Petitioners’ appeal of Ecology’s letter-decision dated February 5, 2016?

3.2 Did the PCHB have jurisdiction under the authority of an “as applied” constitutional challenge to address Petitioners’ issues concerning Ecology’s procedural and due process defects in processing Napavine’s application?

3.3 Was the Trial Court required to grant Petitioners relief under RCW 34.05.570(3)-(4) from the PCHB’s Order, which Order failed to address prima facie violations of Petitioners’ constitutional rights?

3.4 Were Appellants’ rights violated due to Ecology’s failures to perform duties required by law, including:

3.4.1 Ecology’s failure to use the “duty to investigate” standard to review Napavine’s application as required by RCW 90.03.290(1);

3.4.2 Ecology's failure to require Napavine to obtain Petitioners' signatures on the City's applications;

3.4.3 Ecology's failure to terminate the processing of Napavine's application when the City's preliminary permit was canceled in 2011 by operation of RCW 90.03.290(2);

3.4.4 Ecology's failure to require publication of complete and correct legal descriptions in the notice of Napavine's change application and Report of Examination for Certificate 1726; and/or

3.4.5 Ecology's failure to neither require nor provide any direct or due process notice to Petitioners of agency notices and actions concerning changes to Water Certificate 1726.

3.5 Is Ecology required by RCW 90.03.270 to return Napavine's defective application back to the applicant?

4. STATEMENT OF THE CASE

4.1 Origins of Groundwater Certificate 1726

In 1952, Appellant Mike Hamilton's Grandfather, Frank B.

Hamilton, applied for and subsequently procured the water right that is the subject of this appeal (CP 159), referred to herein as Certificate 1726¹.

The later construction of Interstate 5 through Lewis County bisected the Hamilton land. A review of the 1952-1954 water records identify that at least one of the original three wells and more than half of the place-of-use

¹ Petitioners' original appeal also includes Surface Water Certificate 5605; however, on the basis that Ecology conceded error because no public notice had been published for that change application (CP 16, 43-44) and stated it would voluntarily rescind the Change Application for 5605 (CP 128), the issue was not further briefed.

acreage from Frank Hamilton's original water certificate 1726 are located on what is now the east side of I-5 (CP 129-130, 154-160).

Al Hamilton, the son of Frank Hamilton, and Appellant Mike Hamilton's Father, continued to beneficially use the water from Certificate 1726 on his land lying on the east side of I-5. This land along with its accompanying water rights were passed from Frank Hamilton to Al Hamilton and now to Appellant Mike Hamilton and other Al Hamilton heirs operating as Hamilton Corner I LLC. The Frank Hamilton land on what is now on the west side of Interstate 5 was eventually passed to Betty Hamilton and other heirs operating as Hamilton's Walnut Shade LLC. All of the subject lands are now in the city limits of Napavine.

Although the original Frank Hamilton land has been bequeathed to different family members, the water right is undivided. Per RCW 90.03.380, water rights attach to and run with the land. Ecology has attempted to confuse and complicate, and asserted in briefing below that Appellants have not proven their right to Certificate 1726, yet Ecology produced no evidence to indicate any prior enacted changes to, or relinquishment of, any of Appellants' water rights under 1726 or any other Certificate. Respondents provided nothing to contradict the information Petitioners submitted into the record explaining and illustrating the geographic boundaries of Certificate 1726 overlaid onto their property (CP

129-130, 154-160; AR 357-358). Napavine also agrees that Appellants are successors in interest to the land previously owned by Frank Hamilton (CP 87, 19). In any event, it is Napavine who is the applicant to change the water right and had the responsibility to submit a correct application, and prove that other water rights would not be impaired because of the City's change application (RCW 90.44.100(2)(c)-(d)).

4.2 Application to Change Groundwater Certificate 1726

In 2004, Napavine submitted its change application which contained Betty Hamilton's signature indicating that she owned all of the land at the existing points of withdrawal and places of use of the water right to be transferred (AR 126-128)². Ecology accepted this information on "good faith" (AR 6) instead of the "duty to investigate" the application as required both by RCW 90.03.290³ and Ecology's own regulatory procedures to review and verify an application upon submittal to confirm basic ownership information (AR 90-93, 334).

Had Ecology reviewed its own agency records for Water Certificate 1726 and easily-available assessor property information, it would have seen that Betty Hamilton did not own all of the place-of-use

² Excerpts from the cited Administrative Record (AR) are appended hereto.

³ RCW 90.44.060 clarifies that applications to appropriate groundwater utilize the surface water application procedures in RCW 90.03.250 – 90.03.340.

land or all of the original withdrawal points, which instead was owned by Hamilton Corner I LLC (CP 129-130, 154-160; AR 357-358). Ecology would have also seen in its records that there were no previous changes to Certificate 1726 to indicate any transfer of ownership or relinquishment of Appellants' rights. Respondents offered no evidence to the contrary.

Ecology's procedure for processing water change applications requires signatures on the application from all persons holding an ownership interest in either the water right or the land on which the well(s) or place-of-use is located that is sought to be changed by the transfer application. In fact, Ecology's policy states that an "application or form without appropriate signatures cannot be processed." (AR 90). Appellants contend that without their signature on Napavine's application to change the water right, the City's application was invalid and Ecology had no authority to begin processing it.

4.3 Publication of Notice for Napavine's Application

The published notice in 2007 of Napavine's application to transfer Water Certificate 1726 (AR 271) contained an incomplete legal description by omitting the Township and Range of the location that the water right was proposed to be transferred to. Ecology does not deny this error. The notice also identified that 27 irrigated acres were the subject of the change application even though the original Certificate 1726 is for a

total of 57 irrigated acres (CP 159). Ecology does not deny that the published notice to change the water right identified 27 acres, not 57 acres.

4.4 Preliminary Permit for Change of Certificate 1726

In 2008, Ecology issued Napavine a preliminary permit to withdraw the water necessary for testing to identify impacts (AR 273-277). Per RCW 90.44.100(2)(d), the requested change to Certificate 1726 must not impair other existing rights. Under RCW 90.03.290(2)(a), these preliminary permits expire in three years. In 2011, the City was specifically notified by letter that its permit for the change application had expired, was canceled, and explicitly told it must resubmit its application (CP 296). Ecology states this letter was a ministerial error (CP 118-119), but offered no proof to support that claim, produced no documentation that Napavine had fulfilled all of the preliminary permit requirements, and in particular provided no information that showed impacts to Appellants' water rights were analyzed at all (CP 48; AR 63-69 – wherein the ROE's reference to "Hamilton" refers only to the Betty Hamilton/Walnut Shade wells and water usage). Ecology identified no authority that allows any alternative interpretation of RCW 90.03.290(2)(a) that could authorize reinstatement of an expired permit. As such, the subsequently-issued Report of Examination is also invalid since it is based upon an expired and canceled permit.

4.5 Report of Examination to Change Certificate 1726

A year past the cancellation of the preliminary permit, Ecology issued the Report of Examination (“ROE”) (AR 56-73), as if Napavine’s preliminary permit had not already been canceled (CP 296). The ROE also has errors in its legal description: Not only does it consist of a different legal description and acreage size than what was published in the 2007 newspaper notice, but it also misidentifies the new Well 6 location (see AR 71, stating Well 6 is in Section 9, T.13N, R.2W, but that location is several miles north of Napavine, see CP 136). The Report of Examination fails to authorize water withdrawal from Well 6, and does not authorize any usable point of withdrawal.

Appellants received no notice of the Report of Examination either, even though it purports to authorize the City to begin water withdrawal using all of the Certificate 1726 water rights that Ecology deemed were available from that water right (AR 71), and as such would leave nothing remaining for Appellants’ undivided share of this water right. This is a taking of Appellants’ water right (or could result in an over-appropriation of the resource). Fortunately, that has not yet fully occurred, because (1) Napavine did not begin to use any of the water from this water right until 2015 after construction of its new water system was completed (AR 303); (2) Napavine has yet to commence full use of the water due to water

discoloration problems with the well water source of the changed withdrawal point location⁴; and (3) Presently the ROE is only an inchoate right for which the City must first prove it is beneficially using the water, which is not expected until at least Year 2022 (AR 303). Perfection of the changed water right would not occur until after a Superseding Certificate is recorded with the Auditor (AR 344-345).

4.6 Administrative Appeal

Appellants had no idea anything that could affect their undivided share of Certificate 1726 was occurring until 2015 during the course of discussions with the City about Appellants' other water rights which are not at issue here. Napavine's attorney told Appellants' attorney to take this matter up with Ecology (AR 11). The staff of Appellants' attorney proceeded to contact Ecology about what Appellants assumed was a misunderstanding (AR 8-11). However instead of a meeting to discuss the matter, Ecology sent a letter via email on February 5, 2016 (AR 5-6) identified as Ecology's "conclusion" (AR 7) and stated that because Appellants had not brought their concerns at the time the application was published in 2007 or ROE posted online in 2012, that no corrections would be made and Ecology's decision would stand (AR 6).

⁴ Refer to *Hamilton Corner I LLC v. City of Napavine*, Court of Appeals No. 49507-4-II.

Appellants timely appealed Ecology’s 2/5/16 letter-decision to the PCHB under the authority of RCW 43.21B.110(1)(d), on the basis that Ecology’s letter and accompanying email was a final decision that “pertained to” the issuance or modification of a permit and certificate, and “related decisions” made pursuant to Chapter 508-12 WAC⁵. Respondents sought and prevailed on summary judgment.

4.7 Appeal to Superior Court

Appellants next appealed the PCHB’s Order on Summary Judgment to the Superior Court, as authorized by RCW 34.05.570(3), and further appealed under RCW 34.05.570(4) of an “other agency action ... not reviewable under subsection ... (3)” The “other agency action” appealed by Petitioners was Ecology’s refusal to perform a duty required by law to return Napavine’s defective application back to the Applicant, per RCW 90.03.270 (CP 6-7; VR 7-9) wherein Ecology’s decision was conveyed through the Department’s 2/5/16 letter (AR 5-7).

⁵ The hearings board shall only have jurisdiction to hear and decide appeals from the following decisions of the department ... (d) ... the issuance, *modification* ... of any *permit, certificate*, or license by the department.... RCW 43.21B.110(1) (emphasis added).

All final written decisions of the department of ecology *pertaining to permits ... and related decisions* made pursuant to this chapter [Administration of Surface and Groundwater Codes] *shall be subject to review* by the pollution control hearings board in accordance with chapter 43.21B RCW. WAC 508-12-400 (emphasis added).

4.8 Due Process and Constitutional Rights Violations

Ecology's erroneous processing of Napavine's application and continued refusal to return Napavine's defective application has caused violations of Appellants' constitutional rights. Appellants are not merely the "general public" for whom a newspaper publication, website posting, and inaccurate legal descriptions may afford adequate notice. As the owners of land in the place-of-use and withdrawal points of the water right sought to be changed, Appellants were necessary signatories to Napavine's water right change application (CP 90). Also, as holders of the subject undivided water right, they are to receive direct and correct notice of Ecology's actions that could affect their ownership interests in the water right proposed to be transferred to Napavine (discussed *infra* at pp. 38-43).

5. SUMMARY OF ARGUMENT

The Pollution Control Hearings Board declined its authority under RCW 43.21B.110(1)(d) to consider Petitioners' appeal of Ecology's 2/5/16 letter which conveyed the Department's decision that it would not be making any corrections to Napavine's defective application and ROE. The PCHB also declined to consider Petitioners' Petition for Review as an "as-applied" constitutional challenge stemming from Ecology's numerous errors in reviewing and processing Napavine's application.

The PCHB asserted it was without jurisdiction to hear Petitioners' appeal, and on that basis dismissed the case without taking any oral argument, not even on the summary judgment motions, and without making any decision on Petitioners' issues other than deciding it did not have jurisdiction to consider the matter (CP 9-17).

After first exhausting administrative remedies (CP 141-143; VR 9-10) by petitioning the PCHB, Petitioners (now the Appellants) appealed to Superior Court, both under RCW 34.05.570(3) to reverse the PCHB's Order on Summary Judgment, as well as under the authority of RCW 34.05.570(4) which sought review of "other action agency." The "other agency action" on appeal was Ecology's decision, rendered through its February 5, 2016 letter, that no corrections to Napavine's application and subsequent Report of Examination would be made (CP 6-7; VR 7-9).

Regardless of the PCHB's ruling that it did not have jurisdiction, per RCW 34.05.570(4) the Trial Court "shall" review "agency action not reviewable under [RCW 34.05.570](2) or (3)", and in particular shall review other agency actions where a person's "rights are violated by an agency's failure to perform a duty that is required by law to be performed" and grant relief if the agency action is unconstitutional. The Trial Court ruled on Petitioners' issues which the PCHB had declined to hear, but

made errors of law and errors applying facts to the law in its consideration of Petitioners' appeal.

The defects in Napavine's application and Ecology's processing of it have deprived Appellants of due process and have commenced the taking of their water rights. The Petitioners sought relief under the authority of RCW 34.05.570(3)-(4), for the Trial Court to order Ecology to return Napavine's defective application back to the City for correction as required by RCW 90.03.270 (CP 6-7).

This Court has a de novo standard to review questions of law and "sits in the same position as the superior court and reviews the Board's decision by applying the standards of review in RCW 34.05.570...."

Agency action is subject to reversal if the agency's order is outside its statutory authority or jurisdiction, if the agency has erroneously interpreted or applied the law, if the agency's order is not supported by substantial evidence, or if the agency's decision is arbitrary or capricious. *RCW 34.05.570(3)(b), (d), (e), (i); Port of Seattle, 151 Wn.2d at 587-89*. Under the "error of law" standard, the court engages in a de novo review of the agency's legal conclusions. *RCW 34.05.570(3)(c), (d); City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)*.

Fort v. Dep't of Ecology, 133 Wn.App 90, 95, 135 P.3d 515 (2006).

6. ARGUMENT

6.1. The PCHB had Jurisdiction under RCW 43.21B.110(1)(d) to Address Petitioners' Appeal of Ecology's 2/5/16 letter (Issue 3.1; Error 2.1)

Ecology moved for summary judgment to dismiss Appellants' appeal to the PCHB in its entirety, asserting that the Department's February 5, 2016 letter-decision, which was transmitted as Ecology's "conclusion" (AR 7) was not an appealable decision over which the PCHB has jurisdiction under RCW 43.21B.110. The PCHB agreed with Ecology, giving several reasons, although those reasons conflict with prior decisions issued by the PCHB in other cases.

For example, the PCHB states the 2/5/16 letter was not identified as an order and contained no appeal language (CP 14). However, the PCHB's decision in a different case in 2014 acknowledged that even an email communication by itself was an appealable decision:

The fact that the email communicating Ecology's denial of Mr. Hagman's Notice of Termination did not include appeal language is not dispositive of whether the agency action at issue is appealable to the Board. While RCW 43.21B.310(4) requires that appealable decisions "shall contain a conspicuous notice to the recipient that it may be appealed only by filing an appeal with the hearings board", the failure to include this language does not divest the Board of its jurisdiction or impact whether the decision may be appealed.

Hagman v. Dept. of Ecology, PCHB No. 14-016c, Order on Motions, 12/13/14 at p. 14, fn4 (CP 175). The Board has thus identified that

omission of the appeal instruction language does not determine the communication to be a non-appealable decision reviewable by the Board.

The PCHB also cited *Steensma v. Dep't of Ecology*, PCHB No. 11-053, 9/8/11 Order Granting Summary Judgment to Ecology (CP 72-80) in its Order on Summary Judgments for the Hamilton appeal, stating that it lacks jurisdiction over an agency letter (CP 14-15). However, as discussed in the Board's Order in *Hagman, supra*, even an email communication can be an appealable decision, but more to the point in *Steensma, Id.*, the letter on appeal in that case did not pertain to the issuance or modification of a permit, certificate or related decision (CP 74), which is the actual criteria for appeal under RCW 43.21B.110(1)(d) and WAC 508-12-400 (quoted above in footnote 5).

Additionally, WAC 508-12-400 (quoted above at footnote 5) authorizes appeals under Chapter 43.21B RCW of all of Ecology's final written decisions that *pertain to* permits or *related decisions* (regardless of whether that decision is in a letter and transmitted as an email):

In fact, it is through *Steensma*, that the PCHB specifically clarified that RCW 43.21B.110(1)(d) provides authority for the Board to hear and decide appeals relating to the issuance, modification, or termination of any permit or certificate issued by the department:

RCW 43.21B.110(1)(d) authorizes the Board to hear and decide appeals *relating to* the issuance, modification, or termination of *any* permit, certificate, or license issued by the department.

Steensma v. Dep't of Ecology, PCHB No. 11-053, 9/8/11 Order Granting Summary Judgment to Ecology (emphasis added). (CP 77).

In our case, Ecology's 2/5/16 letter specifically relates to Ecology's decision to not require Napavine to correct its defective Change Application for Certificate 1726. Ecology has been processing Napavine's application even though it was rendered void upon submittal due to misrepresented facts and omission of signatures from necessary parties.

Ecology compounded these defects by issuing the ROE based on a preliminary permit that had been previously canceled by operation of law. Ecology's decision to not return Napavine's defective application back to the City, is resulting in the taking of Appellants' water rights. Appellants' request for Ecology to comply with RCW 90.03.270 is not limited by a 30-day appeal period from the published application notice or ROE issuance. RCW 90.03.270 imposes no tolling time limit after which Ecology is relieved of its duty to return a defective application back to the applicant.

The PCHB dismissed Appellants/Petitioners' appeal without considering any of these issues and without holding any hearing (not even

a motion hearing), by stating the Board had no jurisdiction over the matter, primarily because Petitioners did not file a protest within 30 days after a newspaper publication or website post of the ROE. However, Napavine's applications were void prior to publication due to false information and lack of necessary signatures, and Ecology's ROE was also invalid prior to its 4/17/12 issuance due to multiple errors in the content, notice requirements, and expiration of the preliminary permit.

6.2 The PCHB had Jurisdiction to address Petitioners' Appeal of Ecology's 2/5/16 letter as an "as applied" constitutional challenge (Issue 3.2; Error 2.2)

Under other Board cases, the PCHB has recognized its ability to discern procedural defects and consider an "as applied" challenge:

When ruling on an "as applied" challenge, the Board limits its jurisdiction to addressing procedural defects or issues that arise in particular cases. The Board also has jurisdiction over whether a challenged agency action complied with applicable laws. The Board's consideration of an agency's compliance with statutes and regulations may, accordingly, also dispose of procedural due process claims which assert noncompliance with those laws.

Rasmussen v. Puget Sound Clean Air Agency, PCHB No. 12-091, Order on Motions, 1/14/13, at p. 9 (CP 180-196, at CP 188).

In our case, however, the PCHB first decided to not recognize Ecology's 2/5/16 letter as an appealable decision, and thus divested itself of jurisdiction to consider Petitioners' appeal, despite significant

procedural errors that have rendered Napavine's application and Ecology's issuance of the ROE void. If the PCHB's claimed lack of jurisdiction has any logic, it is because there is nothing for the Board to review since Napavine actually has no valid authorization to commence use of any water rights from Certificate 1726.

6.3 As an appeal of a summary judgment dismissal, Appellants' evidence is entitled to a standard that assumes facts in favor of the dismissed party.
(Issue 3.3; Error 2.3)

The Trial Court did not apply the proper standard of review in considering Petitioners' appeal. When Respondents disputed Petitioners' evidence, the Trial Court found for the Respondents even though the Respondents offered no proof at all to support their allegations. "When determining whether an issue of material fact exists, the court construes all facts and inferences in favor of the nonmoving party." *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). Even an Administrative Procedures Act case, as in the instant matter, this summary judgment standard still applies:

Where the original decision was on summary judgment, we must overlay the APA standard of review with the summary judgment standard. *Verizon Nw, Inc., v. Wash. Emp't Sec. Dep't*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). Accordingly, we view the facts in the record in the light most favorable to the nonmoving party.

Skagit Hill Recycling, Inc., v. Skagit County, 162 Wn. App. 308, 318, 253 P.3d 1135 (2011).

The Trial Court used an improper review standard when making its Ruling (CP 200). Appellants made a prima facie showing of evidence to support their claims, but the Trial Court instead construed all inferences in favor of Respondents who had prevailed on summary judgment.

Although Ecology has in its briefing suggested that Petitioners need to bring a quiet title action to prove their right to Certificate 1726 (CP 115), Ecology offered nothing to support that allegation:

- No party disputes that Appellants are direct descendants of Frank Hamilton, the original procurer of the water right, and own the land on which the Certificate 1726 water rights were passed from Frank Hamilton to Al Hamilton and now to Mike Hamilton operating as Hamilton Corner I LLC. A simple review of County tax and assessor records will confirm an undisputed, uninterrupted chain of title.
- No party argued any alternative interpretation of RCW 90.03.380 in which water rights attach to and run with the land.
- Ecology identified no prior change to Certificate 1726 whereby Appellants' water rights have in any way been altered or assigned.

When Petitioners pointed out Ecology's significant errors in processing Napavine's application which violated statutory requirements, Ecology provided no contravening argument or evidence:

- Ecology offered no legal argument that allowed it to accept Napavine’s application on “good faith” instead of the statutory “duty to investigate” it, per RCW 90.03.290.
- Ecology offered no legal argument for why Appellants’ signatures were not required to be included on Napavine’s application when the Department’s own regulations as interpreted by the PCHB state the application cannot be processed without signatures from all landowners (AR 67, 90). Thus, even if Ecology were “uncertain” (CP 122) about the ownership of the water right itself, it is an easily discernable fact that the Certificate 1726 water rights are appurtenant to land owned by Appellants (CP 129-130, 154-160; AR 357-358).
- No party disputed the authenticity of the Department’s 2011 letter cancelling Napavine’s preliminary permit (AR 296) and although Ecology stated in briefing that it was a ministerial error (CP 118-119), Respondents offered nothing to prove that all of the preliminary permit requirements were completed or accepted. In particular, there is an utter absence of analysis of the impacts on Appellants’ water rights. Ecology offered no legal argument relieving Napavine from the statutory requirement at RCW 90.44.100(2)(d) to assure that other existing rights not be impaired.

If the Trial Court had applied the proper standard of review and construed any one of these facts in favor of the Petitioners, then relief should have been granted to Petitioners.

6.4 Appellants' rights were violated due to Ecology's failures to perform duties required by law (enumerated below). (Issues 3.4 and subparts 3.3.1 – 3.3.4; Error 2.4 and subparts 2.3.1 – 2.3.4).

In addition to Petitioner's appeal under RCW 34.05.5470(3) requesting relief from the PCHB Order on Summary Judgment, Petitioners made an appeal to the Trial Court under the authority of RCW 34.05.570(4) - "Review of Other Agency Action" (CP 2, 6-7), wherein a person whose rights are violated by an agency's failure to perform a duty required by law to be performed may seek an order requiring performance. Appellants assert their constitutional rights have been violated by Ecology due to Ecology's failure to comply with the statutory directive to return Napavine's defective application. Appellants provided evidence showing how Napavine's application and Ecology's processing of it was defective, to the point of rendering the application invalid and void, yet Ecology, and the PCHB and Trial Court through their decisions, maintain that those errors do not need to be considered because Petitioners did not appeal the original action, despite the lack of due process notice about those actions.

Under RCW 90.03.290, Napavine’s application was required to not only comply with Chapter 90.03 RCW (and by extension to Chapter 90.44 RCW – see RCW 90.44.020⁶), but also “with the rules of the department....” Had Ecology followed its own procedures, this would have prevented the problems that have arisen. Mike Hamilton/Hamilton Corner I LLC would have had to have been personally notified because their signatures are required on Napavine’s application. Without signatures of all necessary parties, the applications are more than defective; they are void and cannot be processed. Now that Appellants have informed Ecology of these and other critical errors, Ecology is required, by both statute and its department rules, to return the defective application back to the applicant Napavine. The Water Code imposes no time limitation after which Ecology is relieved of this obligation.

⁶ RCW 90.44.020 identifies that Chapter 90.44 RCW is supplemental to Chapter 90.03 RCW. The groundwater requirements incorporate RCW 90.03.250 - .340. Similarly, WAC 508-12-220 identifies that WAC 508-12-080 – 508-12-210 apply to both surface and groundwater.

6.4.1 Ecology’s failure to use the “duty to investigate” standard to review Napavine’s application, as required by RCW 90.03.290(1), is a statutory violation, and has resulted in a deprivation of Appellants’ due process rights.
(Issue 3.4.1; Error 2.4.1)

Per RCW 90.03.290(1), Ecology has a “duty to investigate the application.” Ecology has written department Guidance protocols wherein the Water Resources staff are required to review an application, upon intake, to assure the basic information is correct, and that all parties having a controlling interest in the water right at issue have signed the application; and if all parties have not signed the application, Ecology is required to return the application back to the applicant. This was not done.

In briefing to the PCHB, Ecology submitted Declarations from a Water Resources employee attaching several Department Guidance documents that detailed Ecology’s procedures for reviewing water right/change applications upon intake. Excerpts from GUID-2040 – “Ensuring Proper Signature on Applications and Forms” (AR 090-096) are cited below (emphasis added):

This guidance applies to any application, form, or other document relating to a water right that must be signed to be accepted by the Water Resources Program.

Any application or form that requires a signature must be signed by the applicant *and other required parties to be accepted....* An application or form *without appropriate signatures cannot be processed.*

If improper signatures are discovered later, then the application will be returned.

To determine what signatures are required, it is necessary to determine who holds an interest in (1) the water right(s) involved and (2) the parcel(s) of real property involved. If there is more than one party with a controlling interest in the water right, *all* the parties should sign as the applicant.

As evidenced in its own guidelines quoted above, Ecology is required to perform a basic review of the water right to see what parcels of real property are involved in the water right and who owns those parcels, in order to determine who holds a controlling interest in the water right. Such an initial intake would involve reading the original Water Certificates to identify all of the well locations and places of use of the water, and then checking the ownership of those properties from readily available on-line assessor data (see CP 129-130, 154-160; AR 357-358).

Further, the review and processing of changes to existing water rights requires *more* analysis, not less:

Applications for change or transfer are requests to alter an attribute of an existing water use as documented by a recorded water right certificate ... (RCW 90.03.380). Change applications are processed similarly to new applications (above), but require additional analysis as outlined in the Program's policy on evaluating changes or transfers to water rights (POL 1200).

Ecology Procedures PRO-1000 (AR 334).

Had Ecology performed even a routine review of the property information (CP 152-158), it would have clearly seen that Betty Hamilton was not the owner of all of the lands in the place of use as stated on Napavine's application (AR 126-128), nor was she owner of all the groundwater withdrawal points identified in Certificate 1726 (AR 53-54). Ecology then could have required Napavine to obtain signatures from all of the necessary landowners. However regardless of the delay, per GUID-2040, "if improper signatures are discovered later, then the application will be returned." This Guidance requirement comports with RCW 90.03.270 which also requires defective applications to be returned – with no time limitation to do so.

Without signatures from all necessary parties agreeing to the application to change or transfer their water rights, Napavine lacks standing to request such a change/transfer of water rights held by others who have not consented to the change. Ecology should have rejected Napavine's applications, per its procedural requirements in PRO-1000:

Rejection

Prior to public notice, Ecology may reject an application for a number of reasons including but not limited to: ...

E. For change/transfer applications, a finding that that applicant has no standing to make the change or transfer....

If errors are discovered with the application after public notice, Ecology should consult with the applicant to correct those errors and republish public notice....

(AR 331) (emphasis added)

Similar to RCW 90.03.270, Ecology's procedures anticipate that errors can get discovered late, yet the required remedy is not to hide the error, but to correct it, no matter how late it is discovered.

Respondents' only explanation provided for why Ecology failed to conduct the normal, required application intake procedures is its repeated statement that it relied on what Napavine told them in "good faith" (AR 6, 116). Although the Trial Court concurred with Ecology that it need not "go out of its way to challenge or confirm every detail in an application" (CP 202, lines 1-2), in Appellants' case, the Department failed to check even the most basic property ownership information to compare it with the Department's water records.

A "good faith" acceptance of the submitted application is not a criterion in Ecology's procedural guidelines; it certainly does not demonstrate the "duty to investigate" standard required by the statute in the Water Code. Ecology says it would have reviewed the water right ownership if someone had informed them of a problem (CP 116); however, the duty to investigate water right ownership was required at the time the application was filed per RCW 90.03.290 and in accordance with Ecology's own Guidelines.

Both under RCW 90.03.270 and Ecology's Guidelines, such correction must be made even if an error is discovered "later". Petitioners

have informed Ecology of the errors while the ROE is still an inchoate right, but Ecology refuses to make corrections or require Napavine to comply with requirements. There is no time limit provision in these requirements that excuse Ecology of its duty to correct.

6.4.2 Ecology’s failure to require Napavine to correct its application by obtaining Appellants’ signatures renders the application defective, and deprives Appellants of their due process rights.
(Issue 3.4.2; Error 2.4.2)

As discussed in section 6.4.1 above, Ecology’s own procedures require that “all” persons having an “interest in (1) the water right(s) involved and (2) the parcel(s) of real property involved” must sign the application (AR 91). Appellants are owners of more than half of the land in the water right place-of-use, and own the land of one or more withdrawal points from the original Certificate 1726, and there is no record or evidence identifying any changes to Certificate 1726 prior to Napavine’s application. As such, under Ecology’s regulatory procedures Appellants’ signatures were required on the change application to 1726, regardless of what Napavine may have told Ecology about the ownership of the water right.

The PCHB has previously supported Ecology’s procedure to obtain all necessary signatures on water applications. In *Devine v. Ecology*, PCHB Nos. 09-075 and 09-082, the Board adamantly upheld Ecology’s

refusal to issue approval unless the application contained signatures from all of the landowners, and stated:

RCW 90.03.270 requires Ecology to return an application for a water right permit to the applicant when the application is defective because the application is incorrect or incomplete. WAC 508-12-130 requires every landowner to sign the application for a water right.

Devine v. Ecology, PCHB No. 09-075 and 09-082, Order Granting Summary Judgment, p.9 (4/9/10) (CP 59-70, at CP 67.)

Appellants' position is that Napavine's water transfer application was null and void from its inception (*void ab initio*) because it misrepresented material facts and failed to include signatures from the Appellants who, as owners of the land from which the original Groundwater Certificate 1726 waters are withdrawn and used, are necessary parties to Napavine's application to change Certificate 1726.

In a Washington Supreme Court case addressing applicants' misrepresentation of fact on their application, the Court ruled:

A permit application that is not allowed under the regulations ... and is issued under a knowing misrepresentation or omission of material fact confers no rights upon the applicant.

Lauer v. Pierce County, et al., 173 Wn.2d 242, 263; 267 P.3d 988 (2011).

The *Lauer* Court ruled that the Respondent homeowners' building permit – even though the homeowners had already relied on the permit to begin construction of their residence – to be invalid due to their misrepresentation and omission of material facts on their application. Applying the *Lauer* holding to the instant appeal, Napavine's change application should similarly be held to be invalid due to its misrepresentation of material facts. “[W]here a [] permit is found to be invalid it is void and confers no rights.” *Eastlake Community Council v. Roanoke Assoc.*, 82 Wn.2d 475, 483, 513 P.2d 36 (1973).

Ecology's written Guidance for accepting and reviewing change applications are clearly designed to provide due process notice to and participation from all landowners who even might have a basis to claim a controlling interest in the water right to be changed. Ecology inexplicably failed to use its required procedures in reviewing Napavine's application. The Trial Court's decision did not address this issue.

6.4.3 Upon the cancellation of Napavine's Preliminary Permit in 2011 by operation of RCW 90.03.290(2), Ecology had no Authority to Continue Processing Napavine's Application (Issue 3.4.3; Assignment of Error 2.4.3.)

On 4/2/08 Ecology issued a preliminary permit to Napavine to use water under Certificate 1726 for the purposes of conducting field studies

to provide additional hydrogeological information (AR 273-277).⁷ The preliminary permit letter identified several pages of studies and tests that Napavine was required to provide, and stated in bold and underlined text: “The conditions of this Preliminary Permit must be met by April 1, 2011 or Change Application CG2-GWC1726 will be canceled.” (AR 273).

Under RCW 90.03.290(2)(a), preliminary permits are not to exceed three years. The only allowance for an extension is with the approval of the Governor, and only if requested prior to the three-year expiration period:

[T]he department may issue a preliminary permit for a period of *not to exceed three years*, requiring the applicant to make such surveys, investigations, studies, and progress reports, as in the opinion of the department may be necessary. If the applicant fails to comply with the conditions of the preliminary permit, it and the application or applications on which it is based *shall be automatically canceled* and the applicant so notified. If the holder of a preliminary permit shall, before its expiration, files with the department a verified report of expenditures made and work done under the preliminary permit, which in the opinion of the department, establishes the good faith, intent, and ability of the applicant to carry on the proposed development, the preliminary permit may, with the approval of the governor, be extended, but not to exceed a maximum period of five years from the date of the issuance of the preliminary permit.

⁷ Although the Trial Court notes in its decision that Petitioners did not appeal this permit (CP 198), Petitioners knew nothing about it, nor have Respondents provided any evidence that notice of the Preliminary Permit was provided to anyone other than the applicant and agency personnel.

RCW 90.03.290(2)(a) (emphasis added). Napavine has provided no evidence that it fulfilled any of these requirements to extend the time to complete its preliminary permit.

Napavine's engineering firm submitted a report dated April 14, 2010 addressing only some of the 2008 Preliminary Permit requirements (excerpts at AR 285-294). Although the engineer indicated that analysis was done for Condition 6, he provided nothing in response to the other requirements. Napavine has provided no evidence that it submitted anything additional to respond to the preliminary permit conditions.

Particularly absent is any analysis of how Napavine's transfer of Certificate 1726 will impact Appellants. RCW 90.44.100(2)(c)-(d) prohibits the Department from issuing a water change amendment if existing rights are impaired (and Appellants hold other water rights in addition to Certificate 1726).

An amendment to construct replacement or a new additional well or wells at a location outside of the location of the original well or wells or to change the manner or place of use of the water ... [s]uch amendment shall be issued by the department only on the conditions that ... (d) *other existing rights shall not be impaired.*

RCW 90.44.100(2)(d) (emphasis added).

There was no such analysis made to find out if Appellants' water rights would be impaired even though other impacts to several other area

landowners were analyzed (see AR 63-65, 68-69 - and note that reference to “the Hamiltons” in those documents is to Betty Hamilton and by association to Hamilton’s Walnut Shade LLC properties west of I-5).

The testing required under Condition 2 of the Preliminary Permit would have reviewed hydrogeological impacts to wells located on the Hamilton Corner property, but this testing was not done:

As you will recall, I contacted you in February this year about Condition No. 2 on the preliminary permit, to monitor a non-pumped observation well in the same aquifer accessed by the new well. The nearest wells that appear to access this aquifer are over one half mile from this well and on the opposite side of the Newaukum River. (Wells 10, 12 and 14 in Exhibit A). These wells are owned by local businesses that will be incorporated into the City’s water system once this well is put into service, and these wells will be decommissioned after the businesses are on City water. Based on these facts, you stated that it would not be necessary to monitor a non-pumped well.

AR 285 (from 4/14/10 letter from Gray & Osborne Engineers to Thomas Loranger, of Ecology).

In the mapping referenced in the quote above, Wells 12 and 14 are in Hamilton Corner I LLC property (AR 293). The engineer stated he proposed not to conduct the testing because these wells will be decommissioned, but provided nothing to substantiate his statement. Appellants have not agreed to decommission their wells.

Significantly, the Department provided no documentation that shows Mr. Loranger agreed to delete this Condition 2; there is nothing

acknowledging that this April 2010 report fulfilled the Preliminary Permit requirements; and there is no acknowledgement from the Department accepting what information the engineer did submit in 2010. The Trial Court's decision omitted these facts (CP 198). Put simply, there is no evidence indicating that the conditions of the Preliminary Permit were completed, but there is evidence that the Preliminary Permit expired in April 2011 and was canceled (AR 296).

The Department sent Napavine a letter on 5/20/11 notifying the City, as required by RCW 90.03.290(2)(a), that the Preliminary Permit expired on 4/1/11, is canceled, to cease using the water, and for the City to request a new authorization:

This letter is to notify you that the Preliminary Permit issued to the City of Napavine expired on April 1, 2011 and has been canceled.

Please cease using water under this Preliminary Permit ...the[] City must contact Ecology to request a new authorization of water withdrawals.

Amy Nielson, Ecology Water Resources May 20, 2011 letter to Steve Ashley, Napavine (bold emphasis in original) (AR 296).

The Department's letter required Napavine to submit a new application which would have triggered new notice of application publications (see RCW 90.03.270 - .290). Instead, there is a year-long lapse, after which Ecology issued the final Report of Examination on 4/17/12 as if the preliminary permit for 1726 had not already expired. The

ROE was erroneously based on a canceled preliminary permit, which renders the ROE and any subsequent approval similarly void and invalid.

Ecology's response to the expired permit issue is that it was a "ministerial" error (CP 118-119), but has provided no evidence to support that theory. There is no documentation stating that the preliminary permit conditions were timely fulfilled, and in particular there is no documentation that potential impacts to Appellants were analyzed. Napavine was provided direct notice that the permit had been canceled, yet there is no evidence retracting that notice even if it were legally possible to do. There is nothing to substantiate that the 5/20/11 letter was a ministerial error. Ecology had no authority to issue the ROE on 4/17/12 when the preliminary permit had been canceled a year earlier. Quoting *Eastlake, supra*: "[W]here a [] permit is found to be invalid it is void and confers no rights." The ROE should be determined void.

6.4.4 Ecology and Napavine's failure to publish complete and correct legal descriptions for the notice of Napavine's change application and its subsequent amendments, have rendered Napavine's application and ROE defective, and has resulted in a deprivation of Appellants' due process rights. (Issue 3.4.3; Error 2.4.3)

There are multiple errors in the legal descriptions and omissions of required public notices, all of which render the application and Report of Examination defective and invalid:

- The notice of application published via newspaper in 2007 omitted the Township and Range from the legal description for the changed points of withdrawal. A correct legal description of proposed change/transfer has in fact never been published.
- The ROE issued in 2012 for Napavine’s Application to Change Certificate 1726 describes that the water right proposed for change encompasses 57 irrigation place-of-use acres in that water right (AR 60), yet the 2007 published notice for that Change Application had identified only 27 acres were proposed for change (AR 271). There has been no public notice for an application to change Certificate 1726 that affects more than 27 place-of-use acres of that water right.
- The issued ROE explains that Napavine’s application to change Certificate 1726 previously requested the water right be transferred to the City’s existing wells 2, 4, and 5, but the City amended its application and proposed a different point of withdrawal – at Well #6 (AR 63). However, there has been no published notice for an application requesting a transfer to any withdrawal point location other than to City Wells 2, 4, and 5. This subsequent amendment to transfer Certificate 1726 to the new Well 6 withdrawal point required published public notice and is defective without it:

(2) An *amendment* to construct ... a well or wells at a location outside of the location of the original well or wells ... shall be issued only after publication of notice of the application [e.g., RCW 90.03.280 requiring newspaper publication] and findings as prescribed in the case of an original application

(4) As used in this section, the “location of the original well or wells” is the area described as the point of withdrawal in the original public notice published for the application for the water right for the well.

RCW 90.44.100(2), (4) (emphasis and parenthetical added).

There has been no newspaper publication to identify that the withdrawal location under Certificate 1726 was subsequently proposed to be changed to the Well 6 site. The Trial Court’s statement that the ROE did not need publication (CP 202 line 14) is an error of law.

- The ROE describes the location of the new withdrawal point, Well #6, as being in Section 9, Township 13N, Range 2W (AR 61). This is neither the location of Well #6, nor is it the withdrawal location described in the Notice that was published in December 2007. The ROE describes a non-existent location for Well 6 that is several miles north of Napavine (AR 71, CP 136), rendering the ROE defective. The Trial Court did not address this issue.

Ecology did not perform a due diligence review of what was published, or failed to be published, before it issued the ROE. If the

required public notice is non-existent or defective, then Ecology cannot proceed in issuing the ROE (Ecology Guideline at AR 330). RCW 90.03.280 requires published notice; RCW 90.44.100(2)(a) requires publication of amendments.

If Ecology believes as it has stated, and as the Trial Court concurred (CP 201) that the published Notice of Application was sufficient to apprise Petitioners of their rights, then the Notice of Application to Change the Water Certificate should at least be held to a high standard of compliance with form and construction, and at a minimum contain a correct and fully complete legal description. Legal description errors are cause enough to void an underlying action that affects property rights. For example, tax foreclosure notices must strictly adhere even to the “spirit” of statutory requirements:

[T]he court held that lack of notice or failure to give notice in compliance with the letter and spirit of statutory requirements renders a foreclosure sale and tax deed void, or at least voidable at the suit of the record owners. [Citations omitted] ... notice complying with statutory dictates is a jurisdictional prerequisite to the entry of a valid judgment and to the enforceability of the foreclosure sale.

Pierce County v. Evans, 17 Wn. App. 201, 204, 563 P.2d 1263 (1977).

Ecology admits the publication of the notice of application referenced 27 acres, not 57 acres, and admits that it failed to include the Township and Range in the proposed new points of withdrawal (CP 117).

The ROE has additional fatal errors due to lack of published notice and erroneous legal description. Applying the holdings in *Pierce County, Id.*, notice must comply with statutory requirements (in our case, RCW 90.03.280 and 90.44.100(2),(4)) as a jurisdictional prerequisite.

Respondents have wielded the 30-day protest period as a shield against Appellants' charges of defective public notice and utter absence of due process notice. Respondents can't have it both ways: If a newspaper notice or mere availability on a website (without any corresponding notice that anything is available) could be deemed adequate notice, then at a minimum, the notice must be complete and correct. If not, then the action that is the subject of the notice is rendered null and void, no matter how long ago it occurred:

[I]f a person of ordinary intelligence and understanding can successfully use the description [given] in an attempt to locate and identify the particular property sought to be ... [foreclosed], the description answers its purpose and must be held sufficient.

We do not dispute this rule... However, in the instant case it cannot be applied because the inadequate descriptions cannot be made specific.... [A]dequacy of the legal description, was considered and resolved 63 years ago when it was established that a description which designates the land conveyed as portion of a larger tract without identifying the particular part conveyed is fatally defective [citations omitted].... [T]hat is certain which can be made certain.

Therefore, the tax foreclosure action based upon the defective description is void. It would follow that the exceptions contained in the 1940 conveyance to defendant corporation are meaningless and cannot serve as notice to defendant of plaintiff's interest. Likewise, the 1938 quiet title proceeding as to the parcels contained in the tax-foreclosure proceeding of that year also becomes a nullity.

Asotin County Port Dist. v. Clarkston Cmty. Corp., 1 Wn. App. 1007, 1010-1011, 472 P.2d 554 (1970).

Relating *Asotin* to our case, a newspaper notice which identifies that the water rights on an undescribed 27-acre portion of a larger undescribed place-of-use acreage are subject to change, and also fails to include the Township and Range in its legal description, is a "portion of a larger tract without identifying the particular part" and under *Asotin, Id.*, is "fatally defective." *Asotin, Id.*, and *Pierce County, supra*, stand for the holding that notices of actions which could take a person's real property must contain complete and accurate legal descriptions.

Water rights are property rights. Water rights transfer as real property and are considered real property:

"A water right is descendible by inheritance; and, being neither tangible nor visible, it is an incorporeal hereditament." [Citing Kinney on Irrigation and Water Rights (2nd ed.) at p. 1333.] "A water right has none of the characteristics of personal property, ... It is generally conceded by all of the authorities that *a water right, or an interest in a water right, is real property, and it is so treated under all the rules of law appertaining to such property.*" [Citing Kinney, *Id.*, at p. 1328.]

Madison v. McNeal, 171 Wash. 669, 19 P.2d 97 (1933) (emphasis added).

Because water rights are real property, the *Asotin, supra*, analogy is applied to our instant case, whereby the incomplete and erroneous legal descriptions on Napavine’s notice of application and Ecology’s ROE to change Certificate 1726 “are meaningless and cannot serve as notice” and the “action based upon the defective description is void.”

6.4.5 Ecology’s failure to provide any direct or due process notice to Appellants of agency actions concerning changes to Water Certificate 1726 is a violation of Appellants’ due process rights.
(Issue 3.4.5; Error 2.4.5)

The Trial Court’s discussion of Appellants’ due process notice stated: “While some ownership interests do require actual notice to be provided, this is not one of them.” (CP 202, lines 26-27). This is an error of law.

A water right is a vested interest entitled to due process protection:

Property owners have a vested interest in their water rights *Department of Ecology v. Adsit*, 103 Wn.2d 698, 705, 694 P.2d 1065 (1985); *Department of Ecology v. Acquavella*, 100 Wn.2d 651, 655, 674 P.2d 160 (1983), and these rights are entitled to due process protection. *Department of Ecology v. Acquavella, supra* at 656. It is well established that *prior* to an action affecting an interest in life, liberty or property protected by the due process clause, notice must be given which is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 70 S. Ct. 652 (1950);

Carlstrom v. State, 103 Wn.2d 391, 694 P.2d 1 (1985);
Wenatchee Reclamation Dist. v. Mustell, 102 Wn.2d 721,
725, 684 P.2d 1275 (1984); *Jensen v. Department of
Ecology*, 102 Wn.2d 109, 118, 685 P.2d 1068 (1984); *In re
Puget Sound Power & Light Co.*, 28 Wn.App. 615, 619, 625
P.2d 723 (1981).

Sheep Mountain Cattle Co. v. Dep't of Ecology, 45 Wn. App. 427, 430-
431, 726 P.2d 55 (1986) (emphasis in original).

A general public newspaper notification of a Notice of Application per RCW 90.03.280, or the mere availability of a Report of Examination on an agency website without any corresponding notice to those affected that it was available for review, is not “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Such general notice cannot be misused to enact an involuntary conveyance of Appellants’ water rights, at least not without Appellants having first had specific notice of the action that seeks to take their water rights via transfer to Napavine.

Napavine’s newspaper publication of the 2007 application and Ecology’s website posting of the 2012 ROEs (both of which contained significant errors and omissions) did not provide Appellants with notice that was reasonably calculated to apprise them of the action to be taken which could adversely affect their rights. The Washington Supreme Court

specifically discussed this issue of direct notification in another water rights case:

The fourteenth amendment to the United States Constitution and article 1, section 3 of the Washington State Constitution provide that no person shall be deprived of life, liberty, or property without due process of law. The landmark case with regard to the requirements for notice under the due process clause is *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950)... *Mullane* involved a New York statute which provided that beneficiaries of a number of small trusts administered in a common trust could be notified by newspaper publication of an accounting by the trustee. Since the trustee had the names and addresses of the beneficiaries, the Court found this provision constitutionally inadequate “because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand.” 339 U.S. at 319.

[W]hen the name and address of a party is reasonably ascertainable,

Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party ...

In re Determination of Rights to Use of Surface Waters Etc [Acquavella], 100 Wn.2d 651, 674 P.2d 160 (1983).

Napavine’s Notice of Application to change Certificate 1726 was published in a newspaper in 2007 but no specific notice of it was provided to Appellants who, by every indication of record documents, have a controlling interest in Certificate 1726. The Report of Examination subsequently issued in 2012 was neither published in a general circulation

newspaper, nor were Appellants specifically notified of this ROE action that authorizes Napavine to begin taking Appellants' water rights. Respondents cannot identify any instance where notice of these actions has never been given to Appellants.

Ecology acknowledges that the applicant and any protestors of a notice of application do receive specific notice of the subsequent Report of Examination (CP 98). It is then incongruous that all persons with an ownership interest in the water right proposed for transfer to Napavine would not be provided similar specific notice. Appellants are not simply the "public at large" here; they are the specific co-users and landowners holding the water right that Ecology has conditionally authorized to be transferred to Napavine, but without notice to Appellants, and without Appellants' consent. Appellants are necessary parties that Napavine and Ecology have failed to include in the water right transfer application process.

Even if Ecology is, as it purported to be in its briefing below, "uncertain" of Petitioners' vested ownership in Certificate 1726 (CP 122), the fact that Petitioners are direct descendants in an uninterrupted, short and simple chain of title of the land benefitted by the subject water right, and own the land on which one or more of the Certificate 1726 wells are located, should have been enough in and of itself for Ecology to provide

Petitioners with the required due process notice of the application and ROE. This chain of title is how water rights work: water rights run with the land:

The right to the use of water which has been applied to a beneficial use in the state shall be and *remain appurtenant to the land or place upon which the same is used....*

RCW 90.03.380 (emphasis added).

Once beneficial use has been established, which was done between 1952-1954 by Appellant Mike Hamilton's Grandfather, Frank Hamilton when he perfected Certificate 1726, the right remains appurtenant to the land so long as the water is used. The water continued to be used beneficially by Mike Hamilton's Father, Al Hamilton, and remains in beneficial use by Appellants. Respondents have not identified anything that shows Appellants have in any manner sold, traded, transferred, assigned or relinquished their undivided share of the Certificate 1726.

Respondents have suggested that Appellants must prove their rights to Certificate 1726 (CP 89), but excluded Appellants from any due process notification that would have enabled them to do so within the time period Respondents say it needed to have occurred. Moreover, Appellants are not the ones requesting any change to Certificate 1726. It is Napavine who is required to prove that the water rights the City wants transferred are available and that Appellants' water rights will not be impaired by the

change (RCW 90.44.100(2)(c)-(d). There is no evidence that Napavine or Ecology made any investigation of impacts to Appellants' water rights. It is Ecology who had the "duty to investigate" the application (RCW 90.03.290) to confirm that what Napavine submitted was correct (AR 91). It was Ecology who, under its own rules, was prevented from processing the application unless and until it contained all necessary signatures (AR 90).

Had Ecology complied with its own procedures, any potential dispute over ownership of the undivided water right would have had to be resolved prior to application acceptance, and the precise portion of the undivided water right that Betty Hamilton believed she was transferring to Napavine would have been confirmed prior to application submittal and publishing. It is to prevent such problems, that the Department's procedures, as further interpreted by the PCHB in *Devine, supra*, mandate that signatory consent be obtained from all landowners or the application will not be processed. Ecology's failure to comply with the law violates Appellants' constitutional rights.

6.5 Ecology is required by RCW 90.03.270 and its own Department Guidelines to return Napavine’s defective application back to the applicant for correction.
(Issue 3.5; Error 2.5).

Ecology is required to properly administer Napavine’s application process to assure that it complies with the provisions of the Water Code and the Department’s rules (RCW 90.03.290(1)), and to send back the application if it is defective (RCW 90.03.270): “If upon examination, the application is found to be defective, it *shall* be returned to the applicant for correction or completion...” The statute imposes no time limit or cut-off period by which an error must be discovered that relieves Ecology from this requirement.

The Department’s own guidelines further state that even if improper signatures are discovered “later,” the application is still required to be returned to the applicant for correction because “an application or form without appropriate signatures cannot be processed.” (AR 90). Similar to the statute, the Department Guidelines impose no time limit after which the Department is relieved of this obligation.

The directive to return Napavine’s defective application is especially applicable here due to the deprivation of Appellants’ rights that Napavine and Ecology have caused, and the fact that the ROE approval to transfer the water right is still an inchoate right (AR 344-345).

Additionally, under RCW 90.03.290(1), Napavine's application is required to comply with all provisions of Chapter 90.03 RCW and "with the rules of the department." Improper and omitted signatures are not the only defects with the City's application. RCW 90.03.270 requires Ecology to return the application due to any of these other defects, including the need to correct and republish the erroneous legal notice, and a reapplication to obtain a new preliminary permit to conduct the omitted analysis of impacts to Appellants.

Appellants, as owners of the land on which the subject water right is located and used, and which Ecology's own records show has not had any prior amendment or assignment, were required to be co-signers on Napavine's application. Ecology's regulations and prior PCHB interpretation of the Department's rules insist that signatures be obtained from all landowners as a prerequisite for a reviewable application. Napavine and Ecology's omission and continued exclusion of Appellants from the application submittal and processing is a deprivation of their due process rights.

7. ATTORNEY FEE PROVISIONS

Pursuant to RAP 18.1, Appellants request recovery of their attorneys' fees in having to bring this action, first administratively, next, to the trial court, and now to this appellate court. Appellants renew their

original request for fees as allowed through RCW 4.84.350, and request additional recovery of fees due to Respondents' violations of Appellants' constitutional rights. Appellants request recovery of their costs and reasonable attorneys' fees to be assessed against Respondents pursuant to 42 U.S.C. § 1983 and RCW 64.40.020, under the authority of *Mission Springs, Inc., v. City of Spokane*, 134 Wn.2d 947, 966, 954 P.2d 250 (1998): "Those who are 'the moving force of constitutional violation' are liable under § 1983."

8. CONCLUSION

If the Pollution Control Hearings Board and Lewis County Superior Court decisions are upheld, those decisions will provide not only the blueprint, but also the basis of legal authority to take another person's water rights without due process or compensation.

Appellants' prima facie evidence from property and water certificate records established that they had a right to due process notice of an action that could change the water right which agency records show is appurtenant to and benefits Appellants land, yet received no direct notice of Napavine and Ecology's actions that affect their property rights.

Appellants also identified additional significant errors in Ecology's processing of Napavine's application that fail to comply with statutory requirements. Ecology accepted Napavine's application on good faith

instead of the statutory duty-to-investigate standard. Napavine's application failed to contain the required signatures of all landowners. Appellants were completely omitted from the review process, and neither Napavine nor Ecology conducted any analysis of the impacts on Appellants' water rights from Napavine's proposal. Napavine let its preliminary permit expire without conducting this necessary analysis of impacts to Appellants, and Ecology was without authority to issue an ROE based on Napavine's cancelled preliminary permit and inaccurate and incomplete legal notices.

Ecology failed to follow both statutory mandates and Ecology's own department guidelines when reviewing and processing Napavine's application. Ecology has further refused to comply with the statutory requirement to return Napavine's defective back to the City.

Appellants request that this Court restore Appellants' property rights in accordance with applicable law and Constitutional principles, and reverse the decisions below.

SUBMITTED this 9th day of October, 2017.

DESCHUTES LAW GROUP, PLLC


Ben Cushman, WSBA #23658
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the date signed below, I e-filed the foregoing document with this Court, and e-served it upon Respondent's attorneys.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 9th day of October, 2017, in Olympia, Washington.



Doreen Milward

Attorney for City of Napavine

Mark C. Scheibmeir
Hillier, Scheibmeir, Vey & Kelly, P.S.
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Attorney for WA Dept. of Ecology:

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Attorney General of Washington
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Attorney for the Pollution

Control Hearings Board:

Dionne Padilla-Huddleston
Attorney General of Washington
Licensing & Administrative Law Div.
dionnep@atg.wa.gov
lalseaef@atg.wa.gov

APPENDIX

(cited pages from Administrative Record)



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47775 • Olympia, Washington 98504-7775 • (360) 407-6300

February 5, 2016

RECEIVED

FEB - 8 2016

CUSHMAN LAW

Cushman Law Offices, P.S.
Attn: Doreen Milward
924 Capitol Way S.
Olympia, WA 98501

Dear Ms. Milward

Re: Water Right Change Authorizations CS2-SWC5605 and CG2-GWC1726

We received your email dated January 5, 2016 regarding the above Water Right Change Authorizations.

Ground Water Certificate (GWC) 1726 was issued on January 14, 1954 to Frank B and Edith Hamilton. The certificate authorized 420 gpm and 114 ac-ft per year for irrigation of 57 acres, stockwater, and domestic supply.

Surface Water Certificate (SWC) 5605, issued January 15, 1954, and allowed diversion of 0.7 cubic feet per second (cfs) from the Newaukum River for irrigation of 70 acres. SWC 5605 is non-additive (supplemental) to Ground Water Certificate (GWC) 1726.

Both Applications for Change were filed in 2004, roughly one year after Betty Hamilton and Napavine reached a purchase agreement. The changes were approved by Ecology in 2012. As you may be aware, the water right permitting process is a public process. First, RCW 90.03.280 requires an applicant to advertise a proposed withdrawal in a newspaper of local circulation twice during a two week period. Second, individuals have 30-days in which to file a formal protest against the application. Any time after the 30-day formal protest period is over and before the ROE is approved, anyone can also send the Department a letter of "concern."

And third, Final ROEs have a 30-day period following issuance where a formal appeal can be filed as provided under RCW 43.21B.

Public notice of applications is a key procedural element of the water right acquisition process intended to protect the rights of existing water right holders and ensure interests of other citizens are considered during evaluation of applications. Comments about an application by third parties

71650.001, cc: client m, JEC



Exhibit A AR 000005

received during the statutory notice period are often helpful to identify areas of contention or concern and guide an investigation. Ecology considers comments we receive and may incorporate them into the final report, but are not obligated to do so.

For your general information, The City of Napavine published notice for this project proposal in *The Chronicle* of Lewis County in accordance with RCW 90.03.280 beginning December 14 and ending December 21, 2007. Ecology received six letters on concern on the Hamilton/Napavine changes by the following individuals on the dates below. Their concerns were addressed in the final ROE.

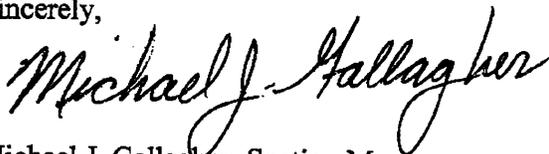
<i>Concerned Party</i>	<i>Date of letter</i>
Tracy & Kathleen Spencer	April 1, 2010
Virgina Breen	March 25, 2010
Tammy Baker & Daniel Smith	March 25, 2010
Harvey & Judy Breen	March 25, 2010
Tammy Baker	March 18, 2010

The Draft ROE was posted on Ecology's website from March 15 to April 15, 2012. No comments were received. The Final ROE was issued on April 17, 2012.

When Ecology receives an application, we consider the information submitted by the applicant as being submitted in good faith. The consultant represented that Betty Hamilton and Napavine reached an agreement to purchase water rights. They also submitted information showing the water rights were in good standing. No conflicting information was presented to Ecology's attention as a result of the public notice or the posting of the draft ROEs. No appeals were filed so Ecology's decision is final and can no longer be appealed.

90.03.280 and RCW 43.21B provided your client opportunity to bring his concerns to our attention. Since he did not, Ecology's decision stands. At this point, your client's dispute is a civil matter between your client and Betty Hamilton.

Sincerely,



Michael J. Gallagher, Section Manager
SWRO Water Resources

Doreen Milward

From: Gallagher, Mike (ECY) <MGAL461@ECY.WA.GOV>
Sent: Friday, February 05, 2016 10:42 AM
To: Doreen Milward; Hall, Tammy (ECY)
Cc: Cline, Vicki (ECY)
Subject: RE: Water Rights and Water Right Reports
Attachments: 20160205102524877.pdf

Doreen

I am attaching a letter that I am sending you via regular mail regarding this issue. Upon review of this issue by one of my regional permit writers and assistant attorney general, this is our understanding and conclusion.

Mike

Michael J. Gallagher, LHG - Section Manager
Water Resources Program - Southwest Regional Office
Washington State Department of Ecology
PO Box 47775
Olympia, WA 98504-7775
360-407-6058 (w) | 360-407-6305 (f) | mike.gallagher@ecy.wa.gov (e)



From: Doreen Milward [<mailto:DoreenMilward@cushmanlaw.com>]
Sent: Thursday, February 04, 2016 12:04 PM
To: Gallagher, Mike (ECY) <MGAL461@ECY.WA.GOV>; Hall, Tammy (ECY) <THAL461@ECY.WA.GOV>
Cc: Cline, Vicki (ECY) <VWIN461@ECY.WA.GOV>
Subject: FW: Water Rights and Water Right Reports

It has been a month since I requested an appointment to discuss this matter. I realize it is complicated and that your attention to the information attached and explained in the earlier threads of this email is needed (otherwise the meeting will not be very productive). Please let me know some days when that meeting can take place. Tuesdays are generally good on our end. Thank you.

Doreen Milward
Paralegal
Cushman Law Offices, P.S.
924 Capitol Way S.
Olympia, WA 98501
Tel: 360/534-9183
Fax: 360/956-9795
dmilward@cushmanlaw.com

From: Doreen Milward
Sent: Tuesday, January 05, 2016 1:53 PM
To: mike.gallagher@ecy.wa.gov; tammy.hall@ecy.wa.gov
Cc: Vicki, McNeley <vicki@tacomadrilling.com>
Subject: FW: Water Rights and Water Right Reports

Mike Gallagher and Tammy Hall,

I think we do need to set up an appointment to discuss. The water rights at issue are 1726 and 5605 (information attached) and have been transferred in error to the City of Napavine, although have still not been put to use, and therefore are not perfected. As explained in my preceding emails to Vicki – in the thread below, our client Mike Hamilton owns property on the east side of I-5 at Exit 72, and Betty Hamilton owns property on the west side. At the time their predecessor-in-common, Frank Hamilton, obtained these water certificates, the property had not been bisected by I-5. The water rights information identifies that the place of use of the water has always encompassed a portion of Section 14 (which is now owned by Mike Hamilton and has never been owned by Betty Hamilton). She does not and has not ever owned property in Section 14, T.13N, R2W. She is not the sole owner of these water rights as erroneously stated on the transfer application. This error should have been caught, by both Napavine and Ecology since the application for transfer clearly identifies the place of use of the water as including Section 14. If not corrected in Ecology's records, this would seem to leave Mike Hamilton without any irrigation rights for his hayfields.

Attached also is a map of current parcels. Mike Hamilton's property is also known as Hamilton Corner I LLC and is comprised of Lewis County Tax Parcels Nos. 017873002000, 017875004000, 017905001000. Betty Hamilton's property is also known as Hamilton's Walnut Shade LLC. I do not have a copy of Napavine agreement with Betty Hamilton since our client was not a party to it.

Doreen Milward
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Cushman Law Offices, P.S.
924 Capitol Way S.
Olympia, WA 98501
Tel: 360/534-9183
Fax: 360/956-9795
dmilward@cushmanlaw.com

From: Cline, Vicki (ECY) [<mailto:VWIN461@ECY.WA.GOV>]
Sent: Monday, January 04, 2016 1:22 PM
To: Doreen Milward
Subject: RE: Water Rights and Water Right Reports

Hi Doreen, I have not been able to locate anything in our records that indicate that the water rights transfer of Certificates 1726 and 5605 were done in error. I recommend that you make direct contact with my Section Manager Mike Gallagher or the permit writer of these records which is Tammy Hall. If an error was made on Ecology's part then there is likely an avenue to work through an error. I am attaching two excel spreadsheets, one is for water right records by Section, Township and Range and the other is for Napavine, City. I was trying to figure out if there are other water rights that go with the property within Section 14 that might attach to you client's property but there are quite a few in the area in the last name of Hamilton. Maybe your client could narrow down the search based on the history that he is aware of. So if there are any of the records on the first list that you would like to review in more detail I can certainly scan and email them.

When you do make contact with either Mike or Tammy please provide the actual legal description of your client's property along with legal owner information (Assessor) and a map of the property/parcel. Also, the water right transfer file does not have a copy of the agreement between Napavine and the Hamilton Family which also might be useful for Mike or Tammy to read through.

Mike can be reached in Olympia at 360 407-6058 or by email to mike.gallagher@ecy.wa.gov Tammy can be reached in Olympia at 360 407-6099 or by email to tammy.hall@ecy.wa.gov

Vicki Cline, Compliance & Enforcement
Water Resources Program
Southwest Regional Office
(360) 407-0278

From: Doreen Milward [<mailto:DoreenMilward@cushmanlaw.com>]
Sent: Wednesday, December 30, 2015 7:05 PM
To: Cline, Vicki (ECY) <VWIN461@ECY.WA.GOV>
Subject: FW: Water Rights and Water Right Reports

Hi Vicki,
I'm checking in to see how you're coming along with your research. If you've sent me anything since your November 6 email, I have not received it.

Doreen Milward
Paralegal
Cushman Law Offices, P.S.
924 Capitol Way S.
Olympia, WA 98501
Tel: 360/534-9183
Fax: 360/956-9795
dmilward@cushmanlaw.com

From: Doreen Milward
Sent: Friday, November 06, 2015 4:48 PM
To: 'Cline, Vicki (ECY)'
Subject: RE: Water Rights and Water Right Reports

Thank you, Vicki, for letting me know you're working through this. The agreement between Napavine and Hamilton was for the City to acquire Betty Hamilton's water rights, not our client Mike Hamilton's water rights. The error is that the City's Consultant and/or Betty Hamilton and/or Napavine proceeded through the Application for Transfer as if Betty was the 100% owner of 100% of the water rights being transferred. They should have caught the error because the original water certificate 1726A identifies that one or more well is in Section 14, and both Certificates 1726A and 5605 identify the place of irrigation use includes Section 14, yet Betty Hamilton owned no property in Section 14, and still does not own property in Section 14. Mike Hamilton, however, does own property in Section 14 which benefits from the irrigation rights of Certificates 1726A and 5605, and we believe he is a rightful owner of a portion (at least 50%) of those water rights.

Whether an intentional error or not, Napavine and/or Betty Hamilton are attempting to transfer some portion of Certificates 1726A and 5605 which do not belong to Betty Hamilton, and instead rightfully belong to Mike Hamilton. If 100% of the water rights from 1726A and 5605 are transferred to Napavine, that will take away all of Mike Hamilton's

irrigation rights (with the exception of only a small 2-afy irrigation right that is encompassed within the commercial water rights).

Doreen Milward
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924 Capitol Way S.
Olympia, WA 98501
Tel: 360/534-9183
Fax: 360/956-9795
dmilward@cushmanlaw.com

From: Cline, Vicki (ECY) [<mailto:VWIN461@ECY.WA.GOV>]
Sent: Friday, November 06, 2015 3:45 PM
To: Doreen Milward
Cc: Smitherman, Opal (ECY)
Subject: FW: Water Rights and Water Right Reports

Hi Doreen, Opal sent your email message onto me for response. I have not yet had a chance to go through all the records associated with the water right transfer/change for Ground Water Certificate 1726A and Surface Water Certificate 5605. I have read through the Reports of Examination for each and it appears that there was a written agreement (December 2003) between the City of Napavine and the Hamiltons for purchase of the water rights but I did not locate it in our records. So far from what I can tell is that the tentative determination of the water rights (beneficial use) is 140 gallons per minute and 105 acre feet per year, the remaining 10 acre feet and 310 gallons per minute was relinquished for non-use.

I still need to do more research into this as there are possibly other water rights or claims that may be relevant. I will be out in the field Monday and Tuesday of next week, out of the office on Veterans Day, back in the office next Thursday and Friday. So I will try and get back to you late next week.

I have attached a scanned copy of the Report of Examination for CG2-GWC1726 and a spreadsheet that I obtained from our Water Right Tracking System showing 11 other records in the name of Hamilton at or near the same area of the other water rights.

Vicki Cline, Compliance & Enforcement
Water Resources Program
Southwest Regional Office
(360) 407-0278

From: Smitherman, Opal (ECY)
Sent: Thursday, November 05, 2015 8:21 AM
To: Cline, Vicki (ECY) <VWIN461@ECY.WA.GOV>
Subject: FW: Water Rights and Water Right Reports

Hi Vicki,

Here is one for you.

Thanks

Opal Smitherman
Southwest Regional Office
Water Resources Program
(360) 407-6859
odav461@ecy.wa.gov

From: Doreen Milward [<mailto:DoreenMilward@cushmanlaw.com>]
Sent: Wednesday, November 04, 2015 7:52 PM
To: Smitherman, Opal (ECY) <ODAV461@ECY.WA.GOV>
Subject: Water Rights and Water Right Reports

I am making this initial contact at the email listed on Ecology's Water Resources web page. This is a complicated matter, and I wanted to provide some basic information before someone calls me back. Cushman Law Offices represents Mike Hamilton who owns property and has associated water rights near Exit 72 in Lewis County where Rib Eye Ramblin' Jacks and other businesses are located, but he also has agricultural land there on which he grows hay and irrigates.

The commercial water rights do not appear to be at issue: G2-26648C encompasses G2-24573C and G2-26356C, for a total of 27 afy at 160 gpm. G2-24573C also contains a small 2-acre irrigation water right.

There is a serious problem, however, with the remaining irrigation water rights. Before Interstate-5 was built, some properties on what are now the west and east sides of Exit 72 at I-5 used to be in common ownership by Frank Hamilton, who procured water rights under Ground Water Certificate 1726A on 4/24/52 and Surface Water Certificate 5605 on 8/18/52. The point of withdrawal for 1726A was from three wells located within 14/13/2W and 15/13/2W, for irrigation use within portions of Sections 14, 15, and 22. The subject land in Section 14 is now owned by Mike Hamilton/Hamilton Corner 1 LLC, on what is now the east side of I-5, but Sections 15 and 22 are located on what is now the west side of I-5 owned by Betty Hamilton/Hamiltons Walnut Shade LLC. Similarly, the point of diversion of 5605 was from 22/13/2W, but the place of use encompassed locations in Sections 14, 15, and 22.

On 11/29/04, Betty Hamilton applied to transfer the full volume of water right 1726A (114 afy at 420 gpm) and 5605 (calculated to equate to 69 afy) to the City of Napavine. The Applications for Change/Transfer, which appear to have been prepared by a consultant for the City of Napavine, mistakenly identified Betty Hamilton as the sole owner of the water right, even though the place of use of these water rights include areas in Section 14, and she owns no property in Section 14. All the while, Mike Hamilton has continued to irrigate his fields in Section 14, just as he always has.

The Betty Hamilton Applications for Transfer and Reports of Examination identify that Napavine will not be using any of the existing Hamilton wells, but rather taking only the water rights, and anticipated that the transferred water rights would not be perfected until 2022. Based on a review of on-line records, we do not see that the water transfer has been perfected into a water right or water certificate. Further, we believe that the City is only just now (by end of 2015) ready to begin using of a portion of water rights acquired through Betty Hamilton.

We have brought this problem to the City of Napavine, and have sent the City and its attorney detailed information, including copies of the water certificates, transfer application, historic maps, etc. Their response was that we should take this up with Ecology. Please review the matter on your end, and then give me a call so we can determine what the next step is. Thank you.

Doreen Milward
Paralegal
Cushman Law Offices, P.S.
924 Capitol Way S.
Olympia, WA 98501
Tel: 360/534-9183

Certificate Record No. 4 Page No. 1726-1

STATE OF WASHINGTON, COUNTY OF Lea

Certificate of Ground Water Right

Issued in accordance with the provisions of Chapter 122, Laws of Washington for 1915, and amendments thereto, and the rules and regulations of the State Supervisor of Water Resources thereunder.

THIS IS TO CERTIFY THAT FRANK B. and EDITH HAWTON

of Chablis, Washington, has made proof to the satisfaction of the State Supervisor of Water Resources of Washington, of a right to the use of the ground waters of Tract (9) - 11a located within the SW¹ of SE¹ of Sec. 14 and SW¹ of SE¹ of Sec. 15, Twp. 19 N., Rge. 2 E.W.U.

for the purpose of irrigation, stock and domestic supply under and subject to provisions contained in Ground Water Permit No. 2266 issued by the State Supervisor of Water Resources and that said right to the use of said ground waters has been perfected in accordance with the laws of Washington, and is hereby confirmed by the State Supervisor of Water Resources of Washington and entered of record in Volume 4 at page 1726-1; that the right hereby confirmed dates from April 24, 1953; that the quantity of ground water under the right hereby confirmed for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed 400 gallons per acre per year per year for irrigation of 37 acres.

A description of the lands to which such ground water right is appurtenant, and the place where such water is put to beneficial use, is as follows:

West 519 feet of SW¹ of SE¹ South of right-of-way, Sec. 14; NW¹ of SE¹ South of right-of-way, Sec. 14; SW¹ of SE¹ South of right-of-way, Sec. 14; SW¹ of SE¹ South of railroad, Sec. 15; NE¹ of NE¹ East of river, Sec. 22; LESS .92 acre 100 rods, All in Twp. 19 N., Rge. 2 E.W.U.

The right to the use of the ground water aforesaid hereby confirmed is restricted to the lands or place of use herein described, except as provided in Sections 6 and 7, Chapter 122, Laws of 1929.

WITNESS the seal and signature of the State Supervisor of Water Resources officed this 14th day of January, 1954.

M. Walker, Act
State Supervisor of Water Resources

RECORDED
M. Walker

STATE OF WASHINGTON, COUNTY OF Lewis

CERTIFICATE OF SURFACE WATER RIGHT

(In accordance with the provisions of Chapter 117, Laws of Washington for 1917, and amendments thereto, and the rules and regulations of the State Supervisor of Water Resources thereunder.)

This is to certify that FRANK E. HAMILTON
of Chehalis, State of Washington, has made
proof to the satisfaction of the State Supervisor of Water Resources of Washington, of a right to the use
of the waters of Newaukum River, a tributary of Chehalis River
with point or points of diversion within the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of
Sec. 22, Twp. 13 N., R. 2 W., W. M., under and subject to provisions contained in
Appropriation Permit No. 8480 issued by the State Supervisor of Water Resources, and
that said right to the use of said waters has been perfected in accordance with the laws of Washington,
and is hereby confirmed by the State Supervisor of Water Resources of Washington and entered of
record in Volume 12, at Page 5605, on the 15th day of January, 1954,
that the priority date of the right hereby confirmed is August 18, 1952; that the
amount of water under the right hereby confirmed, for the following purposes is limited to an amount
actually beneficially used and shall not exceed

0.70 of a cubic foot per second for the
purpose of the irrigation of 70 acres.

A description of the lands under such right to which the water right is appurtenant, and the
place where such water is put to beneficial use, is as follows:

- The West 519 feet of SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 14, Twp. 13 N., Rge. 2 W.W.M. south of railway.
- The NW $\frac{1}{4}$ of SW $\frac{1}{4}$ south of railway, said Sec. 14, Twp. 13 N., Rge. 2 W.W.M.
- The SW $\frac{1}{4}$ of SW $\frac{1}{4}$ south of railway, said Sec. 14, Twp. 13 N., Rge. 2 W.W.M.
- Portion of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ south of railroad, less right-of-way for railroad and roads, Sec. 15, Twp. 13 N., Rge. 2 W.W.M.
- The NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 22, Twp. 13 N., Rge. 2 W.W.M. East of River, less right-of-way for roads.

The right to the use of the water aforesaid hereby confirmed is restricted to the lands or place of
use herein described, except as provided in Sections 6 and 7, Chapter 122, Laws of 1929.

WITNESS the seal and signature of the State Supervisor of Water Resources affixed this
15th day of January, 1954

M. Walker, Asst
State Supervisor of Water Resources.

ENGINEERING DATA
MHW

Permit No. _____

**Certificate of Surface
Water Right**

*Recorded in the office of State Supervisor
of Water Resources, Olympia, Washington,
in Book No. _____ of Water Right
Certificates, on Page _____, on
the _____ day of _____,
19____*

STATE OF WASHINGTON, }
County of _____ } ss.

*I certify that the within was received
and duly recorded by me in Volume _____
of Book of Water Right Certificates, Page
_____ on the _____ day of
_____, 19____*

STATE PRINTING PLANT, OLYMPIA, WASH.

AR 000055



State of Washington
REPORT OF EXAMINATION
FOR WATER RIGHT CHANGE

File NR CG2-GWC1726
WR Doc ID 4237094

Changed Place of Use
Added or Changed Purpose of Use
Added or Changed Point of Withdrawal/Diversion

PRIORITY DATE
April 24, 1952

WATER RIGHT NUMBER
CG2-GWC1726

MAILING ADDRESS
NAPAVINE CITY
PO BOX 810
NAPAVINE WA 98065

SITE ADDRESS (IF DIFFERENT)

Total Quantity Authorized for Withdrawal or Diversion

WITHDRAWAL OR DIVERSION RATE	UNITS	ANNUAL QUANTITY (AF/YR)
140	GPM	105

Purpose

PURPOSE	WITHDRAWAL OR DIVERSION RATE		UNITS	ANNUAL QUANTITY (AF/YR)		PERIOD OF USE (mm/dd)
	ADDITIVE	NON-ADDITIVE		ADDITIVE	NON-ADDITIVE	
Municipal	140		GPM	36		01/01 - 12/31
Municipal				69		5/1-9/30

REMARKS: This water right is associated with SWC5605 which is non-additive.

ADDITIVE	IRRIGATED ACRES		PUBLIC WATER SYSTEM INFORMATION	
	NON-ADDITIVE		WATER SYSTEM ID	CONNECTIONS
			58200	

Source Location

COUNTY	WATERBODY	TRIBUTARY TO	WATER RESOURCE INVENTORY AREA
LEWIS	GROUNDWATER		23-UPPER CHEHALIS

SOURCE FACILITY/DEVICE	PARCEL	WELL TAG	TWP	RNG	SEC	QQ Q	LATITUDE	LONGITUDE
City of Napavine Well #6	018082001000	AFT345	13N	02W	09	SW NW	46.599108	-122.907275

Datum: NAD83/WGS84

Proposed Works:

Well 8 inches in diameter and 379 feet deep.

Exhibit 3

AR 000056

Place of Use (See Attached Map)

LEGAL DESCRIPTION OF AUTHORIZED PLACE OF USE

The place of use (POU) of this water right is the service area described in the most recent Water System Plan/Small Water System Management Program approved by the Washington State Department of Health, so long as the water system is and remains in compliance with the criteria in RCW 90.03.386(2). RCW 90.03.386 may have the effect of revising the place of use of this water right.

Development Schedule

BEGIN PROJECT	COMPLETE PROJECT	PUT WATER TO FULL USE
Started	June 1, 2015	June 1, 2022

Measurement of Water Use

How often must water use be measured?	Monthly
How often must water use data be reported to Ecology?	Upon Request by Ecology
What volume should be reported?	Total Monthly Volume
What rate should be reported?	Annual Peak Rate of Withdrawal (gpm)

Provisions

Wells, Well Logs and Well Construction Standards

All wells constructed in the state must meet the construction requirements of WAC 173-160 titled "Minimum Standards for the Construction and Maintenance of Wells" and RCW 18.104 titled "Water Well Construction". Any well that is unusable, abandoned, or whose use has been permanently discontinued must be decommissioned. Additionally, a well in disrepair that its continued use is impractical or is an environmental, safety or public health hazard must also be decommissioned.

All wells must be tagged with a Department of Ecology unique well identification number. If you have an existing well and it does not have a tag, please contact the well-drilling coordinator at the regional Department of Ecology office issuing this decision. This tag must remain attached to the well. If you are required to submit water measuring reports, reference this tag number.

Installation and maintenance of an access port as described in WAC 173-160-291(3) is required.

Measurements, Monitoring, Metering and Reporting

An approved measuring device must be installed and maintained for each source identified by this water right in accordance with the rule "Requirements for Measuring and Reporting Water Use". WAC 173-173 describes the requirements for data accuracy, device installation and operation, and information reporting. It also allows a water user to petition the Department of Ecology for modifications to some of the requirements.

Recorded water use data can be submitted via the Internet. To set up an Internet reporting account, contact the Southwest Regional Office. If you do not have Internet access, you can still submit hard copies by contacting the Southwest Regional Office for forms to submit your water use data.

Department of Health Requirements

Prior to any new construction or alterations of a public water supply system, the State Board of Health rules require public water supply owners to obtain written approval from the Office of Drinking Water of

the Washington State Department of Health. Please contact the Office of Drinking Water at Southwest Drinking Water Operations, 243 Israel Road S.E., PO Box 47823, Tumwater, WA 98504-7823, (360) 236-3030.

Water Use Efficiency

The water right holder is required to maintain efficient water delivery systems and use of up-to-date water conservation practices consistent with RCW 90.03.005.

Schedule and Inspections

Department of Ecology personnel, upon presentation of proper credentials, will have access at reasonable times, to the project location, and to inspect at reasonable times, records of water use, wells, diversions, measuring devices and associated distribution systems for compliance with water law.

Proof of Appropriation

The water right holder must file the notice of Proof of Appropriation of water (under which the certificate of water right is issued) when the permanent distribution system has been constructed and the quantity of water required by the project has been put to full beneficial use. The certificate will reflect the extent of the project perfected within the limitations of the water right. Elements of a proof inspection may include, as appropriate, the source(s), system instantaneous capacity, beneficial use(s), annual quantity, place of use, and satisfaction of provisions.

Findings of Facts

Upon reviewing the investigator's report, I find all facts, relevant and material to the subject application, have been thoroughly investigated. Furthermore, I concur with the Investigator that water is available from the source in question; that there will be no impairment of existing rights; that the purpose(s) of use are beneficial; and that there will be no detriment to the public interest.

Therefore, I ORDER approval of G2-GWC1726 subject to existing rights and the provisions specified above.

Your Right To Appeal

You have a right to appeal this Order to the Pollution Control Hearings Board (PCHB) within 30 days of the date of receipt of this Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

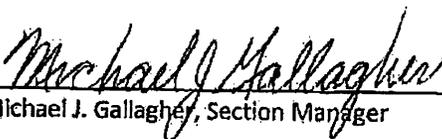
To appeal you must do the following within 30 days of the date of receipt of the Order.

File your appeal and a copy of this Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.

- Serve a copy of your appeal and this Order on Ecology in paper form - by mail or in person. (See addresses below.) E-mail is not accepted.
- You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

Street Addresses	Mailing Addresses
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503	Department of Ecology Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608
Pollution Control Hearings Board 1111 Israel RD SW Ste 301 Tumwater, WA 98501	Pollution Control Hearings Board PO Box 40903 Olympia, WA 98504-0903

Signed at Olympia, Washington, this 17th day of April 2012.


Michael J. Gallagher, Section Manager

For additional information visit the Environmental Hearings Office
Website: <http://www.eho.wa.gov>. To find laws and agency rules visit the Washington State Legislature
Website: <http://www1.leg.wa.gov/CodeReviser>.

INVESTIGATOR'S REPORT
 Tammy Hall, Department of Ecology
 Water Right Control Number CG2-GWC1726

BACKGROUND

On November 23, 2004, Steve Ashley, representing the City of Napavine, filed an *Application for Change of Water Right* to change the points of withdrawal, purpose of use, and place of use of Water Right Certificate (GWC) 1726.

GWC 1726 was issued January 14, 1954. It authorized 450 gallons per minute (gpm) and 114 acre-feet (ac-ft) per year for domestic supply, stockwater, and irrigation of 57 acres.

See Attachment #1

Attributes of the Existing Water Right and Proposed Change

Table 1. Attributes of Water Right Certificate (GWC) 1726 and Proposed Change

	Existing	Proposed
Name	Frank B. and Edith Hamilton	City of Napavine
Priority Date	April 24, 1952	
Change Application Date		11/23/2004
Instantaneous Rate	450 gpm	140 gpm
Annual Quantity	114 ac-ft	36 ac-ft (continuous use) 69 ac-ft (seasonal use, May 1 September 30)
Purpose(s) of Use	Irrigation Stockwater Domestic supply	Municipal Supply
Place(s) of Use	The west 519 feet of SE ¼ SW ¼, south of right of way, Section 14; NW ¼ SW ¼, south of right of way, Section 14; SW ¼ SW ¼, south of right of way, Section 14; N ¼ SE ¼, south of railroad, Section 15; NE ¼ NE 1/4, east of river, Section 22, less 0.91 acre for road. All in T. 13 N., R 2 W.W.M.	The place of use (POU) of this water right is the service area described in the most recent Water System Plan/Small Water System Management Program approved by the Washington State Department of Health, so long as the water system is and remains in compliance with the criteria in RCW 90.03.386(2). RCW 90.03.386 may have the effect of revising the place of use of this water right

Table 2. Proposed Source of Withdrawal.

Source Name	Parcel	Well Tag	Twp	Rng	Sec	QQ Q	Latitude	Longitude
City of Napavine Well #6	018082001000	AFT345	13N	02W	09	SW NW	46.599108	-122.907275

Table 3. Existing Source of Withdrawal.

Source Name	Parcel	Twp	Rng	Sec	QQ Q	Latitude	Longitude
Well #1, Betty Hamilton house	018050005000	13	02W	15	SE SE	46.606886	-122.909375
Well #2 West Coast Oil	018050016001	13	02W	15	SE SE	46.605189	-122.909792
Well #3 Main Well	018050016004	13	02W	15	SE SE	46.606578	-122.911367
Well #4 Polaris	017905004000	13	02W	15	NE SE	46.610608	-122.913172

Legal Requirements for Proposed Change

The following is a list of requirements that must be met prior to authorizing the proposed change in GWC 1726.

Public Notice

The applicant published notice for this project proposal in *The Chronicle* Lewis County once a week for two consecutive weeks beginning December 14 and ending December 21, 2007. The Department of Ecology received five letters of concern in response to this notice.

State Environmental Policy Act (SEPA)

A SEPA determination evaluates if a proposed withdrawal will cause significant adverse environmental impacts. A SEPA threshold determination is required for:

- 1) Surface water applications for more than 1 cubic feet per second (cfs). For agricultural irrigation, the threshold increases to 50 cfs, if the project isn't receiving public subsidies.
- 2) Groundwater applications requesting more than 2,250 gpm.
- 3) Projects with several water right applications where the combined withdrawals meet the conditions listed above.
- 4) Projects subject to SEPA for other reasons (e.g., the need to obtain other permits that are not exempt from SEPA).
- 5) Applications that are part of several exempt actions that collectively trigger SEPA under WAC 197-11-305.

This application does not meet any of these conditions and is categorically exempt from SEPA.

Statutory Requirements

Water Right Changes

RCW 90.03.380(1) states a water right put to beneficial use may be changed. The point of diversion, place of use, and purpose of use may be changed, as long as it would not harm or injure other water rights.

The Washington Supreme Court has held that Ecology is required to make a tentative determination of extent and validity of the claim or right when processing an application for change to a water right. This is necessary to establish whether the claim or right is eligible for change. (*R.D. Merrill v. PCHB and Okanogan Wilderness League v. Town of Twisp.*)

The holder of the right may change the manner or purpose of use. The Washington State Supreme Court held in *Merrill* that a water right holder may change the season of use when related to a change in the purpose of use of a water right. A change in the purpose of use can be approved only after the water has first been applied to beneficial use.

Same Body of Public Groundwater

RCW 90.44.100 allows Ecology to amend a ground water permit (or claim) to allow the user to construct a replacement or additional well at a new location outside of the location of the original well, or to change the manner or place of use of the water, if:

- (a) For replacement wells, the user must discontinue use of the original well and properly decommission the original well.
- (b) For additional wells, use from the original well can continue, but the combined total withdrawal from all wells must not enlarge the right.
- (c) Other existing rights must not be impaired.
- (d) The wells must draw from the *same body of public groundwater*. Sources in the same body of public groundwater are:
 - Hydraulically connected.
 - Have a common recharge (catchment) area.
 - Share a common flow regime.

INVESTIGATION

The material reviewed in support of this application included the following:

- The State Surface Water Codes, administrative rules, and policies.
- Department of Ecology's Water Right Tracking System (WRTS) database.
- Topographic and local area maps.
- Telephone interviews and e-mail correspondence from Karl Johnson, of Gray and Osborne, Inc., representing the City of Napavine.
- The City of Napavine's Draft Water System Plan Update, Gray and Osborne, May 2008.
- Notes from a site visit on March 5, 2012.
- Hydrogeologic memorandum written by Tammy Hall, licensed hydrogeologist, with Water Resources Southwest Regional Office, March 7, 2012.

Project Location and Site Description

The City of Napavine is situated in Lewis County, along Interstate 5, about six miles south of Chehalis. The town sits at the northern edge of the Napavine, Jackson, and Grand Prairies, exactly half-way between the cities of Tacoma and Portland, Oregon. Napavine lies between the Neuwaukum River and Stearns Creek.

The City of Napavine owns and operates a municipal water system (ID# 58200) that serves the town and surrounding areas. Information on Washington State Department of Health's website (Sentry) indicates the water system serves a residential population of 1,900 and a nonresidential population of 772 on 654 connections.

Napavine was originally a logging and sawmill center that once included six sawmills, a shingle mill, and two column factories. Other businesses included a general repair shop, two shoe shops, and a blacksmith. Napavine was incorporated as a town in 1913 and reincorporated as a City in the 1970's. The water system was built in 1955 and used Well 1 as its primary source until 1964, when Well 2 was drilled. Wells 3 and 4 were added in 1975 and 1994, respectively.

Significant water distribution system improvements were made in 2000.

Intent of Application for Change

The intent of this application is to transfer water rights associated with the Hamilton property to the City of Napavine. The City has agreed to purchase the Hamilton water rights pending approval of this transfer.

The original application requested to transfer GWC 1726 to the City's wells 2, 4, and 5. However, the City amended the application and the proposed point of withdrawal was changed to a new well, City of Napavine Well #6.

History of Water Use of GWC 1726

GWC 1726 was issued on January 14, 1954 to Frank B and Edith Hamilton. The certificate authorized 420 gpm and 114 ac-ft per year for irrigation of 57 acres, stockwater, and domestic supply. Surface Water Certificate (SWC) 5605, issued January 15, 1954, is supplemental (non-additive) to GWC 1726. It allowed diversion of 0.7 cubic feet per second (cfs) from the Newaukum River for irrigation of 70 acres.

Anecdotal information from the Hamiltons indicated they used the water right as authorized until around 1994. Records were not kept regarding how much water was being used.

After 1994, other uses began to occur. Water use from each of the groundwater sources continued until summer 2011 when the City of Napavine began providing water service. At least 2 of the 4 wells were also used to irrigate, but the surface water diversion was the main source for irrigation.

The Hamiltons provided statements of various activities that have taken place on their property involving water use throughout the years. Recent documented water uses include the following (Gray and Osborne, 2004):

- Public Water Supply to Hamilton, Betty Water System (ID#04767A), Water Facilities inventory (WDOH, Sadie database) lists one well, one residence, and 5 non-residential connections.
- Water was sold in bulk to Sterling Breen Crushing, Inc., for a project to fill Hamilton property.
- The Hamiltons have raised various irrigated crops on their property, including alfalfa, hay, field corn, peas, potatoes, and potted pine trees. Surface water was the primary source.
- The Hamiltons have raised various stock on their property, including beef cattle, horses, pigs, and sheep. These livestock were shown regularly and bathed routinely.
- Uhlmann RV operated a business and used a separate, un-metered well.

- Water was sold in bulk to Northfork Construction Inc. for asphalt plant dust control and miscellaneous road cleaning.
- Five trailers on the property were supplied with water. Usage was not metered.

Tentative Determination of Extent and Validity of GWC 1726

The Washington Supreme Court holds that when processing an application for change to a water right, Ecology is required to make a tentative determination of extent and validity of the claim or right. This is necessary to establish whether the claim or right is eligible for change. (*R.D. Merrill v. PCHB and Okanogan Wilderness League v. Town of Twisp*).

Water use on the Hamilton property was from four wells with varied uses. In written statements, the Hamiltons have provided estimates of water use on their property. Based on documentation provided, Ecology's tentative determination was that GWC 1726 is valid for 140 gpm and 36 ac-ft of year-round use and 69 ac-ft per year for seasonal use (May 1 through September 30). This use is detailed below in Table 4.

Table 4. Summary of Hamilton water use data

Use	Amount ac-ft/yr
Group B water system/public water supply	2.89
Sterling Breen	17.68
Irrigation of 40 acres (seasonal, primarily surface water under SWC5605)	69.13
Stockwater	2.28
Uhlmann RV	2.97
North Fork Construction	8.84
Show stock bathing	0.15
Trailer residents	1.12
Total	105

(Gray and Osborne, 2004)

The remaining 10 ac-ft and 310 gpm under this right has been relinquished back to the state for non-use without "sufficient cause" as defined by statute (Chapter 90.14 RCW).

Proposed Use

The purpose of use will be Municipal Supply.

Determination of De Facto Change of GWC 1726

In some situations, changes to historic uses associated with water rights have been made in the diversion or use of water without first obtaining authorization for the changes pursuant to chapters 90.03 and 90.44 RCW. Such unauthorized changes to existing water rights are commonly referred to as "de facto", or a change that has already occurred.

When evaluating unauthorized changes to water rights, Ecology generally considers beneficial use to be the measure of the right, even if some attributes of the right may not be consistent with the current authorization.

Use of water in a manner inconsistent with one's water right authorization may not result in forfeiture or abandonment of that right, provided such use is beneficial and not wasteful. Consideration of unauthorized water use as representing beneficial use of the water right is determined on a case by case basis, through careful examination of the specific facts associated with the water right file.

The changes in beneficial use for the Hamilton water rights occurred when the Hamilton property became part of the Urban Growth Area (UGA) for the City of Napavine. At this time, land use changed from primarily agricultural to commercial. All water use after this change in land use has remained within the annual limits of the original water right. Considering the facts and circumstances of this specific situation, I determine that a *de-facto* change occurred in the use of GWC 1726.

Proposed Use

The proposed use is "Municipal Supply Purposes."

Other Rights Appurtenant to the Place of Use

The City of Napavine (System Id. No. 58200) encompasses around 640 acres and serves residential and commercial customers (Gray and Osborne, 2008). Groundwater withdrawals are authorized by two Water Right Certificates and four wells.

Details of the City's water rights are summarized in Table 5.

Table 5. The City of Napavine's Water Rights.

Certificate #	Source	Instantaneous Rate(Qi) GPM	Annual Quantity (Qa) ac-ft/year	Location: QQ-Q T. 13 N., R. 2 W.	
				Sec 34	Sec 35
G2-00101	Wells 1, 2, 4, & 5	265	138	NE NE	
G2-23113	Well 3	50	30		NW NW
Total		315	168		

System Demand and Water Use

The City of Napavine's current Water System Plan (Gray & Osborne, 2008) estimates average daily demand in 2012 to be 130,000 gallons a day or about 146.1 ac-ft/year. Based on projected demand, the City expects to have enough annual quantity to last until 2016.

Approving this change will enable the City to meet projected annual demand until about 2026. (Gray & Osborne, 2008)

Hydrologic/Hydrogeologic Evaluation

General Area Hydrogeology

The City of Napavine is in central Lewis County, about 33 miles south of the southern end of Puget Sound. The City sits in a structural basin that extends from the Willamette Valley in Oregon to British Columbia called the Puget Trough.

The City is situated on a relatively flat upland terrace formed during the Pleistocene, roughly 10,000 years ago. Near Napavine, two terraces exist above the Neuwakum River Valley. The terraces were formed when glacially fed streams discharged across the valley, eroding the fill and forming broad terraces of alluvium and glacial outwash materials. (Weigle and Foxworthy, 1962)

The younger, lower terraces are relatively flat. The older, upland plains have a more rolling surface marked by deep gullies extending back from the scarps. Landslides occur at many places along terrace scarps. (Weigle and Foxworthy, 1962)

All aquifers and streams are expected to be hydraulically connected.

The following units are found in the Napavine area:

- Logan Hill Formation. This unit comprises the upper terrace and can be up to 150 feet thick. The top 20 to 50 feet is a highly weathered, yellow to red clay with gravel. In this weathered zone, pebbles and cobbles are so highly altered that they easily break apart. Below the weathered zone, the unit consists of a heterogeneous mixture of gravel and sand with minor amounts of silt and clay.

The Logan Hill formation yields only small amounts of water from the upper weathered zone, but can produce moderately large amounts of water from the lower, un-weathered zone. (Weigle and Foxworthy, 1962)

- Newaukum terrace. This unit ranges from less than 20 to more than 100 feet thick. Groundwater yields for the Newaukum terrace unit is usually small because the unit is tightly cemented although in some areas, only a small portion of the unit is saturated.
- River alluvium of the Neuwakum River. The alluvium of the Neuwakum River consists predominantly of fine-grained materials. As expected, wells completed in this unit are relatively shallow and have low yields.
- Non-marine deposits. This unit underlies the terrace deposits (Logan Hills and Newaukum terrace) and river alluvium in the Neuwakum River Valley. This unit was deposited in a structural basin formed from activity during the Pliocene Epoch. The Newaukum artesian basin covers about 25 square miles.

Recharge to this unit is from precipitation that falls on the adjacent upland plains. In the Napavine area, the hydraulic gradient is enough to produce artesian pressures.

Preliminary Permit

A Preliminary Permit was issued to the City of Napavine on April 2, 2008 requiring drilling and testing of a new production well. This new production well, Well #6, is about 200 feet south of the Neuwakum River about ¼ mile south of the wells associated with the Hamilton property. The unit exposed at the ground surface at the well site is the Newaukum terrace (Weigle and Foxworthy, 1962)

See Attachment #1

Drilling Napavine Well #6 began on November 10, 2009 and the well was completed on March 4, 2010. Construction details are summarized below in Table 6.

Table 6. Construction details of City of Napavine Well #6

Well Tag	AFT345
Date Drilled	March 2, 2010
Well elevation (ft above mean sea level, msl)	240
Well diameter (Inches, In)	8
Completed depth (ft below ground surface, bgs)	384
Elevation, ft below mean sea level (msl)	-144
Screened interval	346-379
Pumping capacity (gpm)	270
Hydrologic unit	Non-marine deposits Newaukum artesian aquifer

When the Newaukum artesian aquifer was penetrated, the water level rose and stabilized at about 19 feet below the top of the casing (Gray and Osborne, 2010). Based on the depth of the well and the elevation of the static water level, Well #6 is completed in the non-marine deposits of the Newaukum artesian aquifer.

Pump testing began on February 24 and ended February 26, 2010. The well was pumped at 270 gpm for 24 hours. At about 1,000 minutes (16.67 hours) into the test, the drawdown curve flattened out indicating a recharge boundary at distance. The estimated transmissivity of the aquifer, using early data is calculated at 7,425 gallons per day per foot of aquifer (gpd/ft) and 11,140 gpd/ft using data after 1,000 minutes of pumping (Gray and Osborne, 2010).

Hamilton wells

Information provided by Gray and Osborne (2004) indicates that groundwater use on the Hamilton property took place from four wells.

See Attachment #1

Well reports are only available for three of the four wells, Wells #1, #2, and #4. Well #3 was the main well, used primarily for the Group B water system. It's likely this well was also completed in the Newaukum terrace unit. Construction details of Wells #1, #2, and #4 are summarized in Table 7.

Table 7. Well construction details for Wells #2 and #4.

Well	Depth	Static water level, ft bgs	Hydrologic unit	Production capacity
Well #1, Betty Hamilton House	320	Artesian conditions when drilled	Newaukum artesian aquifer	120
Well #2, West Coast Oil	81	6	Newaukum terrace	25
Well #4, Polaris	44	11	Newaukum terrace	25

Same Body of Public Groundwater

When adding wells to groundwater rights, RCW 90.44.100 requires that the wells must draw from the *same body of public groundwater*. Based on Water Resources Program Policy 2010 (2007) wells that tap the *same body of public groundwater*:

- Are hydraulically connected.
- Share a common recharge (catchment) area.
- Share a common flow regime.

The wells used on the Hamilton property and City of Napavine Well #6 draw water from the same body of groundwater. The wells are hydraulically connected, share the same recharge, and common flow regime. Groundwater from all wells ultimately discharges to the Newaukum River.

Impairment Considerations

Effects to Area Water Users

Water right changes have greatest potential to affect wells completed in the same aquifer near the new point of withdrawal.

WAC 173-150-060 specifies impacts to "qualifying withdrawal facilities" fit the legal definition of impairment. This allows wells to be affected but impacts are not considered impairment. Qualifying withdrawal facilities are wells completed in the same aquifer as the new point of withdrawal. The well must span the aquifer's entire saturated thickness and the pump elevation must allow variation in seasonal water levels.

This change will allow withdrawals of 140 gpm and 105 ac-ft per year from a well 379 feet deep. Only 39 ac-ft will be authorized for year-round use. The remaining 69 ac-ft is limited to seasonal use from May 1 through September 30.

A query of Ecology's water right (WRTS) database identified three water right certificates within 1/4 mile of Well #6. The Schwarz well is shallow (25 ft deep) and is not expected to be affected by withdrawals from Well #6.

The Balmelli Dairy wells are completed at a comparable depth as Well #6, at a distance of about 1/4 mile. Pumping Well #6 will likely affect the pressure in the Newaukum artesian aquifer and lower the water level slightly, but not enough to affect well production. Therefore, impairment is not expected.

Details of these water rights are summarized in Table 8.

Table 8. Water right certificates within ½ mile of Well #6.

<i>Certificate</i>	<i>Name</i>	<i>Priority date</i>	<i>Purpose of use</i>	<i>Q1</i>	<i>Qa</i>	<i>Well depth</i>
114	Schwarz	5/1/1945	Irrigation of 40 acres	125	40	25
G2-23286	Balmelli Dairy	10/17/1974	Irrigation of 50 acres	135	100	305
G2-23288	Balmelli Dairy	10/17/1974	Stockwater Domestic Supply	100	34.6	325

Ecology records also identified the following in about one-mile from Well #6:

- Twenty surface water certificates and superseding certificates authorizing 7.25 cfs and 926 ac-ft per year for irrigation, stockwater, and domestic supply.
- Six groundwater certificates totaling 430 gpm and 74.7 ac-ft per year for irrigation and domestic supply.
- Seventy-three surface water and groundwater claims are registered for domestic supply, irrigation, and stockwater. The validity and exact location of wells under these claims is not known.
- Forty-four well reports are on file in Ecology's database.
 - Twenty-one are less than 100 feet deep.
 - Sixteen are between 100 and 200 feet deep.
 - Seven are between 200 and 300 feet deep.

Impacts to Surface Water

WAC 173-522 establishes instream flows for the Newaukum River at River Mile (RM) 4.1 in Section 9, T. 13 N., R. 2 W., about five miles downstream of the City of Napavine.

The proposed change will authorize groundwater withdrawals from four shallow wells completed in the Newaukum terrace unit to a deeper well completed in the Newaukum artesian aquifer. Although all wells are completed in the same body of public groundwater, wells in the Newaukum terrace unit have a more direct communication with flows in the Newaukum River. Therefore, this change will benefit streamflows in the Newaukum River.

Public Interest Considerations

Approving CG2-GWC1726 is not detrimental to the public interest and consistent with RCW 90.54 and WAC 173-522.

Consideration of Protests and Comments

In response to the public notice, Ecology received five letters of concern with regard to this proposed change. These letters are considered "letters of concern" instead of formal "letters of protest" because they were received after the 30-day protest period had expired. All parties expressed the same concerns:

- Approval of CG2-GWC1726 would result in impairment of their water rights.

- Approval of CG2- GWC1726 would result in impairment of surface water.
- GWC 1726 is not a valid water right in good standing and available for change.

The parties who expressed their concern regarding this proposed change are listed in Table 9.

Table 9. Concerned parties regarding CG2-GWC1726.

<i>Concerned Party</i>	<i>Date of letter</i>
Tracy & Kathleen Spencer	April 1, 2010
Virgina Breen	March 25, 2010
Tammy Baker & Daniel Smith	March 25, 2010
Harvey & Judy Breen	March 25, 2010
Tammy Baker	March 18, 2010

Potential to impair other water rights

It is not likely that approval of this proposed change will result in impairment of other water right holders. Most area wells are completed in the shallow aquifer system; either the Newaukum terrace or river alluvium. The proposed new point of withdrawal, City of Napavine Well #6 is completed in the Newaukum artesian aquifer.

The well completed in the Newaukum artesian aquifer closest to Napavine Well #6 is about ½ mile away. Although pumping in Well #6 will likely affect the pressure in the Newaukum artesian aquifer, it is not expected to interfere with production of the wells.

Potential to impair surface water

It is not likely that flows in the Newaukum River or other surface water streams should be affected by this proposed change. It is likely that flows in the Newaukum River will benefit from this change since shallow wells associated with this water right will no longer be used. Shallow wells have a more direct connection with the Newaukum River.

Extent and validity of GWC 1726

Changes from an authorized water right use to other uses does not necessarily result in forfeiture or abandonment of that right, provided such use is beneficial and not wasteful. When evaluating unauthorized changes to water rights, Ecology generally considers beneficial use to be the measure of the right, even if some attributes of the right may not be consistent with the current authorization.

Based on Ecology's evaluation, it appears that a "de facto" change in water use occurred around 1995 when land use began to change from agricultural to more commercial. All water use after this change in land use has remained within the annual limits of the original water right.

Based on the information provided, 140 gpm and 36 ac-ft will be approved for year-round use. The remaining 69 ac-ft is authorized for seasonal use, May 1 September 30.

Determined Future Development Plan (DFDP)

RCW 90.14.140(2)(c) states that a water right not used for more than 5 years is not relinquished if it is claimed for a determined future development to take place within 15 years of the last beneficial use of water under the water right.

In order to qualify as a DFDP, a determined future development plan must satisfy a series of tests as established in *R.D. Merrill Company v. Pollution Control Hearings Board*; *City of Union Gap and Ahtanum Ridge Business Park LLC v. Washington State Department of Ecology*; and *Protect Our Water v. Islanders for Responsible Water Management (Interveners), State of Washington, Department of Ecology, and King County Water District No. 19*:

- The project must be sufficiently complex as to require more than 5 years to complete;
- The plan must be determined and fixed within five years of the last beneficial use of the water;
- The party exercising the plan must have equity in the water right;
- The plan must remain fixed, and;
- Affirmative steps must be taken to implement the plan within 15 years.

In December of 2003, the City of Napavine and the Hamiltons entered into a written agreement to purchase water rights associated with the Hamilton property. This purchase would take place following their successful transfer to the City from this proposed change. This agreement qualifies as a DFDP.

RECOMMENDATIONS

Based on my investigation and conclusions, I recommend CG2- GWC1726 be approved for the amount listed below. Approval of this application is subject to the provisions beginning on Page 2.

Purpose of Use and Authorized Quantities

The amount of water recommended is a maximum limit. The water user may only use that amount of water within the specified limit that is reasonable and beneficial:

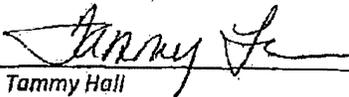
- 140 gpm
- 36 ac-ft, year round use
- 69 ac-ft seasonal use, May 1 to September 30.
- Municipal supply

Point of Diversion

- SW¼ NW¼, Section 9, Township 13 North, Range 2 W.W.M.

Place of Use

- As described on Page 1 of this Report of Examination.


Tammy Hall

4/17/2012
Date

If you need this publication in an alternate format, please call Water Resources Program at (360) 407-6600. Persons with hearing loss can call 711 for Washington Relay Service. Persons with a speech disability can call 877-833-6341.

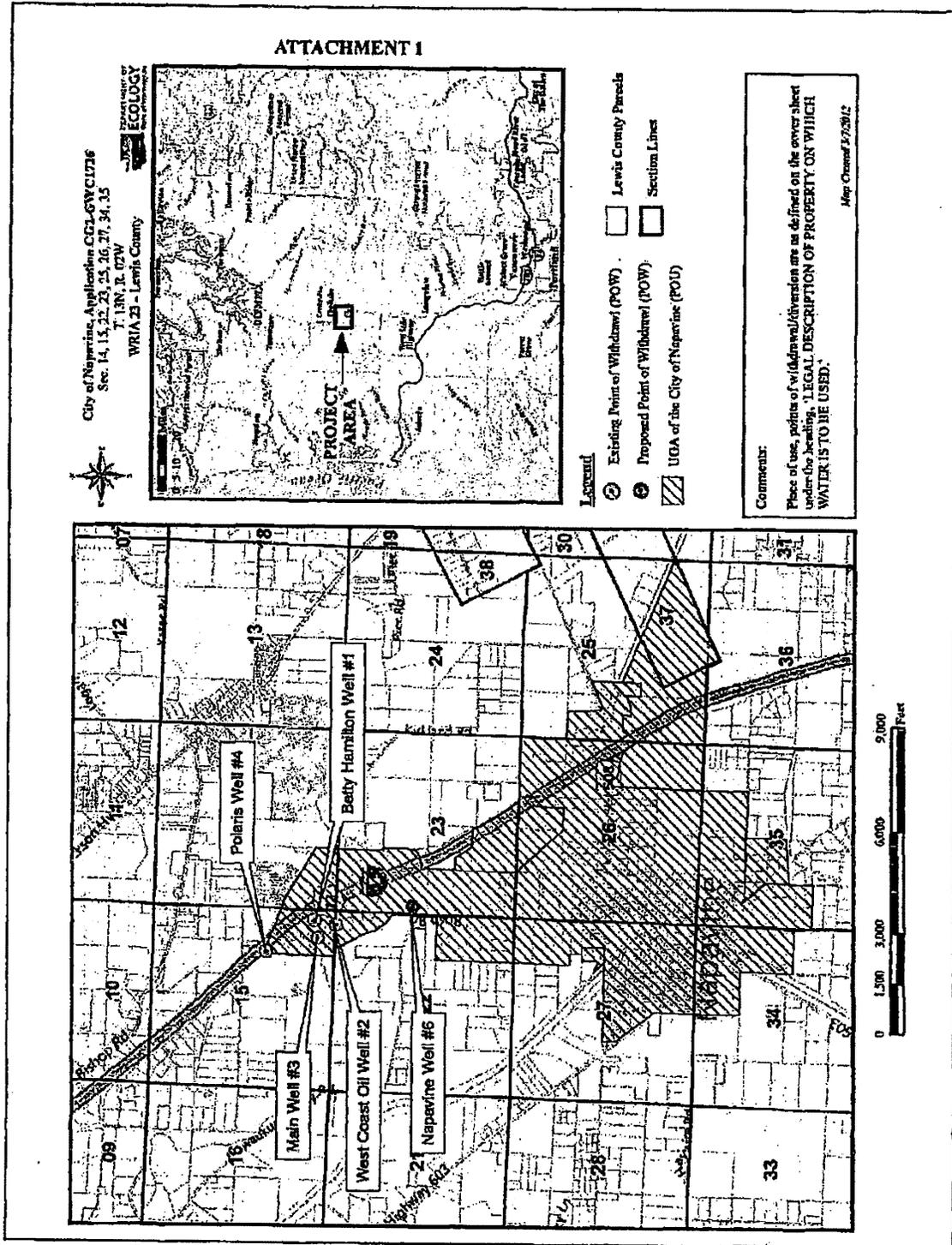
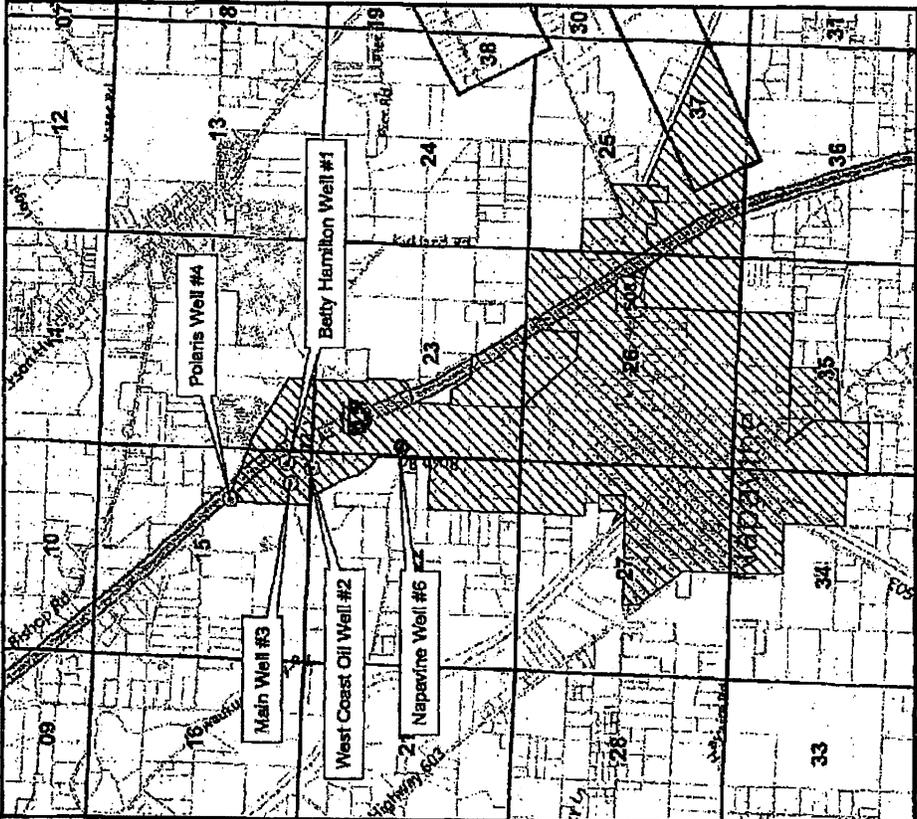
References

Gray and Osborne, Inc., 2004, City of Napavine Application for change/Transfer of Water Rights Numbers 1726A (CWRIS#G2-02468) and 5605 (CWRIS#S2-11592), November 2004.

Gray and Osborne, Inc., 2008, City of Napavine, Lewis County, Washington, Water System Plan, May 2008.

Gray and Osborne, Inc., 2010, Preliminary Permit (GWC) 1726, Report of Drilling and Testing Results, City of Napavine, Lewis County, Washington G&O #09239, April 14, 2010.

Weigle, J.M. and Foxworthy, B.L., 1962. Geology and ground-water resources of west-central Lewis County, Washington. Washington Division of Water Resources, Water Supply Bulletin No. 17. 78 p.

0 1,500 3,000 6,000 9,000 Feet



ENSURING PROPER SIGNATURE ON APPLICATIONS AND FORMS

- Contact:** Program Development and Operations Support Effective Date: 08/10/2009
Revised Date: 10/09/2013
- References:** RCW 90.03.260, RCW 90.03.270, RCW 90.03.380, RCW 90.03.390, RCW 90.44.060, RCW 90.44.100, RCW 90.44.105, RCW 90.44.460, WAC 508-12-100, WAC 508-12-130.
- Purpose:** To provide guidance to water resources staff when reviewing water right applications, change applications, and other forms and documents for acceptance.
- Application:** This guidance applies to any application, form or other document relating to a water right that must be signed to be accepted by the Water Resources Program.

This guidance supersedes any previous guidance, policy, interpretive statement, focus sheet or other stated Department of Ecology (Ecology) or Water Resource Program (program) viewpoint with which it may conflict.

Background and Evaluation

Any application or form that requires a signature must be signed by the applicant and other required parties to be accepted. An unsigned application or form is considered defective and must be returned for correction or completion. An application or form without appropriate signatures cannot be processed.

A signature is the name of a person written with his or her own hand, or a hand written mark or sign intended to authenticate any instrument or writing. The following handwritten marks are acceptable as signatures:

- The name in the same form as it appears on the application or on the certificate of ownership.
- Initials corresponding to the first letters of the given name(s), along with a full last name.
- A given name(s) corresponding to the initials.
- Common nicknames such as Bob for Robert, Jim for James, Betty for Elizabeth, etc. along with a full last name.

A signature memorandum, signature stamp, mark or sign intended to authenticate an application or form is acceptable.

Signing an application or form makes it valid, identifies the applicant, shows informed consent, and constitutes approval, acceptance, or obligation by the person(s) who signs it. Where required

below, a signature may be required to be witnessed by a notary public that the signature is authentic.

Inability of the applicant to obtain all signatures should be evaluated on a case by case basis. If improper signatures are discovered later, then the application will be returned. The applicant will be given a reasonable time to obtain required signatures.

Washington State is a "community property" state, and as such, all real and personal property is generally owned in undivided one-half interests by those in marital relationships. Water right applications, permits, and certificates may be held as community property by spouses. Spouses should sign and date any application, assignment, or form that pertains to water rights, permits, changes or certificates. However, if only one spouse signs the document, that person binds the community unless another exemption applies.

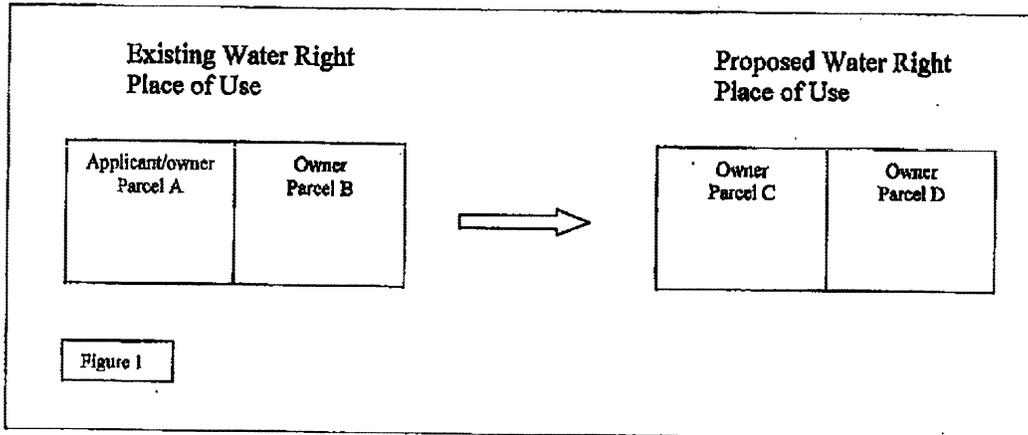
The following signature guidelines apply:

- For a sole proprietorship, the owner must sign the application;
- For a limited liability company (LLC) or professional limited liability company (PLLC), an authorized member or manager must sign the application;
- For a partnership, one or more authorized partners must sign the application;
- For a limited partnership or liability partnership (LLP), a general partner must sign the application;
- For a corporation or association, including nonprofit corporations, an authorized corporate officer must sign the application;
- An attorney, agent or other legally authorized representative may sign the application if so authorized in writing by the applicant or other required party.

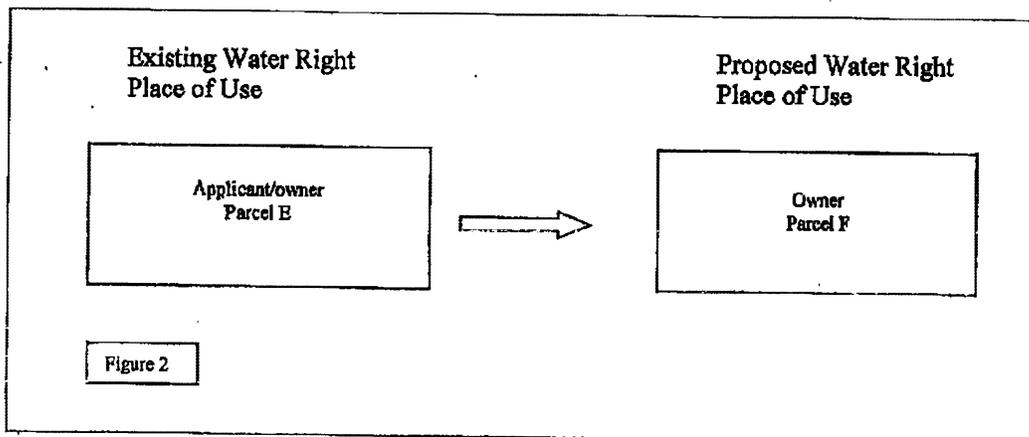
This list is intended as internal guidance only. This guidance does not supersede current law on agencies, partnerships, corporations or the internal bylaws or other agreements between partners or organizations. Ecology may request documentation of signature authority but is not required by this policy to do so.

To determine what signatures are required, it is necessary to determine who holds an interest in (1) the water right(s) involved and (2) the parcel(s) of real property involved. If there is more than one party with a controlling interest in the water right, all of the parties should sign as the applicant. Parties with an ownership interest in the parcel(s) of land constituting the proposed place of use are also to sign, if not already signing as an applicant or owner(s) of the water right.

For example, in Figure 1 below, the applicant holds a water right and is applying to change it from the current place of use (Parcels A and B) to a new place of use (Parcels C and D). The applicant holds the entirety of the water right and owns Parcel A. Another party owns Parcel B, within the current place of use, but is not a holder of A's water right. The applicant would need to secure the signatures of land owners for Parcels C and D in order to file the application for change. If the owner of Parcel B has no interest in the portion of the water right subject to the application, the owner of parcel B does not need to sign.



If the water right holder does not own either parcel of property, only the water right holder and owner of the proposed place of use are required to sign the application or form. For example in Figure 2 below, the applicant (within Parcel E) proposes to change the place of use of a water right to Parcel F. The applicant would need to secure the signature of the land owner of Parcel F in order to file the application for change.



The best practice is to attempt to identify and acquire signatures of all landowners early in the the application process. If after submission of the application other landowners are identified, however, notice can be made to the additional landowners via certified mail.

The names and addresses provided by applicants and other signatories should be entered into the Water Right Tracking System (WRTS) under "Last Known Contact" and in some cases will supersede addresses in the application or permit record, provided legal interest in the application or permit is demonstrated.

Special Circumstances for Signature Requirements

In certain circumstances, the following guidance may assist in determining how to apply the signature requirements:

- The party's legal representatives, trustee, or power of attorney may sign provided that authority to act as the legal representative is provided. For example, if an attorney is acting on behalf of a property owner, the attorney may sign the application. Ecology staff may supplement the file with documentation that the attorney is acting in that capacity.
- Where there is clear documentation by court decree, property transfer deed, or other document (e.g. a divorce decree) showing a property owner's interest in the water right (or lack thereof), Ecology should consider this in identifying parties required to sign as water right holder and/or property owner.
- A statement in a property deed such as "along with any water rights" is generally not sufficient to fully relinquish all interests in a water right such that signature is not required on any application relating to that water right. The program at its sole discretion may waive the signature requirement when clear documentation is provided as to ownership interest in water rights. In this event, staff will attempt to contact those whose signatures are absent. A decision on whether to proceed with the application without all signatures will not be made until thirty days after such an attempt to contact. Ecology will consider any response in its decision.
- Be aware that problems can arise when there is an ownership dispute; Ecology has no authority to resolve ownership disputes. If it is uncertain if all parties with equity interest in a water right are informed and support the action, then staff should not proceed until the uncertainty is resolved.
- An exception is made to the signature requirement in cases where water is conveyed to the trust water program. RCW 90.03.030 provides that water right holders may convey water rights downstream. Signatures of property owners who own land under rivers or streams (e.g. the proposed place of use for trust water rights) shall not be required.

In the case of any special circumstances or exception to the signature requirement, the exception must be clearly described and all accompanying documentation must be included in the file, including the steps taken to obtain signatures.

Reviewing Water Conservancy Board Decisions

Ecology recognizes that water conservancy boards operate under their own statutes and rules. Boards must follow the law, but are not subject to Ecology's policies, guidance, and interpretive statements, as described in Attorney General Opinion 2006 No. 17¹ (AGO), citing the Administrative Procedures Act (APA). The APA encourages agencies "to advise the public of

¹ AGO 2006 No. 17 - September 25, 2006. Extent of Department of Ecology's discretion in reviewing decisions of local water conservancy boards.

its current opinions, approaches, and likely courses of action by means of interpretive or policy statements." The AGO also recognizes that interpretive and policy statements are advisory only.

However, Ecology will use its own policies when reviewing board decisions and act consistently with Ecology's own interpretation of water law in deciding how to act on such decisions.

As such, the following guidance applies to staff when reviewing a board's record of decision.

- Program staff will not use this signature guidance as a sole basis for reversing or modifying a board's decision.
- Staff will apply existing water law and regulations to make decisions on appropriate signature authority for water right change applications and other legally required forms.
- RCW 90.80 requires a board to use Ecology's change application. Boards need to ensure that all parties are notified and sign the application as required by Washington State water law.

The above guidelines apply to specific documents as follows:

New Water Right Applications

The applicant (or authorized representative) must certify that the information in the application is true and accurate, and print their name, and sign and date the application.

If the applicant is not the legal owner of the entirety of the land where the water will be used, the application must include a dated signature and the address of all such legal owners of the proposed place of use.

Water Right Change Applications

The applicant must certify the information in the application is true and accurate, print their name, and sign and date the application.

In addition, when the applicant does not own the land where the water right is proposed to be used when a change of place of use is requested, the application must include the signature and address of the legal owner of the land comprising the proposed changed place of use (WAC 508-12-130). When the applicant holding the water right does not own the land comprising the existing place of use and requests a change of place of use to other land, then the signature of the owner of the land comprising the existing place of use is not required.

Seasonal Change Applications

The applicant must certify that the information in the application is true and accurate, and sign and date the application. Signatures are required in the same manner as for change applications. At the end of the period authorized by the seasonal change, the water right reverts back to the original place of use.

Reservoir Applications

The applicant must sign and date the application. If the applicant is not the owner of the property, the property owner's name, signature and address must be included.

Application for an Amended Water Right Claim

The applicant must affirm the information is true and accurate, and sign and date the application. If the Amendment involves any new parties whose signature is required, such signatures must be added.

Voluntary Relinquishment and Voluntary Partial Relinquishment of Certificate of Water Right

This form requires the printed name(s), Water Right number, priority date, purpose(s) of use, attachment of the legal description, and affirmation of several statements. All holders of the certificate wishing to relinquish their interest in the water right must sign and date the form in the presence of a notary.

Voluntary Abandonment of a Water Right Certificate

The signers of the form must declare that the statements made are true and correct. This form requires the printed name, signed name, and date, of all persons holding or claiming to hold an interest in the water right certificate. All holders of the certificate wishing to voluntarily abandon their interest in the water right must sign and date the form in the presence of a notary.

Voluntary Abandonment and Voluntary Partial Abandonment of a Water Right Claim

This form requires the printed name, signed name, date, and where signed, by all persons holding or claiming to hold an interest in the claim.

Construction Notice

The applicant must certify that it is the holder of the permit or change/transfer authorization and are the authorized representative as described above. The form requires the printed name, signed name, date, address and telephone number (if available).

Proof of Appropriation and Project Completion

The permit holder must certify that the appropriation of water for the authorized beneficial use is complete, that the notice and documents are true and accurate, and that the use of water is in compliance with the terms and provisions on the permit or change authorization. The permit holder must sign and date the notice in the presence of a notary.

Request for a Conforming Municipal Supply Document

The person filing the request must print their name and phone number, indicate their title and authorization or interest in the water right, and sign and date the request.

By filing this request, the person acknowledges they are requesting a Superseding Water Right document to reflect the municipal status of the water right (RCW 90.03.560).

Showing of Compliance with RCW 90.44.100(3)

The water right holder filing the Showing of Compliance must complete the affidavit certifying that the new or replacement well complies with both the statutory criteria and provisions within the water right. The person filing must sign and date the notice in the presence of a notary.

Assignment of Application or Permit

Rights to groundwater and surface water, under a permit, belong to the applicant and not to the land. Property rights associated with the use of water do not attach to the land until perfection. Regardless of whether title to the land is transferred, applications and permits are personal property and must be assigned to transfer ownership. In order to transfer, the holder(s) of the

application or permit and the person(s) it is being assigned to must provide their address, telephone number (if available), and sign and date the form in the presence of a notary.

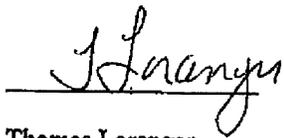
In the event that the applicant or water right permit holder is deceased, the program will accept signature of the authorized representative such as an estate executor, through heirs as indicated in probate documents, or a surviving party with a remaining controlling interest in the application. The program may require evidence of testamentary or probate documents (e.g. a will or order/deed from the probate court). If the applicant or authorized representative cannot be located, or no evidence of controlling interest in an application or permit is provided, staff will attempt to return the application as defective to the last known property address.

Request for Administrative Confirmation of Division of a Water Right

Each property owner holding a portion of a water right certificate must complete and sign and date the request. The signatories agree to divide the water right certificate consistent with the apportioning detailed on the form and consistent with historic beneficial use. Each party is responsible for paying associated fees. All fees must be received before a superseding certificate can be issued. Water right permits are required to be assigned.

Application to Enter a Water Right into the Trust Water Rights Program

The applicant, water right holder(s) and property owner(s) at the existing place of use must each sign and date the application. If the water right is in an irrigation district, the application must be signed by a representative with signature authority for the irrigation district.



Thomas Loranger
Program Manager
Water Resources Program

Special Note: These policies and procedures illustrate existing law and encourage consistency to guide water resources program staff in administering laws and regulations. These policies and procedures are not formal administrative regulations adopted through a rule-making process. Therefore, while this policy provides general guidance, it is not intended to supersede the applicable statutes and rules or control in all situations where staff may exercise discretion as to how best to apply the law.

The policies indicate Ecology's practices and interpretations of laws and regulations at the time they are adopted and may not reflect later changes in statute or judicial findings. If you have any questions regarding a policy or procedure, please contact the department.

RECEIVED

NOV 29 2004

Washington State
Department of Ecology



STATE OF WASHINGTON
**APPLICATION FOR CHANGE/TRANSFER
OF WATER RIGHT**

For filing with Ecology or with County Conservancy Boards

A MINIMUM FEE OF \$10.00 PAYABLE TO ECOLOGY MUST ACCOMPANY THIS APPLICATION

- (Check all that apply.)
- Change purpose(s) of use
 - Add purpose(s) of use
 - Change point(s) of diversion/withdrawal
 - Add point(s) of diversion/withdrawal
 - Change/transfer place of use
 - Other (i.e. consolidation, intertie, trust water)

Explain: _____

FOR OFFICE USE ONLY	
CHANGE No. <u>1726</u>	WRIA <u>23</u>
DATE ACCEPTED <u>11 29 04</u>	BY <u>SL</u>
FEE \$ <input checked="" type="checkbox"/>	REC'D <u>11 29 04</u>
CHECK No. _____	
SEPA: <input type="checkbox"/> Exempt <input type="checkbox"/> Not exempt	

"IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS (PLEASE PRINT OR TYPE CLEARLY)"

1. Applicant Information:

APPLICANT/BUSINESS NAME City of Napavine, Attn: Steve Ashley, Director of Public Works		PHONE NO. (360) 262-9231	FAX NO. (360) 262-9885
ADDRESS 214 NE Second St., PO Box 810			
CITY Napavine		STATE Washington	ZIP CODE 98565

CONTACT NAME (IF DIFFERENT FROM ABOVE) Karl Johnson, P.E., Gray & Osborne, Inc.		PHONE NO. (360) 754-4266	FAX NO. (360) 754-4266
ADDRESS 2401 Bristol Ct. SW			
CITY Olympia		STATE Washington	ZIP CODE 98502

2. Water Right Information:

WATER RIGHT OR CLAIM NUMBER 1726A (CWRIS # G2-02468)	RECORDED NAME(S) Frank B. and Edith Hamilton
DO YOU OWN THE RIGHT TO BE CHANGED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
IF NO, PROVIDE OWNER(S) NAME: Betty Ann Hamilton	
HAS THE WATER BEEN PUT TO BENEFICIAL USE IN THE LAST FIVE (5) YEARS? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	

Please attach copies of any documentation that demonstrates consistent, historical use of water since the right was established. Also, if you have a water system plan or conservation plan, please include a copy with your application.

FOR OFFICE USE ONLY			
APP. NO. <u>2468</u>	PERMIT NO. <u>2266</u>	CERT. NO. <u>1726</u>	CERT. OF CHANGE NO. <u>1726</u>

*WRIA 23
CWRIS*

3. Point(s) of Diversion/Withdrawal:

A. Existing

SOURCE	NO.	¼	¼	SEC.	TWP.	RGE.	PARCEL #	WELL TAG #
Well	1	SE	SE	15	13N	2W	18309-6	None
Well	2	SE	SE	15	13N	2W	18309-6	None
Well	3	SE	SE	15	13N	2W	18309-6	None
Well	4	NE	SE	15	13N	2W	18309-6	None

B. Proposed

SOURCE	NO.	¼	¼	SEC.	TWP.	RGE.	PARCEL #	WELL TAG #
Existing Well	2	NE	NE	34	13N	2W	8372-2-5	None
Existing Well	4	NE	NE	34	13N	2W	8372-2-5	None
Existing Well	5	NW	NW	35	13N	2W	8372-2-5	None

DO YOU OWN THE EXISTING AND PROPOSED POINT(S) OF DIVERSION/WITHDRAWAL?
 EXISTING YES NO PROPOSED: YES NO - IF NO, PROVIDE OWNER(S) NAME: Existing point of withdrawal is on property owned by Betty Ann Hamilton. Proposed point of withdrawal is on property owned by City of Napavine

Please include copies of all water well reports involved with this proposal. Also, if you know the distances from the nearest section corner to the above point(s) of diversion/withdrawal, please include that information in item No. 6 (remarks) or as an attachment.

4. Purpose of Use:

A. Existing

PURPOSE OF USE	GPM or CFS	ACRE-FT/YR	PERIOD OF USE
Irrigation, stock and domestic supply	420 gpm	114	Continuously

B. Proposed

PURPOSE OF USE	GPM or CFS	ACRE-FT/YR	PERIOD OF USE
Municipal	420	114	Continuously

5. Place of Use:

A. Existing

LEGAL DESCRIPTION OF LANDS WHERE WATER IS PRESENTLY USED:							
West 519 feet of SE ¼ of SW ¼ South of right-of-way, Sec. 14;							
NW ¼ of SW ¼ South of right-of-way, Sec. 14;							
SW ¼ of SW ¼ South of right-of-way, Sec. 14;							
E ½ of SE ¼ South of Railroad, Sec. 15;							
NE ¼ of NE ¼ East of river, Sec. 22; LESS 0.91 acre for road, All in Twp. 13 N., Rge. 2W.W.M.							
¼	¼	SEC.	TWP.	RGE.	COUNTY	PARCEL #	# OF ACRES
SE	SW	14	13N	2W	Lewis		
NW	SW	14	13N	2W	Lewis		
SW	SW	14	13N	2W	Lewis		
E ½	SE	15	13N	2W	Lewis		
NE	NE	22	13N	2W	Lewis		

DO YOU OWN ALL THE LANDS IN THE EXISTING PLACE OF USE? YES NO - IF NO, PROVIDE OWNER(S) NAME
 Betty Ann Hamilton

B. Proposed

LEGAL DESCRIPTION OF LANDS WHERE NEW USE IS PROPOSED:							
The Urban Growth Area of the City of Napavine, including all or portions of Sections 14, 15, 22, 23, 25, 26, 27, 34 and 35, T 13N R 2W WM							
¼	¼	SEC.	TWP.	RGE.	COUNTY	PARCEL #	# OF ACRES
			13N	2W	Lewis		

DO YOU OWN ALL THE LANDS IN THE PROPOSED PLACE OF USE? YES NO - IF NO, PROVIDE OWNER(S) NAME:
 Various current and future residents and landowners in the City of Napavine Urban Growth Area.

Attach a detailed map of your proposed change/transfer. The map should show existing and proposed point(s) of diversion/withdrawal, place of use and any other features involved with this application. If platted property, please include a certified copy of the plat map.

Are there any ADDITIONAL WATER rights OR CLAIMS RELATED to the same property as the ONE PROPOSED FOR CHANGE/TRANSFER?
 YES NO - IF YES, PROVIDE THE WATER RIGHT/CLAIM NUMBER(S): 5605 (CWRIS # S2-11592)

6. Remarks and Other Relevant Information:

The City of Napavine has entered into a purchase agreement with Ms. Hamilton contingent on successful transfer of this water right.

The City of Napavine has applied for new water rights, application No. G 2-28678. In response to that application Ecology has stated that Napavine must show mitigation, including transfer of existing water rights, acquisition and relinquishment of existing rights in exchange for new rights, or seasonal capture and re-release of high river flows. This application is intended to meet that mitigation requirement.

IF FOR SEASONAL OR TEMPORARY, START DATE ___/___/___ END DATE ___/___/___

7. Signatures:

I certify that the information above is true and accurate to the best of my knowledge. I understand that in order to process my application, I am hereby granting staff from the Department of Ecology or the County Conservancy Board access to the above site(s) for inspection and monitoring purposes. If assisted in the preparation of the above application, I understand that all responsibility for the accuracy of the information rests with me.

Robert C. Mealy (Applicant) 11/23/04 (Date)
Dorothy Hamilton (Water Right Holder) 11/23/04 (Date)
Dorothy Hamilton (Land Owner(s) of Existing Place of Use) 11/23/04 (Date)

IMPORTANT! APPLICATION FILING INFORMATION IS PROVIDED ON THE NEXT PAGE.

WE ARE RETURNING YOUR APPLICATION FOR THE FOLLOWING REASON(S):

APPLICATION FEE NOT ENCLOSED MAP NOT INCLUDED or INCOMPLETE

ADDITIONAL SIGNATURES REQUIRED SECTION _____ IS INCOMPLETE

OTHER/EXPLANATION: _____

STAFF: _____ DATE: ___/___/___

AFFIDAVIT OF PUBLICATION

STATE OF WASHINGTON }
COUNTY OF LEWIS } SS

Sadie Rockey, says that she is the legal clerk of

The Chronicle

a daily newspaper, which has been established, published in the English language, and circulated continuously as a daily newspaper in the City of Centralia, and in said County and State, and of general circulation in said county for more than six (6) months prior to the date of the first publication of the Notice hereto attached, and that the said Chronicle was on the 7th day of July 1941, approved as a legal newspaper by the Superior Court of said Lewis County.

And that the attached is a true copy and was published in regular issues (and not in supplement form) of said newspaper as Legal # 1233,

once each week for a period of 2 consecutive weeks,

commencing on the

14 day of December, 2007

and ending on the

21 day of December, 2007, and both dates inclusive, and that such newspaper was regularly distributed to its subscribers during all of said period. That the full amount of the fee charged for the foregoing publication is the sum of

\$ 2006.00.

Sadie Rockey

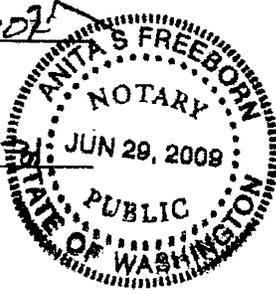
Subscribed and sworn to before me this

20th day of December, 2007.

Anita S Freeborn

Notary Public in and for the State of Washington, residing at

Centralia WA 985



State of Washington
Department of Ecology
Notice of Application
to Change the Purpose,
Place, and Point of
Withdrawal of Ground
Water Certificate 1728-A

Take notice That the City of Napavine filed an application to change the purpose of use, place of use and points of withdrawal under Ground Water Certificate 1728-A.

That said Certificate Issued to Frank Hamilton and authorizes the withdrawal of 420 gallons per minute, and up to 114 acre feet per year for the irrigation of 27 acres, and stock and domestic supply. The authorized wells are located within the SW 1/4 NW 1/4 of Section 14, and the SE 1/4 SE 1/4 of Section 15, T.12N., R.2 W. W.4.

That the application requests a change in purpose of use from irrigation, stock and domestic supply to municipal water supply; a change in points of withdrawal to the South 1/2 of Section 14, the NE 1/4 SE 1/4 of Section 22, and the SW 1/4 NW 1/4 of Section 29, and a change in the place of use to the water service area of the City of Napavine.

Protests or objections to approval of this Application must include a detailed statement of the basis of objections and are subject to public disclosure. Protests must be accompanied by a \$50.00 fee and filed with the Department of Ecology at PO Box 4775, Olympia, WA 98541-7775 within 30 days from December 21, 2007. L#1223 Dec. 14, & 21, 2007.

RECEIVED
JAN 10 2008
Washington State
Department of Ecology

S



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47775 • Olympia, Washington 98504-7775 • (360) 407-6300

RECEIVED

DEC 27 2011
WA State Department
of Ecology (SWRO)

April 2, 2008

Steve Ashley, Director of Public Works
City of Napavine
PO Box 810
Napavine, WA 98565

Dear Mr. Ashley:

Re: Preliminary Permit to Drill and Test a Well Under Application to Change Ground Water Certificate (GWC) 1726

Change application CG2-GWC1726 requests the withdrawal of public ground water at a rate of 420 gallons per minute (gpm) and 114 acre-feet per year for Municipal Use. The City of Napavine (Napavine) has proposed drilling well(s) within the S ½, Section 14, the NE ¼ SE¼, Section 22, and the SW ¼ NW¼, Section 23, T. 13 N., R. 2 W., W.M., in Lewis County. The Department of Ecology (Ecology) has evaluated the extent and validity of Ground Water Right Certificate 1726. Based on that analysis Ecology has determined GWC 1726 is valid for 140 gallons per minute and 36 acre-feet per year of continuous use, and an additional 69 acre-feet of water during the irrigation season (May 1 through September 30).

Under the authority of Chapter 90.03.290 Revised Code of Washington (RCW), Ecology can issue preliminary permits allowing water right applicants to conduct studies, surveys, and investigations to gather information to assess water right applications. As Ecology cannot evaluate availability and impairment without more information, the purpose of this preliminary permit is allow Napavine to conduct field studies to refine its proposal and to provide additional hydrogeological information.

GWC 1726 was issued prior to establishment of minimum instream flows for the Newaukum and Chehalis rivers per Chapter 173-522 WAC. Therefore, the critical issues in making a decision on CG2-GWC1726 are whether nearby senior wells could be impaired and whether or not there could be increased effects on the Newaukum River.

The conditions of this Preliminary Permit must be met by April 1, 2011 or Change Application CG2-GWC1726 will be canceled. Under some circumstances Ecology may grant limited time extensions, if requested. This Preliminary Permit does not commit Ecology to approve the water right change for your project. This Preliminary Permit allows temporary groundwater withdrawals for testing purposes only and other water uses



requiring a water right are not allowed. Ecology reserves the right to ask for more information before making a final decision on the application, if necessary.

This Preliminary Permit is subject to existing rights and the following conditions:

1. This Preliminary permit will remain in effect until April 1, 2011, unless revoked sooner by Ecology.
2. At least one observation well completed in the same aquifer as the pumping well must be monitored for drawdown, and recovery during the test. Observation wells should be selected to best determine potential for effects on nearby wells and impacts to the Newaukum River. Observation wells must not be pumped immediately before, during, or immediately after the test is completed. The data collected must be corrected for influences of barometric pressure, if necessary.

In order to evaluate potential aquifer responses to influences such as precipitation events, well interference, etc., water levels in the pumping well and all observation wells be measured hourly at least 24 hours before the start of the aquifer test.
3. A Washington Licensed Hydrogeologist or Registered Engineer (specializing in groundwater evaluation) must supervise the test and perform the data analysis. The well must be tested at a constant rate not less than the maximum design rate. The Washington State Department of Health (DOH) Water System Design Manual (DOH #331-123, June 99), Appendix E provides guidelines for designing and conducting aquifer tests (<http://www.doh.wa.gov/ehp/dw/publications/design.htm>). These guidelines are considered minimum requirements. Failure to follow correct methods may cause Ecology to require that the test be repeated.
4. The test must be designed to provide the following information:
 - a. Distance and time drawdown response in the producing aquifer
 - b. Aquifer transmissivity
 - c. Aquifer storage coefficient or specific yield
 - d. Potential for effects on nearby wells and impacts to the Newaukum River.
5. For confined aquifers the pumping portion of tests must last at least 24 hours OR until the water level in the pumping well has been stable for at least four (4) hours, whichever leads to the longest pumping period. For wells completed in unconfined (water table) aquifers, pumping must last 24 hours to 72 hours. Pumping during unconfined aquifer tests can be terminated prior to 72 hours

only if the water level in the pumping well has been stable for at least four (4) hours AND drawdown has been detected in an observation well for at least four (4) hours. Water levels are stable if they drop 0.1 foot an hour or less while the well is being pumped. After the pumping portion of the test is complete, you must collect recovery data from all wells until the water level in the pumped well nears pre-pumping static conditions and the water-level recovery rate is less than 0.1 foot per hour.

Water pumped during the test must be discharged so as not to recharge the drawdown cone or influence monitoring during the test. Water level measuring points for all wells must be accurately located within 10 feet horizontally and 1 foot vertically.

6. You must file a report with Ecology when aquifer testing is complete. The report must describe all findings regarding hydrology, hydrogeology, and results of the pumping test. All water level and water quality data collected from the pumping well and observation wells must be presented in both tabular form and on data plots (as elevation --feet above mean sea level vs. time). Ecology may also request some information in an electronic (spreadsheet) format. The report must address the concerns described above and include the following:

- A map showing locations of wells used in pump test (pumping and observation wells) and surface water bodies.
- Pumping well information including:
 - Well report and lithology description
 - Construction diagrams
 - Pump intake depth
 - Wellhead elevation and method for determining (e.g., topographic map, GPS, surveyed)
 - Identification of water level measuring point
- Observation well information including:
 - Well reports (if available)
 - Well information and method for determining (if no well report)
 - Wellhead elevations and method for determining
 - Total well depth
 - Screened interval (if available)
 - Identification of water level measuring point
- Distances between pumping well and observation well(s)

- Testing information including:
 - Pumping rates
 - Duration of pumping and recovery
 - Notes on any additional influences on pumping, such as pumping from additional nearby wells or heavy precipitation.
 - Water level information (measured to 100ths of a foot rather than inches) including:
 - Raw data and corrected measurements
 - Type of instrument used to take water level measurements (e.g., pressure transducer or electric tape)
 - Discussion of the methods and calculations used to determine aquifer characteristics
 - Copies of all field data sheets
- A description of the hydrogeologic system
- Two hydrogeologic cross sections
- A discussion of potential effects on nearby wells and the Newaukum River.

You will assume all expenses, risks, and liabilities incurred in response to this Preliminary Permit. If adverse impacts to senior water right holders occur during any portion of the test, the test must be stopped immediately. Once testing is complete the well must be capped so it does not pose a safety hazard.

Please make sure that your consultant receives a copy of this Preliminary Permit so they will comply with all conditions. Please check with the Lewis County Health Department to see if well site approval is required before well construction.

In addition to authorizing aquifer testing under this preliminary permit, this Order documents the extent and validity of Ground Water Certificate 1726 in the amounts of 140 gpm, 105 acre feet per year. Furthermore, the water right holder and the City have presented enough evidence to show a determined future development of the water right for municipal use. These quantities of water represent the entire water duty used on the Hamilton property in recent history. Since these amounts are attributed to GWC 1726, there is no water to attribute to Surface Water Certificate 5605 and that right shall be voluntarily relinquished.

You have a right to appeal this ORDER. To appeal this you must:

- File your appeal with the Pollution Control Hearings Board within 30 days of the "date of receipt" of this document. Filing means actual receipt by the Board

during regular office hours.

- Serve your appeal on the Department of Ecology within 30 days of the "date of receipt" of this document. Service may be accomplished by any of the procedures identified in Chapter 371-08-305(10) WAC. "Date of receipt" is defined at Chapter 43.21B.001(2) RCW.

Be sure to do the following:

- Include a copy of this document that you are appealing with your Notice of Appeal.
- Serve and file your appeal in paper form; electronic copies are not accepted.

1. To file your appeal with the Pollution Control Hearings Board

Mail appeal to:

Deliver your appeal to:

Pollution Control Hearings Board
PO Box 40903
Olympia, Washington 98504-0903

OR

Pollution Control Hearings Board
4224 - 6th Ave SE Rowe Six, Bldg 2
Lacey, Washington 98503

2. To serve your appeal on the Department of Ecology

Mail your appeal to:

Deliver your appeal in person to:

Department of Ecology
Appeals Coordinator
PO Box 47608
Olympia, Washington 98504-7608

OR

Department of Ecology
Appeals Coordinator
300 Desmond Drive SE
Lacey, WA 98503

3. And send a copy of your appeal to:

Thomas Loranger, Section Manger
Department of Ecology, SWRO
PO Box 47775
Lacey, WA 98504-7775

If you have any questions regarding this Preliminary Permit, please contact Tom Culhane at (360) 407-0289.

Sincerely,



Thomas Loranger
Water Resources Section Manager
Southwest Region Office



Gray & Osborne, Inc.
CONSULTING ENGINEERS

April 14, 2010

Excerpt

Mr. Thomas Loranger
Water Resources Section Manager
Southwest Region Office
Washington State Department of Ecology
P.O. Box 47775
Olympia, Washington 98504-7775

SUBJECT: PRELIMINARY PERMIT (GWC) 1726, REPORT OF DRILLING AND TESTING RESULTS
CITY OF NAPA VINE, LEWIS COUNTY, WASHINGTON
G&O #09239

Dear Mr. Loranger:

Pursuant to preliminary permit to drill and test a well dated April 2, 2008, the City of Napavine has acquired property, hired a contractor and drilled and tested a well. This letter constitutes a report of the well drilling and testing results.

As you will recall, I contacted you in February this year about Condition No. 2 on the preliminary permit, to monitor a non-pumped observation well in the same aquifer accessed by the new well. The nearest wells that appear to access this aquifer are over one half mile from this well and on the opposite side of the Newaukum River. (Wells 10, 12, and 14 in Exhibit A). These wells are owned by local businesses that will be incorporated into the City's water system once this well is put into service, and these wells will be decommissioned after the businesses are on City water. Based on these facts, you stated that it would not be necessary to monitor a non-pumped well.

Following is a discussion of the items required under condition 6 of the preliminary permit:

- A map, showing the location of the new well and other wells in the vicinity is enclosed and labeled Exhibit A. Well 10, 12, and 14 are estimated to be completed in the same aquifer as the new well.
- Pumping well lithology and construction records are well documented in the enclosed Water Well Report labeled Exhibit B. A temporary pump was installed for well pump testing with an intake at a depth of 330 feet.

Mr. Tom Loranger
April 14, 2010
Page 2

The testing pump was removed after well testing. Based on a USGS Topographic map, the ground elevation at the well site is estimated at 240 feet. Depth to geologic strata was measured during drilling based on depth from existing ground level at the well site. Water levels were measured from the top of casing, which is approximately 3 feet above ground level.

- Observation wells were not used, pursuant to discussion above. Well logs of the nearest wells completed in the same aquifer are included as Exhibit C.
- Step drawdown and 24-hour sustained drawdown testing data and charts.
- Distances between the pumping well and other wells completed in the same aquifer are indicated on Exhibit A.
 - Testing information including pumping rates, duration, of pumping and recovery, water level, and copies of field data sheets are included in Exhibit D. Due to distances and lack of any significant water use by other wells accessing the same aquifer as the pumping well, there were no significant influences from other wells. Light rain fell off and on during pump testing, but due to the depth of the well and the 238 feet of clay above the aquifer, it is reasonable to presume that precipitation had very little immediate influence on the aquifer water levels. Aquifer characteristics are calculated as follows:
 - Distance and time drawdown response in the producing aquifer:
 - Time drawdown response is demonstrated in the step drawdown test and 24-hour sustained drawdown test data and charts, included in Exhibit D. Distance drawdown response is not demonstrable from the data because no non-pumped well was observed.
 - Aquifer Transmissivity:
 - Aquifer Transmissivity was calculated using the simplified Cooper-Jacobs equation, as follows:

Mr. Tom Loranger
April 14, 2010
Page 3

$$T = \frac{264 \times Q}{\Delta S}$$

Where:

T is Transmissivity in gallons per day per foot
Q is Pumping Rate in gallons per minute
 ΔS is drawdown in feet over one log period

Based on the 24-hour drawdown curve in Exhibit D, the drawdown over the log period from 100 minutes to 1000 minutes was approximately 9.6 feet, yielding a T value of 7,425 gpd/ft. Drawdown over the log period from 100 minutes to 1,000 minutes was approximately 6.4 feet, yielding a T value of 11,140 gpd/ft. From the 24-hour drawdown curve in Exhibit D, it appears that the drawdown curve continues to flatten past 1,000 minutes, which indicates that the well drawdown is reaching a recharge boundary. This means that the calculation of Transmissivity would most likely increase if the well were pumped over a longer period. Therefore, it is appropriate to use the larger value of Transmissivity calculated above.

Transmissivity: $T = 11,140 \text{ gpd/ft}$

- o Specific Yield: Because no non-pumped observation well was used, it is not possible to calculate aquifer storage coefficient or specific yield from the data.
- o During the step drawdown test, the well had a drawdown of 28.10 feet after pumping at 76 gpm for 1 hour, a rate of 2.70 gpm per foot of drawdown. The well had a drawdown of 51.27 feet after pumping at 140 gpm for 1 hour, a rate of 2.73 gpm per foot of drawdown. The well had a drawdown of 74.40 feet after pumping at 200 gpm for 1 hour, a rate of 2.69 gpm per foot of drawdown. The well had a drawdown of 128.08 feet after pumping at 270 gpm for 1 hour, a rate of 2.63 gpm per foot of drawdown. At the end of the 24 hour sustained pump test at 270 gpm, the well had a drawdown of 128.08 feet, a rate of 2.41 gpm per foot of drawdown. →



Mr. Tom Loranger
April 14, 2010
Page 4

- Description of hydrogeologic system:

- The well was drilled approximately 200 feet south of the Newankum River and approximately 200 feet from the road. Weigle and Foxworthy (1962) (Excerpts included in Exhibit E) describe this location as Newankum River Terrace, and state that it is typically a poorly sorted mixture of sand and subrounded pebbles and cobbles bound in a matrix of yellow or yellow-gray clay and silt. Based on mapping in the Weigle and Foxworthy report the well appears to be near the south edge and approximately 1 mile from the west end of the Newankum Artesian Basin.

While drilling this well, when the aquifer formation was penetrated at a depth of approximately 339 feet, aquifer material and water surged up the well casing. The aquifer material came up approximately 100 feet, and the water rose approximately 100 feet to 19 feet below ground surface before stabilizing. The well driller added salt water to the well as a precautionary measure to prevent artesian flow from the well, but after completion of drilling, developing and pump testing the well, the static water level remains at approximately 19 feet below the top of casing. The material removed from the well casing consisted of ~~sands and~~ gravel and bits of wood. ←

Based on the mapping and descriptions in the Weigle and Foxworthy report, it appears that this well is tapping the Newankum Artesian Basin.

It should be noted that water samples from this well were analyzed at Columbia Analytical Services of Kelso, Washington, and were found to contain 90.6 mg/L of sodium and 77.2 mg/L of chloride. While this is not enough to compromise the usefulness of the water for municipal supply, it is appreciably higher than other wells used by the City of Napavine, which have ranged from 8.6 to 10.5 mg/L sodium and 2.0 to 4.1 mg/L chloride.

- Geologic Cross Sections:

- Geologic cross sections (Exhibit A) have been prepared based on well logs (Exhibit C) obtained from the Ecology web site for the

Mr. Tom Loranger
April 14, 2010
Page 5



project area. Wells were located by matching names on the well logs with names on the Lewis County Assessors maps. For mapping purposes, wells were estimated to be near the center of each parcel. Elevations of the land surface at each well were estimated from a USGS topographic map.

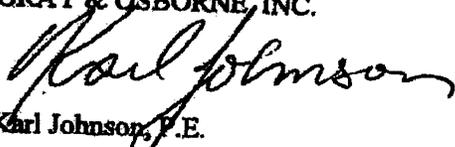
As can be seen from the geologic cross sections, there is very little consistency of aquifer layers between the wells. Dotted lines have been drawn where there appears to be some consistency, but it is not known for certain that geologic structures are continuous between well locations.

- Potential for effects on nearby wells and impacts on the Newaukum River.
 - As discussed above, the nearest wells completed in the same aquifer as the pumping well are over one half mile away from the pumping well. All nearer wells are completed in shallower aquifers, which were not encountered at the drilling location. Therefore, impacts on nearby wells are estimated to be minimal or non-existent. Similarly, impacts on the Newaukum River are estimated to be minimal to non-existent, due to the 238 feet of clay penetrated by the well before encountering the aquifer.

We trust that the foregoing adequately addresses all requirements of the Preliminary Permit. If you have any questions or require additional information. Please feel free to contact me at the number below.

Very truly yours,

GRAY & OSBORNE, INC.


Karl Johnson, P.E.

KJ/sp

cc: Mr. Steve Ashley, City of Napavine



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47775 • Olympia, Washington 98504-7775 • (360) 407-6300

May 20, 2011

Steve Ashley
City of Napavine
PO Box 810
Napavine, WA 98565

Re: Preliminary Permit to Drill and Test a Well Under Application No. CG2-GWC 1726

Dear Mr. Ashley:

On April 2, 2008 the Department of Ecology issued a Preliminary Permit to the City of Napavine. The Permit authorized the City to conduct field studies in order to refine its proposal and provide additional hydrogeological information for the above referenced water right change application.

This letter is to notify you that the Preliminary Permit issued to the City of Napavine expired on April 1, 2011 and has been cancelled.

Please cease using water under this Preliminary Permit. If additional time is needed to gather necessary data in regards to this application, they City must contact Ecology to request a new authorization for water withdrawals.

If you have questions or would like help, please contact me amy.nielson@ecy.wa.gov or at (360) 407-6116. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Amy Nielson for".

Amy Nielson
Water Resources
Southwest Regional Office





STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47775 • Olympia, Washington 98504-7775 • (360) 407-6300

June 2, 2015

City of Napavine
Attn: Steve Ashley
PO Box 810
Napavine WA 98065

Re: Water Change Authorization No's: CG2-GWC1726 and CG2-SWC5605

Dear Mr. Ashley:

Thank you for submitting your *Construction Notice* reporting you have completed construction of your water system.

Your next deadline is for *Proof of Appropriation* which is due to Ecology by June 1, 2022. We will be sending you a form when this date approaches.

If there are delays in completing your project, you must contact us in writing to request an extension.

Take note, although you sent in your completed *Form 1 Metering*, you failed to include a picture of your source meter. Additionally, you must begin to report your water use as provisioned in each Change Authorization. Your metering data can be reported online. Contact Eva Richards at 360-407-6643 or at erich461@ecy.wa.gov to set up an online account.

If you have any questions, please contact Tammy Hall at 360-407-6099 or thall461@ecy.wa.gov.

Sincerely,

Tammy Hall, L.H.G.
SWRO/Water Resources

PRO-1000 Water Rights Processing Procedures | 2015

PRO-1000 WATER RIGHTS PROCESSING PROCEDURES

Effective Date: 10-23-90

Revised: 03-30-2015

Resource Contact: Program Development and Operations Support

References: RCW 43.21, RCW 90.03, RCW 90.14, RCW 90.16, RCW 90.42, RCW 90.44, RCW 90.54, RCW 90.66, RCW 90.90, WAC 173-152, WAC 173-165, WAC 173-173, WAC 197-11, WAC 508-12

WATER RIGHTS PROCESSING PROCEDURES

Purpose: To provide guidance and to ensure relevant factors are considered in pre-application conferences and in the processing of applications to appropriate water and applications for change or transfer of existing water rights.

Application: This procedure applies to all applications to appropriate water and applications for change or transfer of water rights, pursuant to Chapters 90.03 and 90.44 RCW.

CHAPTER ONE: PRE-APPLICATION CONFERENCES4

CHAPTER TWO: PROCESSING NEW AND CHANGE APPLICATIONS.....5

 I. ACCEPTANCE OF APPLICATIONS.....5

 II. PUBLIC NOTICE AND PROTESTS.....6

 Public Notice.....6

 Affidavit Review.....7

 Protests and Concerns.....7

 III. APPLICATION REJECTION OR WITHDRAWAL.....7

 Withdrawal.....7

 Rejection.....7

 Application Reinstatement.....8

 IV. ASSIGNMENT OF APPLICATIONS8

 V. APPLICATION INVESTIGATION.....8

 Applications for a Water Right Permit8

 Applications for Change or Transfer of Existing Water Right.....10

CHAPTER THREE: REPORT OF EXAMINATION (ROE)13

 I. INVESTIGATOR’S REPORT13

 II. COVER SHEET/ORDER.....14

 III. REVIEW AND POSTING OF DRAFT REPORT OF EXAMINATION15

 IV. SIGNATURES AND POSTING OF FINAL REPORT OF EXAMINATION15

 V. DISTRIBUTION OF REPORT OF EXAMINATION15

 VI. Amendment of Report of Examination15

CHAPTER FOUR: WATER RIGHT PERMITS.....17

 I. ISSUANCE OF PERMITS17

 II. PERMIT MAINTENANCE.....17

 Beginning of Construction.....17

 Completion of Construction17

 Proof of Appropriation17

 Permit Extensions.....18

 Cancellation of Permits18

 III. ASSIGNMENT OF PERMITS18

IV. PROOF EXAMINATION.....19

CHAPTER FIVE: CERTIFICATES AND SUPERSEDING DOCUMENTS20

I. CERTIFICATES.....20

II. CORRECTIONS TO PERMITS OR CERTIFICATES20

III. SUPERSEDING DOCUMENTS.....20

CHAPTER ONE: PRE-APPLICATION CONSULTATION

Department of Ecology (Ecology) Water Resources staff offer pre-application consultations to help prospective water right applicants better understand the challenges they may incur when seeking a new water right, or a change or transfer to an existing water right. This technical assistance provides an opportunity to educate applicants about water supply, water law, and the water rights process. Perhaps, most importantly, staff can help applicants gain an understanding of the water availability in their particular basin.

A pre-application consultation is often the best time to discuss issuing a preliminary permit ([POL 1030](#)) if the applicant proposes to drill a well for their project ([RCW 90.03.290](#) and [RCW 90.44.060](#)). Staff can also discuss whether the proposed project might qualify for priority processing ([WAC 173-152-050](#)), may be processed through a water conservancy board, the cost-reimbursement process, or by some other means.

Pre-application consultation requests are received electronically, by mail, telephone, or in person. If an applicant is seeking a pre-application consultation, Ecology staff should:

- A. Contact the applicant and determine the type and location of the project.
- B. Request that the applicant submit the Water Right [Pre-Application Consultation Form](#) *via email* to support tracking of the number of applicants requesting this service.
- C. Schedule a time for a telephone or in-office consultation and provide the applicant with relevant materials to help them prepare for the meeting.
- D. Review the appropriate internal pre-application consultation checklist for new applications or change applications. (Links to the checklists are located on the left hand side of the [Water Right Application Processing](#) Sharepoint page.)
- E. Conduct the pre-application consultation and enter tracking information on the SharePoint site, or current tracking procedures. (Pre-application tracking instructions are located at the top of the [Pre-Application Consultation](#) Sharepoint page).

CHAPTER TWO: PROCESSING NEW AND CHANGE APPLICATIONS

Anyone seeking a new water right must first submit a water right application to Ecology's Water Resources Program. Applications to change or transfer a water right are submitted to Ecology or to the local county water conservancy board. Ecology permit writers process most of the applications filed with Ecology. They also review the applications and decisions of the conservancy boards, and the work of contractors when the cost reimbursement program is used.

Application processing normally involves office and field examinations to determine whether the application should be recommended for approval or denial. Other permitting considerations may also be explored at the discretion of the regional office.

I. ACCEPTANCE OF APPLICATIONS

The following processes and considerations apply to water right applications received by Ecology:

- A. The applicant must submit the statutory minimum fee before Ecology may accept their application. If an additional exam fee is required, Ecology must make the request within five (5) days of receiving the application (RCW 90.03.470 and WAC 508-12-140).
- B. Applications receive a date stamp for the day received, which generally becomes the priority date (RCW 90.03.270, RCW 90.03.340).
- C. Headquarters staff scan each application received at Cashiering and distribute them electronically to the appropriate regional office (for sending procedure, see Scanning Water Rights to Sharepoint page).
- D. Prior to accepting the application, regional staff review the application (see Receiving Instructions).
 - a. An application is assigned a number, according to Water Rights Tracking System (WRTS) procedures, when received by the Region and entered into WRTS, even if the application is not considered complete.
 - b. The application must contain sufficient information to prepare a proper public notice (see Section II. Public Notice and Protests), or contact the applicant for clarification.
 - c. For applications requesting a new appropriation, check the list of closed sources and possible existing rights attached to the proposed place of use before accepting the application. If the source is closed to the proposed use, the applicant may be contacted with a letter of explanation describing the unlikelihood of approving the application. At the applicant's request, Ecology will accept the application for a formal determination to preserve due process and retain the priority date.
 - d. For applications to change or transfer a water right, compare information on the application to the existing certificate, permit, or claim proposed for change/transfer (quantities, use, legal descriptions, etc.).

- e. All applications must include the signature(s) of the applicant(s) and the legal landowner(s) of the place of use for new applications and the proposed place of use for transfers. (GUID 2040).
- E. If the application is not complete, contact the applicant by phone or email, or return the application with a request for the needed information, including additional fees. The applicant's response is due within 60 days of filing the application to retain the original priority date.
- F. The applicant must file an application for each separate source of water, with a few exceptions (WAC 508-12-110, WAC 508-12-220). A separate application must also be filed for each permit, certificate, or claim that the applicant proposes to change or transfer.
- G. Check status with regard to State Environmental Policy Act (SEPA). Details can be found in RCW 43.21C and Chapter 14 of the Water Right Investigator's Manual.
- H. To accept an application once it is complete and the required fees are paid, fill in the priority date, initial the application as accepted, and enter the WRTS data. Assigned staff will then create a paper file for the application, then scan it for electronic distribution.
- I. The application is mapped using GIS software showing the proposed location of the diversion or withdrawal and the place of use.
- J. Send notice to the program Listserv, which contains the email addresses of agencies, Tribes, and other interested parties wishing to review applications Ecology has accepted. Regions may also have special lists of stakeholders that request to be contacted when applications are accepted.
- K. Under limited circumstances, applications may be amended at the request of the applicant or permit writer.

II. PUBLIC NOTICE AND PROTESTS

Prior to issuing the ROE, the applicant must publish public notice for the application to give the public an opportunity to comment or protest.

Public Notice

The regional office prepares the public notice, which is then sent to the applicant for publication in a newspaper of general circulation in each county containing the proposed point(s) of withdrawal/diversion, or storage site, or any place of use (refer to regional approved lists of newspapers). The public notice must appear once a week for two consecutive weeks. The public notice should contain the following information:

- A. Applicant's name and city of residence.
- B. Application number and priority date.
- C. Proposed source water body (e.g., river name or well). For surface water, list source and tributaries, if applicable.
- D. Purpose(s) of use.
- E. Rate and/or quantity of withdrawal, diversion, or storage .
- F. Period of use (year-round or seasonal).

- G. Project location (e.g. county, city).
- H. Location of withdrawal, diversion, or storage.
- I. Place of use description.
- J. For change applications, include narrative description of the existing right and proposed change(s).
- K. Manner and time limit for the filing of protests or objections to the application.

Affidavit Review

After publication of the public notice, the newspaper will issue an affidavit of publication. The applicant must send the original affidavit to the regional office. Staff will check each affidavit to ensure it is an original document with a notary stamp, contains the required information, and there are no errors. If errors are found, the applicant must republish the public notice at their own expense.

Protests and Concerns

Parties wishing to formally protest a specific application must submit it in writing, together with a \$50 filing fee, to Ecology's cashing section. To be considered a formal protest, Ecology must receive the protest within 30 days of the last date of publication of notice. No fee is required to submit a comment, by mail or otherwise, regarding an application. Protests are placed in the application file along with the cashing receipt and are entered into the WRTS file. Ecology responds to the protestant with a letter, and the applicant is sent a copy of both the protest and the response letter.

All other comments received after the 30 days since last date of public notice, or without the required fee, are treated as concerns. Concerns are also added to the application file, but may or may not be addressed in the report of exam. No fees are required to submit concerns.

III. APPLICATION REJECTION OR WITHDRAWAL

Even after applications are accepted, rather than being processed through a Report of Examination, they may be rejected or withdrawn. Withdrawal of an application is initiated by the applicant, whereas Ecology initiates a rejection prior to public notice. The difference between these two actions are explained below.

Withdrawal

An applicant may withdraw an application by notifying Ecology of their intent in writing. The withdrawal request may be submitted at any time prior to Ecology issuing the Report of Examination. Application fees should not be refunded (RCW 90.03.470).

Rejection

Prior to public notice, Ecology may reject an application for a number of reasons including, but not limited to:

- A. The applicant did not provide requested information within the required time.
- B. The applicant failed to pay applicable fees.
- C. Ecology never received the original Affidavit of Publication.
- D. The applicant refused access to land for the field examination.

- E. For change/transfer applications, a finding that the applicant has no standing to make the change or transfer.
- F. Ecology was unable to contact or locate applicant.

If errors are discovered with the application after public notice, Ecology should consult with the applicant to correct those errors and republish public notice, if necessary.

To reject an application:

- A. Send a letter requesting information or compliance and warning of possible rejection of their application if they do not comply within the specified time period.
- B. Send a rejection letter if the applicant does not respond by the due date.
- C. Retain all returned mail records (undeliverable, moved, etc.)
- D. Ensure update of WRTS entry.
- E. Wait an additional 30 days before processing the application file for archiving.

Application Reinstatement

If an applicant shows good cause for failing to respond during the application rejection process, the regional office has the discretion to reinstate the application as long as the information is provided within a reasonable time (RCW 90.03.270). Reinstated applications retain the original priority date.

IV. ASSIGNMENT OF APPLICATIONS

An application may be assigned to another person or persons by the applicant, upon written consent of the department, using Ecology's Assignment of Application or Permit to Appropriate or Store Water form. No such assignment(s) shall be binding unless properly filed with Ecology along with the appropriate fee (RCW 90.03.310). Assignments are noted on either the application or permit.

Assignment is not required when an applicant or permit holder changes his/her name (e.g. due to marriage, divorce, or corporate name change). In these cases, a memorandum to the file is made and a ministerial amendment is made to the document.

V. APPLICATION INVESTIGATION

When processing a water right application, a permit writer will investigate specifics of the proposed water right to determine whether it should be recommended for approval or denial. An applicant may submit a new application for new appropriation of water, or an application for change or transfer to an existing water right.

Applications for a Water Right Permit

When processing a new application, permit writers assess the application to verify that the proposed water use meets the four part test:

1. Water is available;
2. The use will not impair existing rights;
3. The proposed use is a beneficial use of water; and

4. The use will not be detrimental to the public interest.¹

New applications must pass all four tests in order for Ecology to issue a water right permit (RCW 90.03.290)². The permit writer takes the following steps to answer the four part test³:

A. Office Examination

- a. Verify the accuracy of the published public notice and expiration of 30 day protest period.
- b. Review all protests and comments submitted by agencies, Tribes, and other interested parties.
- c. Research existing rights, local hydrogeology, nearby well locations, and other pertinent information.
- d. For groundwater, obtain well report and well development data if available.
- e. Research potential for seawater intrusion for coastal wells, hydraulic continuity with closed or limited surface waters, etc.
- f. If the Family Farm Act applies, ensure correct information has been provided (RCW 90.66).
- g. For all irrigation uses determine maximum and average water requirements. See the Washington Irrigation Guide (available from the National Resources Conservation Service) to determine irrigation needs in that area for the proposed crop type(s).
- h. Determine SEPA status of project for which the water right is requested – request assistance from the regional office SEPA coordinator if needed.
- i. If the application has been protested, acknowledge receipt of protest by informing the applicant and protestant.

B. Field Examination

- a. Contact the applicant to set up a site visit, verify intentions, and collect any other data that may be pertinent to the application (meet applicant on site if possible).
- b. Interview/meet with protestants.
- c. Note any existing project development.
- d. Assess physical availability of water:
 - i. Measure or estimate flow of surface water source.
 - ii. Check static water level of well(s), if accessible (obtain owner's permission).
 - iii. Describe the diversion/withdrawal/storage system and distribution system.
 - iv. Verify pump size.
 - v. Visually confirm compliance with well construction standards.
- e. Take GPS coordinates of the point of withdrawal or diversion or storage site.

¹ Additional guidance for processing new and change applications can be found in the draft Water Right Investigators Manual.

² If sufficient information is not available, Ecology may issue a preliminary permit per POL 1030.

³ Additional guidance for processing new and change applications can be found in the draft Water Right Investigators Manual.

- f. Verify that actual point of withdrawal or diversion locations are consistent with the locations in the public notice.
- g. Verify legal description with actual or proposed place of use.
- h. For irrigation, determine the number of acres feasible for irrigation; type of crop; period of use; irrigation infrastructure; and/or any other factors related to irrigation.
- i. Determine the number and type of units or estimate the population to be served if for domestic/municipal purposes; refer to Water System Plan, if available (this can also be done in the office prior to the field visit).
- j. Note the location of other wells or nearby diversions from the same source (this can also be done in the office prior to the field visit).
- k. Observe and describe local geology, vegetation, and other environmental factors that may impact proposed and existing water use and water rights, including stream flows.
- l. Take photographs of relevant water intakes, wells, and other identifying structures.
- m. Check any existing onsite wellheads for an Unique Ecology Well ID Tag. Follow regional procedure for getting the well owner into compliance if no ID tag exists.

If additional information is required prior to making a permit decision, a preliminary permit may be issued to the applicant. The preliminary permit allows the applicant to conduct studies, surveys, and investigations necessary to provide information needed to properly assess their application (POL 1030).

Applications for Change or Transfer of Existing Water Right

Applications for change or transfer are requests to alter an attribute of an existing water use as documented by a recorded water right certificate, permit, claim, or previously issued certificate of change (RCW 90.03.380). Change applications are processed similarly to new applications (above), but require additional analysis as outlined in the Program's policy on evaluating changes or transfers to water rights (POL 1200).

Changes to a water right's attributes that can be considered include:

- A. Changing the place of use.
- B. Changing or adding purpose(s) of use.
- C. Adding irrigated acres or new uses (POL 1210).
- D. Changing or adding point(s) of diversion or withdrawal.
- E. Changing season of use (typically combined with a change of purpose of use).
- F. Changing the source of supply from surface water to groundwater and vice versa (may be accepted under certain circumstances; see POL 2010).
- G. Consolidating exempt wells with an existing water right.
- H. Placing water into Trust.

Some of the more notable restrictions on changes or transfers to *surface water rights* include:

- A. No unperfected portion of a surface water permit may be considered for transfer or change (RCW 90.03.380), except as authorized under RCW 90.03.397 or RCW 90.03.570.
(Unperfected portions of groundwater permits are eligible for changes to the point of withdrawal, place of use, and the manner of use (RCW 90.44.100(1)).
- B. The purpose of use of any unperfected permit may not be transferred or changed.
- C. The public interest test is not applicable to changes or transfers of surface water rights, except as described in RCW 90.42.040.
- D. Transfers or changes of water rights under the Family Farm Water Act (RCW 90.66).

The use of development schedules on changes should be consistent with POL-1280 and evaluated on a case-by-case basis.

In addition to the considerations for processing a new application, examinations for change or transfer applications may include additional elements:

Office Examination:

- A. Availability of metering information.
- B. Analysis of full or partial relinquishment.
- C. Aerial photo analysis of acreage, crop types, etc.
- D. Review file history for compliance and correspondence.
- E. Date of first use for changes to claims.

Field Examination:

- A. Verify existing water right provisions have been complied with.
- B. Verify that a meter is installed and functioning.
- C. Ensure current use is consistent with existing rights.

Other Potential Requirements for New or Change/Transfer Applications

The permit writer should advise the applicant whether any other permitting requirements may be needed and include the appropriate proviso on the permit, if necessary. Other permitting requirements may include:

- A. Hydraulic Project Approval (HPA) or appropriate screening provisions from the Department of Fish and Wildlife.
- B. Other approvals from Ecology. The permit writer should consult with the appropriate program(s) to identify required permits.
- C. Special Use Permits.
- D. Other local, state, or federal approvals.
- E. Approval from Department of Health (DOH). When DOH water system approval is necessary:
 - a. Consult regional office files to determine if DOH has approved a water system plan.

- b. If water system plan has not been approved, issue permit with a proviso stating that DOH approval of the water system plan is required prior to issuance of a certificate.
- F. Approval from Federal Energy Regulatory Commission (FERC) for hydropower development:
 - a. Determine if applicant has submitted Request for Jurisdiction Determination to FERC.
 - b. Determine if annual power license fees are required (RCW 90.16.050). If so, add proviso on ROE to indicate annual fees.
 - c. Inform the applicant, if appropriate, that annual power license fees are required at the time the permit is issued and on or before January 1 of each year thereafter.
- G. State Environmental Policy Act (SEPA): Check with the regional SEPA coordinator to determine SEPA requirements for the proposal. If the city or county will be the SEPA lead agency, but currently has no application to act on, discuss options with them on SEPA compliance. If SEPA is required but the water right permit is exempt (WAC 197-11-800 (4) and RCW 43.21C.035), it may only be issued prior to completion of SEPA if the lead agency agrees that it would not limit the choice of reasonable alternatives (WAC 197-11-070). In all other cases where SEPA is required, Ecology must wait to issue the permit until after the SEPA process is complete.
- H. Family Farm Act: If the application is for irrigated agriculture, determine which classification is applicable and ensure appropriate provisions are explicit in the report of exam (RCW 90.66.050).

CHAPTER THREE: REPORT OF EXAMINATION (ROE)

Permit writers document their findings and recommendations in an ROE. The ROE may recommend approval that a water right permit be issued on the application, or may recommend that the application be denied. An application is subject to denial, Ecology may issue a formal order of denial rather than a ROE. Before issuing the formal order of denial, the permit writer should first provide a letter to the applicant justifying the decision.

ROEs can be produced using currently accepted templates (e.g. ActiveDocs wizards) and consist of the Investigator's Report and the Cover Sheet/Order (see the [ROE Tool Box](#) for additional guidance and templates). The draft ROE is posted on Ecology's website for public review and comment before Ecology issues the final ROE. Additional guidance can be found in the [Water Right Investigator's Manual](#).

I. INVESTIGATOR'S REPORT

The investigator's report documents the findings of the permit writer's investigation of the application. The report should address the following:

- A. Background information
 - a. Proposal description
 - b. Project background
 - c. Legal authorization for processing (e.g. authority under chapters 90.03, 90.14, 90.42, 90.44, or 90.90 RCW)
 - d. Public notice
 - e. Any protests or concerns
 - f. SEPA status
 - g. Consultation with the Department of Fish and Wildlife
- B. Investigation
 - a. Identify the date and who performed the field exam.
 - b. References used in office research.
 - c. Name(s) of person(s) interviewed.
 - d. Determination of priority date.
 - e. Observations:
 - i. Source location(s) (absolute and relative)
 - ii. Well depth (compare to well report; look for the Unique Well ID#)
 - iii. Water availability
 - iv. Observed or measured surface water flows
 - v. Feasible irrigable acreage
 - vi. Other water rights appurtenant to proposed place of use
 - vii. Other water rights near proposed place of use
 - viii. Source characteristics
 - ix. Proposed or existing distribution system description.

- x. Geology-hydrology
- xi. Hydraulic continuity
- xii. Sea water intrusion assessment
- xiii. Instream flow assessment
- xiv. History of water use in area.
- f. Other region-specific concerns.
- g. General use of stream or aquifer(s).
- h. Hydrogeologic technical analysis (including but not limited to):
 - i. evaluation of groundwater flow regime
 - ii. surface water/groundwater hydraulic continuity
 - iii. well pumping effects on both surface water and groundwater wells.
- C. Consideration of objections and discussion of protest(s) (WAC 508-12-170).
- D. Conclusions⁴:
 - a. Availability of water for appropriation.
 - b. Estimate of effect on existing rights.
 - c. Beneficial use (RCW 90.54.020 and RCW 90.14.031).
 - d. Whether proposed use is detrimental to public interest.
 - e. Assessment of points raised by protestant(s) or commentor(s).
- E. Recommendations:
 - a. Denial; partial denial; approval.
 - b. Proposed beneficial use(s).
 - c. Additive or non-additive (POL 1040) for each proposed use.
 - d. Quantities (instantaneous and annual, or maximum storage limit).
 - e. Acreage irrigated.
 - f. Number of proposed housing units to be served.
 - g. Period of use for each proposed use (year-round or seasonal).
 - h. Whether the water use is consumptive or non-consumptive (POL 1020).
 - i. Reference to the provisions listed with the cover sheet.
 - j. Place of Use Map

II. COVER SHEET/ORDER

The cover sheet is an Administrative Order that provides a summary of key water right parameters in Ecology's decision to approve or deny the application. The cover sheet/Order should include the following items at a minimum:

- A. Name and address of applicant
- B. Priority date

⁴ Legal considerations may differ for changes or transfer of existing water rights and changes to Trust Water rights. For procedures in changes and transfers of water right, refer to POL 1200. For changes to Trust Water Rights, refer to GUID 1220.

- C. Application number
- D. Source of water
- E. Quantities (Instantaneous and annual)
- F. Period of use (year-round or seasonal)
- G. Purpose(s)
 - a. Irrigated acreage
 - b. Public water system information
 - c. Clarifying terms of the water right (for example: primary, additive, stand-by/reserve, non-additive, consumptive, non-consumptive, and so on; see POL 1040).
- H. Source limitations
- I. Source location(s) of point(s) of diversion or withdrawal
- J. Place of use (including legal description)
- K. Proposed works
- L. Development schedule (determined in consultation with the applicant)
- M. Cumulative quantity of water use (if the water right is part of a portfolio of rights, consider listing all the rights and the total quantities authorized in the portfolio.)
- N. Any provisions:
 - a. necessary to satisfy identified concerns and agency objectives
 - b. required by rules (such as water use measurement provisions per WAC 173-173)
 - c. addressing regionally specific conditions (see the ROE Tool Box)
- O. Current appeal language (use agency standards on Compliance and Enforcement Intranet)
- P. Signature block for appropriate regional section manager.

III. REVIEW AND POSTING OF DRAFT REPORT OF EXAMINATION

Draft ROEs undergo an internal review and approval process, before being posted to the Internet for a 30-day comment/review period (see Posting of Draft and Final Reports of Examination). The permit writer and section manager/permit unit supervisor should evaluate the comments received during the review period and incorporate them into the ROE as appropriate.

IV. SIGNATURES AND POSTING OF FINAL REPORT OF EXAMINATION

When the draft ROE has been approved, clerical staff prepare the final document. The final investigator's report is signed by the permit writer, and the cover page Order is signed by the section manager. The final ROE is then scanned and posted to the Internet.

V. DISTRIBUTION OF REPORT OF EXAMINATION

ROEs are sent by certified mail to both the applicant(s) and any protestant(s). There is a 30 day appeal period. It starts upon applicant's or protestant's receipt of the ROE (RCW 43.21B.310).

VI. AMENDMENT OF REPORT OF EXAMINATION

Ecology may amend an ROE to make any necessary correction(s) to the original ROE. Corrected errors in an amended ROE should be administrative and/or clerical in nature and not alter the approval or denial

of the original ROE. The permit writer will prepare a memorandum to describe the reason for the amendment, which is made a permanent part of the file.

CHAPTER FOUR: WATER RIGHT PERMITS

A water right permit grants the permittee a legal authorization to begin putting water to beneficial use. Permits are typically issued with a number of provisions and deadlines. As identified in the development schedule, the permittee is responsible for providing Ecology with notice when they begin and complete construction of their project, and when they have fully applied the water to the proposed beneficial use(s).

I. ISSUANCE OF PERMITS

For new applications, a permit is generally issued after the 30-day appeal period has passed. Ecology has discretion to issue a permit even if appeals are received, but generally waits until the appeal is resolved.

For change applications, a superseding document may be issued after the appeal period, or according to the development schedule (POI 1280).

II. PERMIT MAINTENANCE

The period during which a permittee initiates and appropriates water under the water right permit is known as permit development. During this time, the permittee is obligated to meet specific milestones. Permit maintenance is the process by which water resources staff periodically evaluates the permittee's progress on these milestones. Applicants not in compliance with their development schedules may face permit cancellation or other compliance actions.

Beginning of Construction

Beginning of construction may include, but is not limited to, actions such as well drilling or development of the diversion or the distribution system. The permittee should submit a Begin Construction Notice to Ecology by the date designated on their development schedule.

Completion of Construction

In order to demonstrate completion of construction, all proposed and required infrastructure and measuring devices must be in place, including the water distribution system. If the appropriation is from groundwater, ensure that a well report has been received. The permittee should complete these steps and submit a Complete Construction Notice to Ecology by the designated date on their development schedule.

Proof of Appropriation

Upon establishing full beneficial use of the water under the terms of the permit, or any lesser amount, the permittee must submit a notarized proof of appropriation form to the appropriate regional office. Staff must confirm that the form is notarized.

A field proof examination may be necessary to demonstrate beneficial use. If so, the permit writer sends a letter instructing the permittee to secure the services of a Certified Water Rights Examiner, see WAC 173-165.

Permit Extensions

Extensions for any phase of the development schedule may be approved by the issuing regional office on a case-by-case basis (RCW 90.03.320 and POL 1050). Extensions shall be based on a showing of good cause, due diligence, and good-faith effort by the permittee, through submission of a written request for the extension with the proper statutory extension fee [RCW 90.03.470(6)]. Extensions may be granted based on the size and the scope of the project. Submission of an application for change, or other issues raised by the permittee, are not sufficient reason to avoid extension fees.

Cancellation of Permits

If the terms of the permit are not pursued with due diligence, a letter warning of permit cancellation may be sent. The letter provides a 30-day response period. If the response to the warning letter is inadequate, Ecology should send a 60-day "show cause" letter by certified mail. The permittee then has 60 days from receipt to provide justification for their failure to abide by the agreed development schedule. Ecology may grant an extension for just cause, or the letter may be followed by an Order of Cancellation. Cancellation can also be requested at any time by the permittee.

Types of cancellation may include:

- Type 1 Cancellation: Request by permittee before or after 60-day show-cause letter sent.
- Type 2 Cancellation: No response to the 60-day show cause letter.
- Type 3 Cancellation: A response to show cause letter is submitted, but determined to be inadequate.

The following need to be in the file when preparing an Order of Cancellation:

- When requested by the permittee (Type 1, as defined above): Written documentation from the permittee specifically requesting that the permit be canceled.
- At agency discretion (Type 2 or Type 3, as defined above): Copies of the 30-day warning letter and the 60-day show cause letter, as well as any response(s) received

The following items should be considered when preparing to issue an Order of Cancellation:

- A. An Order of Cancellation resulting from noncompliance with the development schedule should indicate the specific facts in the case that warrant permit cancellation.
- B. If it is believed or known that any stage(s) of permit development have been completed, telephone or personal contact with the applicant should be made before proceeding further. A site visit may be appropriate if the permittee cannot be located.
- C. In all cases where a 60-day show cause letter has been sent, ensure that the 60 days has elapsed before preparing the Order of Cancellation (except in cases where the permittee has already requested cancellation).

III. ASSIGNMENT OF PERMITS

A permit is considered personal property and can be assigned to another person or person(s) by the permittee, with Ecology's written consent. Refer to "Assignment of Applications" (page 8) for applicable

procedures. Once assigned, a superseding document is issued which retains all necessary provisions contained in the original document. Assignments to multiple parties may be made so long as no enlargement occurs.

IV. PROOF EXAMINATION

Proof examinations shall be completed by a Certified Water Rights Examiner (CWRE) unless exempted at the discretion of regional management [RCW 90.03.665(9)]. Through a field inspection, the CWRE must determine the extent of actual development in terms of use(s), place of use, quantities, diversion locations, storage facilities, acreage irrigated (if any), etc. (WAC 173-165), and submit that information in a proof of examination report. Once a CWRE proof exam report is submitted [RCW 90.03.665(6)], the typical procedure is as follows:

A. Review the proof exam

- a. Compare the CWRE proof exam report to the permit file for completeness and compliance with the permit conditions.
- b. Review and comment on any inadequacies in the CWRE report and return it to the CWRE and applicant within 30 days.
- c. If after reviewing the CWRE report there are no inadequacies or corrections, issue a decision, by way of an Order, within 60 days of receipt of the report.
- d. Upon receipt of an amended proof exam report, issue a decision, by way of an Order, within 30 days.

B. Request fees

Notify the permittee when requesting fees if the certificate is to be issued for reduced quantities from those authorized by the permit.

CHAPTER FIVE: CERTIFICATES AND SUPERSEDING DOCUMENTS

Issuance of a water right certificate or superseding document is the final decision point in the permitting process.

I. CERTIFICATES

A water right certificate will not be issued until the permittee "perfects" the water right, and any appeals have been resolved. To perfect the right, the permittee must show that they have applied the authorized quantity of water (or some lesser quantity) to beneficial use under the terms of the permit.

Verification of water use is typically done by the permittee hiring a Certified Water Right Examiner to conduct a proof examination. In these cases, Ecology issues the certification decision in an order, which includes a 30-day appeal period.

In some cases, the permittee has submitted adequate information with their Proof of Appropriation to satisfy Ecology on the quantity and use of water under the permit. Ecology may then choose to issue the certificate without requiring an additional proof examination by a Certified Water Right Examiner.

A certificate is issued after statutory state and county filing fees have been received by Ecology's Cashiering Section and a receipt is received by the regional office. The certificate is forwarded to the county auditor(s), together with the appropriate recording fee, for entry into the county's permanent records. The auditor then forwards the recorded document to the certificate holder.

II. CORRECTIONS TO PERMITS OR CERTIFICATES

Ecology may amend a permit or certificate to make any necessary correction(s) to the original. Corrected errors in an amended permit or certificate should be administrative and/or clerical in nature and not alter the conditions of the original certificate. The permit writer will prepare a memorandum to describe the reason for the amendment, which is made a permanent part of the file.

If the department identifies the need to make a correction to a permit or certificate that alters the conditions/attributes of a permit or certificate, it shall do so via a superseding permit or certificate with the same number, referencing the date of issuance of the original. Such a correction must be checked for consistency with public notice and re-advertised if not consistent.

If the permittee or water right holder corrects or alters information that is different from the public notice or the place of use under which the permit or certificate issued, he/she must submit an application for change and will result in a superseding document, if approved.

III. SUPERSEDING DOCUMENTS

The water right change process results in different documents, depending on the original document type. Table 1 presents the types of superseding documents which result from changes of different types of water right documents.

Table 1. Superseding documents resulting from changes to different types of water rights.

Document to be Changed	Resulting Document
Water Right Certificate	Superseding Certificate
Water Right Permit	Superseding Permit
Vested Claim or Certificate of Change	Certificate of Change

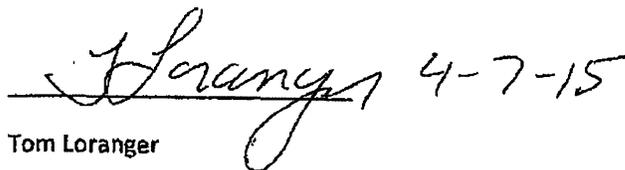
Actions that result in superseding documents include the following⁵:

- A. Corrections which alter conditions of a permit or certificate.
- B. Corrections in information from the applicant as described above.
- C. Partial relinquishment.
- D. Rescission.
- E. Corrections of clerical errors which alter the conditions/attributes of the permit or certificate.
- F. Approved change authorizations.
- G. Partial assignments affecting permits only.

In contrast, a permit or certificate can undergo a number of actions which do not result in superseding documents. These may include the following:

- A. Clerical errors which *do not* alter the conditions or attributes of the permit or certificate.
- B. Claim amendments.
- C. Showing of Compliance (POL 1260).

A superseding certificate is filed with the state then forwarded to the county auditor(s), together with the appropriate recording fee, for entry into the county's permanent record. The auditor then forwards the recorded document to the right holder.

 4-7-15

Tom Loranger

Program Manager, Water Resources Program

Special Note: These policies and procedures are used to guide and ensure consistency among water resources program staff in the administration of laws and regulations. These policies and procedures are not formal administrative regulations that have been adopted through a rulemaking process. In some cases, the policies may not reflect subsequent changes in statutory law or judicial findings, but they are indicative of the department's practices and interpretations of laws and regulations at the time they are adopted. If you have any questions regarding a policy or procedure, please contact the department.

⁵ Superseding documents will have the same number and reference the date of issuance of the original. For partial assignments, the letters A through Z are used to indicate a split record.

1 PRO-1000 at pp. 20-21, it explains that the water right change process results in different
2 documents, and provides a comparison chart wherein a changed water right certificate ultimately
3 culminates in a superseding certificate. "A superseding certificate is filed with the state and then
4 forwarded to the county auditor..." There is no indication that Napavine's ROE 1726 has reached the
5 point of becoming a superseding certificate.

6 Considering the stage in the development schedule at which Napavine is operating, Napavine's
7 water right under ROE 1726 is at least several years away from being put to full beneficial use as
8 contemplated in the ROE, and perhaps many more years depending on the rate of the City's population
9 growth. (Currently though, Napavine is unable to make any beneficial use of ROE 1726 due to water
10 discoloration problems from Well 6.) Inasmuch as Napavine's ROE 1726 authorizes a change in the
11 place of withdrawal from a new replacement well; a change in the place of use; a change in the type of
12 use (from irrigation & domestic to municipal); and allows an extended period of time before beneficial
13 use is expected to be achieved, then confirmation via Proof of Appropriation (described at p. 17 of
14 PRO-1000) that full beneficial use of the water has been made is an appropriate requirement before a
15 superseding certificate is issued. Essentially, Napavine's CG2-GWC1726 has not been perfected.

16 **E. Appellants ask for the Basic Property Review that was Required at Application Intake**

17 The Department's Response misstates Appellants' appeal and tries to over-complicate the
18 issues by suggesting Appellants are asking the Board to resolve a water right ownership dispute. That
19 is not Appellants' appeal at all. GUID-2040 – "Ensuring Proper Signature on Applications and
20 Forms" states:

21 To determine what signatures are required, it is necessary to determine who holds an
22 interest in (1) the water right(s) involved and (2) the parcel(s) of real property
23 involved. If there is more than one party with a controlling interest in the water
right, all the parties should sign as the applicant.

24 GUIDE-2040 at p.2 (a copy was made Ex. 5 to Tammy Hall's 5/3/16 Declaration).

25 HAMILTONS' REPLY IN SUPPORT OF
REQUEST FOR JUDGMENT IN FAVOR
OF NON-MOVING-PARTY APPELLANTS - 10

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AR 000357

1 Certificate 1726 describes the locations of three wells within “the SW¼ of SW¼ of Sec.14
2 and SE¼ of SE¼ of Sec. 15, in Township 13N, Range 2 W.W.M.”

3 The Place of Use is described as:

4 West 519 feet of SE¼ of SW¼ South of right-of-way, Sec.14; NW¼ of SW¼
5 South of right-of-way, Sec.14; SW¼ of SW¼ South of right-of-way, Sec. 14;
6 E½ of SE¼ South of Railroad, Section 15; NE¼ of NE¼ East of river, Sec. 22,
7 LESS 0.91 acre for road, All in Twp. 13N, Rge. 2.W.W.M.

8 Attached as Exhibit C is basic assessor property information from Lewis County easily
9 accessible online, showing Hamilton Corner I LLC’s property in Section 14 & 15, Township 13N,
10 Range 2W. An assessor’s parcel map is included to aid in comparing the Hamilton Corner properties
11 with the properties identified above as withdrawal points and places of use in Certificate 1726. The
12 Hamilton Corner properties are all on the east side of Interstate 5, located generally in the SW¼ of
13 Section 14 between the railroad r-o-w and what is now the Interstate 5 r-o-w; and a smaller area
14 in the E½ of the SE¼ of Section 15 in between the railroad r-o-w and I-5 r-o-w. Also compare the
15 assessor map where these Hamilton Corner properties have been highlighted, to the property map
16 submitted for Permit 2468 - which became Certificate 1726 (this map and Cert. 1726 are also included
17 in Ex. C). The Hamilton Corner property abuts the railroad right-of-way (hatch-marked on the 1952
18 water permit map, and described in tiny print on the assessor map as “Abandoned CC&C Rwy R/W”).

19 Emphasized above are the property areas in common between the well locations and place of
20 use, with the Hamilton Corner I LLC ownership. As you can see, Certificate 1726 attaches to land in
21 Sections 14 and 15. All of this Section 14 land and a portion of the Section 15 land is owned by
22 Hamilton Corner. There is no doubt that Napavine misrepresented its application by failing to identify
23 the Hamilton Corner wells covered by Certificate 1726, and Napavine deliberately falsified its
24 application when it said Betty Hamilton owned all the lands in the existing place of use.

24 HAMILTONS’ REPLY IN SUPPORT OF
25 REQUEST FOR JUDGMENT IN FAVOR
OF NON-MOVING-PARTY APPELLANTS - 11

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