70796-5

70796-5

No. 70796-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

WHATCOM COUNTY,

Appellant,

v.

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS, DAVID STALHEIM, FUTUREWISE, AND WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondents.

BRIEF OF APPELLANT WHATCOM COUNTY

VAN NESS FELDMAN, LLP
Jay P. Derr, WSBA #12620
Tadas Kisielius, WSBA #28734
Duncan Greene, WSBA #36718
719 Second Ave., Ste. 1150
Seattle, WA 98104-1700
Attorneys for Appellant/Cross Respondent Whatcom County

DAVID S. MCEACHRAN
Whatcom County Prosecuting Atty
Karen N. Frakes, WSBA #13600
Civil Deputy Prosecuting Attorney
311 Grand Avenue
Bellingham, WA 98225-4048
Attorneys for Appellant/Cross Respondent Whatcom County

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 FEB 27 PM 2:25

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 4

III. STATEMENT OF THE CASE 5

A. Relevant Amendments Adopted in Ordinance No. 2012-032. 6

B. The Board's Review of Ordinance No. 2012-032. 8

IV. ARGUMENT 11

A. Standard of Review. 11

B. The County Complied with GMA Provisions for Protection of Water Availability 13

1. *Kittitas* Requires that Counties Adopt Rural Measures that are Cooperative and Consistent with Ecology's Water Resources Management Decisions. 14

2. The County's Rural Measures Include Regulations that Protect Water Availability, Consistent with Ecology's Management of Water Resources, and Consistent with *Kittitas*. 16

3. The Board's Finding of Noncompliance Is Based on an Erroneous Interpretation of *Kittitas* and the Rule for WRIA 1. 19

4. The Board's Conclusion Is Not Based on Substantial Evidence. 25

5. This Appeal Is Not the Appropriate Forum to Challenge Ecology's Interpretation of WRIA 1. 28

C. The County Complied with all GMA Requirements for Protection of Water Quality. 30

1. The County's Rural Element Includes Numerous Measures that Apply to Rural Development and Protect Water Quality. 31

a. Stormwater 32

b. On-Site Sewage System Regulations 37

2. The Board's Conclusion that the County's Measures Fail to Protect Water Quality Is Not Supported by Substantial Evidence. 38

3. The Board's Conclusion Is Based on Unlawful Procedure. 45

4. The Board's Conclusion Is Based on an Erroneous Interpretation and Application of the Law by Effectively Requiring the County to Correct Past or Existing Impacts. 47

V. CONCLUSION 49

TABLE OF AUTHORITIES

Cases

B.D. Lawson v. GMHB, 165 Wn.App. 677, 269 P.3d 300 (2011).....44

Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002).....15

Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County, 121 Wn.2d 179, 849 P.2d 646 (1993).....13

Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency, 344 F.3d 832 (9th Cir. 2003).....34

Kittitas County v. Eastern Washington Growth Management Hearings Bd., ("Kittitas"), 172 Wn.2d 144, 256 P.3d 1193 (2011).....passim

Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 11 P.3d 726 (2000).....18, 27, 28

Quadrant Corporation v. State Growth Management Hearings Bd., 154 Wn.2d 224, 110 P.3d 1132 (2005).....12

R.D. Merrill Co. v. PCHB., 137 Wn.2d 118, 969 P.2d 458 (1999).....22

Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board, 161 Wn.2d 415, 166 P.3d 1198 (2007).....48

Administrative Decisions

Futurewise v. Whatcom County, GMHB Case Nos. 05-2-0013 and 11-2-0010c.....7

Steensma v. Ecology, PCHB No. 11-053.....21

Wilma v. Stevens County, EWGMHB No. 06-1-0009c.....31

Statutes

RCW 34.05.330 29

RCW 36.70A.020 13

RCW 36.70A.030 13

RCW 36.70A.070 ..... 1, 3, 13

RCW 36.70A.290 44

RCW 36.70A.320 ..... 12, 13

RCW 36.70A.3201 12

RCW 64.40.020 25

RCW 90.03.290 24

RCW 90.44.050 ..... 16, 24

RCW 90.44.060 24

33 U.S.C. § 1313 42

Regulations

WAC 173-501-030 ..... 22, 23

WAC 173-501-030, -040 18

WAC 173-501-060 ..... 22, 23

WAC 173-501-070 22

WAC 173-501-080 22

WAC 173-518-070 23

WAC 173-539A-025 23

WAC 242-03-640 47

WAC 246-272A-001 38

County Regulations[1]

WCC 20.71.010 35

WCC 20.71.021 35

WCC 20.71.150 35

WCC 20.71.302 35

WCC 20.80.630 ..... 32, 33, 34

WCC 20.80.632 32

WCC 20.80.633 32

WCC 20.80.634 ..... 33, 37

WCC 20.80.635 32

WCC 20.80.636 35

WCC 20.80.735 35

WCC 21.01.040 ..... 7, 16

WCC 21.04.034 ..... 6, 17

WCC 21.04.090 ..... 6, 17

WCC 21.04.150 ..... 6, 17

WCC 21.05.037 ..... 6, 17

WCC 21.05.080 ..... 7, 17

WCC 24.05.030 37

WCC 24.05.100-.150 37

WCC 24.05.160 37

WCC 24.05.170 37

[1] For ease of reference, the County has attached several of these regulations as an Appendix to the brief.

WCC 24.05.240 37
WCC 24.11.060 ..... 7, 17
WCC 24.11.070 7
WCC 24.11.080 7
WCC 24.11.090 ..... 7, 28
WCC 24.11.140 7
WCC 24.11.150 7
WCC 24.11.160 ..... 7, 28
WCC 24.11.170 7

I. INTRODUCTION

Appellant/Cross-Respondent Whatcom County ("County") asks this Court to reverse the Final Decision and Order ("Order") of the Growth Management Hearings Board ("Board") that is the subject of this appeal. Specifically, the County asks the Court to rule that the County's rural element includes measures to protect surface and ground water resources that comply with the Growth Management Act ("GMA").[2]

In its Order, the Board concluded that the County failed to adequately protect water availability and water quality. The Board went to great lengths (reaching even beyond the record that was presented by the parties to the case) to establish the very basic fact that rural development can impact water resources, in general, and to affirm the general legal principal that the GMA requires the County to adopt rural measures protecting water resources. However, this case is not about those general concepts; the County does not dispute that rural development can impact water resources, nor does it dispute that the GMA requires the County to adopt a rural element that includes measures to protect those resources. Indeed, the County is mindful of the importance of water resources and, as was demonstrated to the Board, the County has numerous measures in place to rigorously protect water quality and water availability. Rather, this case is about two questions: first, whether the County can comply

[2] While the Board cited to several GMA provisions, all of which are discussed below, its fundamental holding is solely based on the requirement to adopt a "plan, scheme or design" for a rural element that includes measures to protect "surface and ground water resources" from rural development. *See* RCW 36.70A.070(5)(c); CP 1559.

with the GMA by incorporating the Washington State Department of Ecology's ("Ecology") water resource management decisions into its water availability regulations; and second, whether the County's measures protecting water quality must be found out of compliance unless and until the County successfully solves pre-existing water quality problems whose causes are multi-faceted and beyond the rural development that is the subject of the County's measures.

In reaching its conclusions that the County's measures do not comply with the GMA, the Board relied on *Kittitas County v. Eastern Washington Growth Management Hearings Bd., ("Kittitas")*, 172 Wn.2d 144, 256 P.3d 1193 (2011), which addressed the same provisions of the GMA that are at issue in this case. However, the situation presented to the Court in *Kittitas* was very different than this case. In *Kittitas*, the Court concluded that Kittitas County's subdivision regulations functionally allowed applicants to circumvent water permitting requirements in a manner inconsistent with Ecology's management of water resources. In this case, by contrast, the Board agreed that County has subdivision regulations in place that address the specific issue that was the focus of *Kittitas*. Nevertheless, the Board extended the Court's holding in *Kittitas* to address water quality protections and Ecology regulations adopted under the Instream Resources Protection Program. The Board adopted an expansive interpretation of the GMA that is not supported by either the plain language of the statute or by *Kittitas*.

In the context of water availability, the County has adopted

regulations that address consistency with water resources regulations more generally by prohibiting land use approvals that rely on water sources that Ecology has determined are prohibited by rule. With its regulations, the County ensures it exercises its land use planning consistent with Ecology's management of the scarce resource, as mandated by *Kittitas*. The Board nevertheless concluded that the County's measures protecting water availability do not comply with the GMA because the County has allowed permit-exempt withdrawals in areas that are subject to an instream flow rule that imposes restrictions on new water rights permits and certificates. With its conclusion, the Board adopted a more restrictive interpretation of Ecology's instream flow rule than that of Ecology, the agency charged with administering water resources. The Board's Order forces the County to interpret water law and instream flow regulations contrary to Ecology's interpretation of water availability. Ironically, this result is directly at odds with the fundamental holding in *Kittitas,* which required cooperative and consistent exercise of land use and water resources authority.

The Board's Order also increases the level to which the County must scrutinize water rights issues beyond what *Kittitas* requires. The Board's Order forces the County to require a property owner that would otherwise be exempt from statutory water permitting requirements to submit to an impairment analysis, a costly and complicated part of the water rights permitting process. This result is not required by the GMA, *Kittitas,* Ecology, or general principles of water law.

In ruling on the issue of water quality, the Board relied on

generalized evidence of water quality "problems" as proof that the County's rural regulations are insufficient to satisfy GMA obligations. The Board's decision is not supported by substantial evidence, which demonstrates that the water quality problems identified by the Board are caused by many sources other than the rural development that is the subject of the County's rural measures. Moreover, to justify its conclusions, the Board reached beyond the evidence presented to consider documents that were not presented by any party, tacitly acknowledging that there was insufficient record evidence supporting its decision. Additionally, the Board's reliance on existing water quality problems as proof of noncompliance is an erroneous interpretation and application of law because it assumes the need to "protect" water quality includes the requirement to "restore," which is inconsistent the Supreme Court's past interpretations of the GMA. Accordingly, the County asks this Court to reverse the Board's Order.

II. ASSIGNMENTS OF ERROR

1. The Board erred when it concluded that the County's measures to protect surface and ground water availability were clearly erroneous.

2. The Board erred when it concluded that the County's measures to protect surface and ground water quality were clearly erroneous.

3. The Board erred when it considered evidence that was not

presented by either party and did not follow its own procedures for taking official notice.

The following issues pertain to these assignments of error:

Issue 1. Did the Board err by ruling that the GMA requires the County, when making water availability determinations, to adopt a legal interpretation of the controlling water resources regulations that is independent of and inconsistent with Ecology's interpretation? (Assignment of Error 1).

Issue 2. Did the Board err by ruling that the County's measures to protect surface and ground water quality do not comply with the GMA on the basis of evidence of pre-existing water quality problems whose causes are multi-faceted and beyond the rural development that is the subject of the County's measures? (Assignment of Error 2)

Issue 3. Did the Board err by considering evidence beyond the record presented by the parties and failing to follow its own rules for taking official notice? (Assignment of Error 3).

III. STATEMENT OF THE CASE

On June 7, 2013, the Board issued the Order that is the subject of this appeal.[3] The Board's Order is the result of an administrative appeal of Whatcom County's Ordinance No. 2012-032, which amended the

[3] The majority of the record in this case consists of the Board's administrative record, which the Superior Court transmitted as part of the clerk's papers. CP 163-1673. Thus, the administrative record transmitted to the Court bears two different sets of Bates stamp page numbers: one from the Board and one from the Superior Court. For consistency, the County cites to the CP numbers assigned by the Superior Court. The Board's Order is included in the administrative record at CP 1516-67.

County's comprehensive plan and development regulations, including the County's rural measures to protect groundwater and surface water resources that are the subject of this appeal.[4] The following sections set forth the factual background regarding Ordinance No. 2012-032 and the Board's review of the Ordinance.

A. Relevant Amendments Adopted in Ordinance No. 2012-032.

The County adopted Ordinance No. 2012-032 to achieve compliance with the GMA in response to the Board's Final Decision and Order from a prior Board case, GMHB Case No. 11-2-0010c. Ordinance No. 2012-032 addressed a wide range of issues related to the County's rural element and rural development regulations. Most of the topics covered by the Ordinance are outside the scope of this appeal. This appeal focuses exclusively on the County's measures to protect groundwater and surface water resources.

Specifically, Ordinance No. 2012-032 adopted a new County Policy 2DD-2.C, which lists the County's measures to protect surface and groundwater quality and quantity.[5] These measures are further described in detail in sections IV.B.2 and IV.C.1-2, below.[6] In short, they include regulations that protect water resources by requiring applicants to provide evidence of an adequate water supply prior to approval.[7] Importantly for

---

[4] CP 178-346.

[5] CP 206-08.

[6] For ease of the Court's reference, the County attaches an Appendix of relevant County regulations.

[7] *See, e.g.*, WCC 21.04.034(2)(a), Appendix at pp. 16-17; WCC 21.04.090, Appendix at pp. 17-18; WCC 21.04.150(1)(d), Appendix at p. 18; WCC 21.05.037(1), Appendix at

purposes of this appeal, the County's existing development regulations only allow a subdivision or a building permit applicant to rely on a private well when the well site "proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist."[8] Also, the County's subdivision regulations require that "contiguous parcels of land in the same ownership shall be included within the boundaries of any proposed long or short subdivision of any of the properties" and that "lots so situated shall be considered as one parcel."[9] Policy 2DD-2.C also incorporates County regulations and programs that protect water quality. County regulations include critical areas regulations, its extensive stormwater management program, the County's Water Resource Protection Overlay District, and its on-site sewage regulations.[10] These regulations apply stormwater restrictions county-wide with added focus and more

---

pp. 20-21; WCC 21.05.080, Appendix at pp. 22-23; WCC 24.11.060, Appendix at p. 30; WCC 24.11.070, Appendix at p. 30-31; WCC 24.11.080, Appendix at p. 31; WCC 24.11.140, Appendix at pp. 35-36; WCC 24.11.150, Appendix at p. 36; WCC 24.11.170, Appendix at pp. 40-43.

[8] WCC 24.11.090(B)(3), Appendix at p. 32; WCC 24.11.160(D)(3), Apppendix at p. 37; WCC 24.11.170(E)(4), Appendix at p. 40.

[9] WCC 21.01.040, Appendix at p. 13 (emphasis added).

[10] The Ordinance also includes measures specifically designed to protect the Lake Whatcom watershed. These specific measures designed to protect water quality in that sub-basin, and Petitioners' challenge to their adequacy were the subject of a different proceeding before the Growth Board and is outside the scope of this appeal. Notably, the Board has concluded that the measures to protect Lake Whatcom comply with the Growth Management Act. *See Futurewise v. Whatcom* County, GMHB Case Nos. 05-2-0013 and 11-2-0010c, Order Finding Compliance Regarding Issues 1, 2, 3, 4, and 8 And Finding Non-Compliance Regarding WCC 20.36.310(6) in Issue 2, (January 23, 2014) (As Amended on Reconsideration), available at http://www.gmhb.wa.gov/LoadDocument.aspx?did=3473 at 17 ("The Board finds the County's action complies with RCW 36.70A.070(5)(c)(iv) because the County has adopted measures to protect Lake Whatcom' s water quality.")

restrictions in those specific areas where water quality issues are documented.

B. The Board's Review of Ordinance No. 2012-032.

Petitioners before the Board ("Petitioners") filed an appeal challenging the adequacy of the County's measures protecting water resources adopted in Ordinance No. 2012-032. The Board issued the Order that is the subject of this appeal on June 7, 2013.

In its Order, the Board found that the County does not have adequate measures to protect rural character by protecting surface water and groundwater resources. The Board relied principally on the Supreme Court's decision in *Kittitas*. The Board extended the Court's holding on water availability in the context of subdivision regulations in two ways. First, the Board acknowledged that the "reasoning in *Kittitas County* concerns water availability" but concluded that the Court's holding "is equally applicable to water quality."[11] Second, in the context of water availability, the Board extended the Court's holding beyond the subdivision regulations at issue in *Kittitas*. Indeed, the Board "agree[d]" that the County has subdivision regulations in place to address the specific water availability issues addressed in *Kittitas*, but nevertheless concluded that the GMA, as interpreted by the Court in *Kittitas*, imposes a broader obligation on the County to regulate water availability.[12]

With respect to water availability, the Board relied on evidence of

---

[11] CP 1537.
[12] CP 1555.

new wells in basins closed to new surface water permits and concluded on the basis of that information that the County has not sufficiently protected water resources by somehow prohibiting construction premised on these new wells. Thus, at specific issue in the case are permit-exempt withdrawals in closed basins. The Board evaluated the County's provisions that prohibit subdivision and building permit approval when the well serving the development is in an area that Ecology has determined by rule that no water is available and concluded that those provisions were insufficient; instead, the Board determined that the County must "deny a permit for a new building or subdivision unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows."[13]

With respect to water quality, the Board pointed to the "proliferation of evidence in the record of continued water quality degradation" and, without specifically linking this evidence to the County's water quality measures, concluded that the County's measures did not comply. The Board concluded that the County's on-site sewage regulations are inadequate because they allow for homeowners to self-inspect their septic systems, even though that practice is authorized by the Department of Health.[14] Additionally, the Board determined that the County's stormwater measures are inadequate because, even though

---

[13] CP 1557.
[14] CP 1551-52.

stormwater management is required throughout the County for development over a certain threshold, the County applies its most stringent stormwater protections in specific areas of the County where the County has determined more controls are necessary and appropriate.[15]

In reaching its decision regarding water quality, the Board improperly took official notice of two documents that the Board concluded were "authoritative references … documenting the need for land use planning to be coordinated with water resource planning."[16] The documents were not presented as evidence or argued by the parties.[17] Moreover, contrary to the Board's own rules, the parties were not notified either before or during the hearing of the materials, nor were the parties afforded an opportunity to respond to the materials or contest the noticed materials. Similarly, in reaching its decision regarding water availability, the Board cited and discussed case law that was not cite by the

---

[15] CP 1553-54. These areas include urbanizing areas covered under Phase II NPDES Stormwater Municipal General Permit, areas established as Stormwater Special Districts, and areas identified as Water Resources Protection Overlay Districts.

[16] CP 1545. The two documents are the Puget Sound Partnership's 2012/2013 Action Agenda for Puget Sound (August 28, 2012) ("Action Agenda") and Knight, K (2009) Land Use Planning for Salmon, Steelhead, and Trout ("WDFW Report").

[17] Despite the fact that the Board relied on these documents, they are not part of the Administrative Record that was transmitted to the Court. As explained further in section IV.C.3, below, the Board's reliance on these documents violates the Board's procedures and is erroneous. Moreover, as explained in section IV.C.2, the documents do not support the Board's decision. Because the documents are not properly part of the record, the County cites to the documents as they appear on the websites to which the Board cites in its decision. CP 1546-48. As noted by the Board, the Action Agenda is available at: http://www.psp.wa.gov/downloads/AA2011/083012_final/Action%20Agenda%20Book%202_Aug%2029%202012.pdf.
The WDFW Report is available at
http://wdfw.wa.gov/publications/00033/wdfw00033.pdf

Petitioners.[18]

On July 2, 2013, Petitioners filed a petition in Thurston County Superior Court seeking review of the Board's decision not to make a "declaration of invalidity" regarding the County's water resource measures.[19] On July 3, 2013, the County filed a petition in Skagit County Superior Court seeking review of the Board's conclusion that the County's measures protecting surface water and groundwater resources are insufficient.[20] The Board issued its Certificates of Appealability regarding the Order on August 15, 2013, certifying these appeals for direct review by this Court.[21] On August 23, 2013, Petitioners' appeal in Thurston County Superior Court was transferred to Skagit County Superior Court and consolidated with the County's appeal.[22] This Court accepted these consolidated appeals for direct review on November 22, 2013.

IV. ARGUMENT

A. Standard of Review.

The County seeks review of the Board's Order under seven prongs of the Administrative Procedure Act (APA), RCW Chapter 34.05, which authorizes courts to grant relief from agency orders in adjudicative proceedings.[23] In reviewing the Board's Order under the APA, courts

---

[18] CP 1539, n. 81; CP 1554-56.
[19] *See* CP 1-66.
[20] CP 1-66.
[21] CP 1956-64.
[22] CP 1678-80.
[23] *See* RCW 34.05.570(3)(a)-(e), (h), (i) (authorizing relief if the Court determines that: "[t]he order . . . is in violation of constitutional provisions on its face or as applied"; "[t]he agency has engaged in unlawful procedure or decision-making process, or has

must give deference to the County's planning choices.[24] This deference to the County "supersedes deference granted by the APA and courts to administrative bodies in general."[25]

This deferential standard, which departs from the general APA standard, stems directly from the GMA's requirement that the Board defer to the County's planning decisions. In a Board proceeding, the County's plans and regulations are presumed valid, and the burden is on the petitioner to demonstrate that the County's action is not in compliance with the GMA.[26] The Board must give heightened deference to the County's planning choices.[27] In particular, "the GMA requires deference to local government determinations regarding what measures will best protect rural character."[28] A "board's ruling that fails to apply this 'more deferential standard of review' to a county's action is not entitled to deference" from the courts.[29]

The Board must find compliance unless it determines that the County's action "is clearly erroneous in view of the entire record before

---

failed to follow a prescribed procedure"; "[t]he agency has erroneously interpreted or applied the law"; "[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court . . ."; "[t]he order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency"; or "[t]he order is arbitrary and capricious."

[24] *Quadrant Corporation v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132, 1139 (2005).

[25] *Id.*

[26] RCW 36.70A.320(1)-(2).

[27] RCW 36.70A.3201.

[28] *Kittitas*, 172 Wn.2d at 164.

[29] *Quadrant*, 154 Wn.2d at 238 (internal citations omitted).

the board and in light of the goals and requirements of [the GMA]."[30] To find an action "clearly erroneous," the Board must have a "firm and definite conviction that a mistake has been committed."[31]

B. The County Complied with GMA Provisions for Protection of Water Availability.

The County's rural element complies with all GMA provisions that address protection of water availability. In its Order, the Board cites several different GMA provisions addressing the protection of water resources in the County's comprehensive plan,[32] but bases its decision on RCW 36.70A.070(5)(c), which requires the County to adopt a rural element that includes "measures that apply to rural development and protect the rural character of the area, as established by the county, by . . . (iv) [p]rotecting . . . surface and ground water resources."[33]

As described below, the Supreme Court's decision in *Kittitas*

---

[30] RCW 36.70A.320(3).

[31] *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646, 657 (1993).

[32] CP 1527-29 (citing RCW 36.70A.020(9) (GMA goal to "conserve fish and wildlife habitat"); RCW 36.70A.020(10) (GMA goal to protect the environment, "including air and water quality, and the availability of water"); RCW 36.70A.030(15) (defining "rural character" as patterns of land use and development that are "compatible with the use of land by wildlife and for fish and wildlife habitat" and that are "consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas"); RCW 36.70A.030(16) (stating that rural development "can consist of a variety of uses and residential densities, including clustered rural development, at levels that are consistent with the preservation of rural character and the requirements of the rural element"); RCW 36.70A.070(5)(c) (requiring rural element to "include measures that apply to rural development and protect the rural character of the area, as established by the county, by . . . (iv) [p]rotecting . . . surface and ground water resources"). The Board also cited to RCW 36.70A.070(1); however, that provision pertains to the land use element, which is inapplicable to the rural element that was the subject of the Board's review. *See* RCW 36.70A.070(1). To the extent the Board relied on that GMA provision to support its conclusion, the Board erred.

[33] CP 1559.

provides important and controlling interpretation of these general provisions. However, in this case, the Board extended *Kittitas* to address instream flow rules and concluded that Whatcom County's measures violated the GMA requirement to protect water availability. Because the Board's conclusion regarding water availability is not supported by the law or the facts, its Order should be reversed.[34]

1. *Kittitas* Requires that Counties Adopt Rural Measures that are Cooperative and Consistent with Ecology's Water Resources Management Decisions.

The Board's conclusion is based on an overly-broad interpretation and application of *Kittitas*. That decision focused on a county's obligation to adopt subdivision regulations that prevent an applicant from evading water permitting requirements.[35] In interpreting the GMA's requirements for the protection of water availability, the majority in *Kittitas* held that

---

[34] The Board in its Order erroneously stated that the County "did not respond to Petitioners' arguments about the effect of water quantity or quality upon fish and wildlife." CP 1535. That is incorrect. Petitioners' arguments regarding fish and wildlife were simply additional support for their basic premise that measures to protect water quality and quantity are important. The County's arguments that it has satisfied GMA obligations to protect water resources therefore also respond to the Petitioners' arguments related to fish and wildlife. In no event do Petitioners' arguments (and the Board's discussion) of fish and wildlife issues provide independent grounds for finding the County out of compliance.

[35] Washington water law creates an administrative permitting process pursuant to which the Ecology grants and regulates the right to use surface water and groundwater through a system of permits and certificates. *See, e.g.,* RCW 90.44.050; RCW 90.03.290. Upon application to appropriate water, Ecology issues a permit that authorizes the appropriation. RCW 90.03.290; RCW 90.44 060. The holder of the water right permit perfects the right by putting the water to actual beneficial use at which point Ecology issues a certificate. RCW 90.03.330; RCW 90.44.060. There are exceptions to this permitting process, including groundwater withdrawals for domestic use not exceeding 5,000 gallons per day. RCW 90.44.050. These withdrawals are referred to as "permit-exempt withdrawals."

counties must "regulate to some extent to assure that land use is not inconsistent with available water resources."[36] Under *Kittitas*, counties are required "at least" to adopt subdivision regulations that "conform to statutory requirements by not permitting subdivision applications that effectively evade compliance with water permitting requirements."[37] The Court did not comment on what other actions counties might be required to comply with the GMA's provisions regarding water availability protections. When determining what constitutes "compliance with water permitting requirements," the Court looked to case law and to Ecology interpretations, which the Court stated "ought to assist counties in their land use planning to adequately protect water resources."[38]

The majority in *Kittitas* concluded that Kittitas County had failed to protect water resources because its subdivision regulations allowed "multiple, separately evaluated subdivision applications that are all part of the same development," thus allowing applicants to evade the well-established rule that commonly-owned, nearby development projects that collectively exceed the limit for permit exempt withdrawals are not exempt from water permitting requirements under RCW 90.44.050.[39] Ecology and the Courts have long recognized that the practice of segmenting larger development projects into smaller projects that

---

[36] *Kittitas,* 172 Wn.2d at 178.
[37] *Kittitas,* 172 Wn.2d at 181.
[38] *Id.* at 180.
[39] *Id.* at 175-77 (citing *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 4, 43 P.3d 4 (2002)).

individually qualify for a permit-exempt withdrawal is contrary to RCW 90.44.050.[40] The Court held that the County's challenged subdivision regulations did not comply with this established rule and required the County to collect and consider land ownership information in the application review process. Ultimately, the Court required the County to exercise its land use authority in a manner that is consistent with Ecology's management of water resources, rather than facilitating the evasion of well-established water rights permitting requirements.[41]

2. The County's Rural Measures Include Regulations that Protect Water Availability, Consistent with Ecology's Management of Water Resources, and Consistent with *Kittitas*.

In contrast to the regulations under review in *Kittitas,* Whatcom County's regulations governing land use approvals work cooperatively and are consistent with Ecology's regulation of water resources.

First, the County's subdivision regulations include protections that address the exact issue before the Court in *Kittitas*. Whatcom County's subdivision regulations require that "contiguous parcels of land in the same ownership shall be included within the boundaries of any proposed long or short subdivision of any of the properties" and that "lots so situated shall be considered as one parcel."[42] This provision directly prohibits the practice that the Court found objectionable in *Kittitas*. The

---

[40] *Id.* at 177-180 (noting that Ecology "communicated with [Kittitas] County about concerns regarding the availability of water during its planning process").
[41] *Id.* at 180 (counties must "plan for land use in a manner that is consistent with the laws providing protection of water resources and establishing a permitting process.").
[42] WCC 21.01.040 (emphasis added), Appendix at p. 13.

Board agreed that the County's regulations address the specific issue in *Kittitas*.[43]

Second, the County's building permit and subdivision regulations expressly require applicants to provide evidence of an adequate water supply prior to approval.[44] The County's code further specifies submission and review requirements when the subdivision or building permit applicant seeks to prove water is available from an existing public water system,[45] when the applicant seeks to create a new public water system,[46] and when the applicant proposes to use a private well.[47]

Notably, the County will only approve a subdivision or a building permit application that relies on a private well when the well site "proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist."[48] Thus, the County's regulations for water availability directly incorporate Ecology's rule, codified at ch. 173-501 WAC, for management of the Nooksack River Basin, which is also known as Water

---

[43] CP 1555.

[44] *See, e.g.*, WCC 21.04.034(2)(a), Appendix at pp. 16-17; WCC 21.04.090, Appendix at pp. 17-18; WCC 21.04.150(1)(d), Appendix at p. 18; WCC 21.05.037(1), Appendix at pp. 20-21; WCC 21.05.080, Appendix at pp. 22-23; WCC 24.11.060, Appendix at p. 30.

[45] WCC 24.11.070, Appendix at pp. 30-31; WCC 24.11.140, Appendix at pp. 35-36.

[46] WCC 24.11.080, Appendix at p. 31; WCC 24.11.150, Appendix at p. 36.

[47] WCC 24.11.090, Appendix at pp. 31-35; WCC 24.11.160, Appendix at 36-40; WCC 24.11.170, Appendix at pp. 40-43.

[48] WCC 24.11.090(B)(3), Appendix at p. 32; WCC 24.11.160(D)(3), Appendix at p. 37; WCC 24.11.170(E)(3), Appendix at p. 40. While the Board pointed to purported deficiencies in the County's standard form for implementing these water availability standards, the Board should measure compliance of the regulations, not the forms on which the County collects information to implement its regulations. *See* CP 1545 (citing the County's Water Availability Notification Form, Ex. R-152).

Resource Inventory Area (WRIA) 1.[49] Ecology adopted the rule in 1985 pursuant to chapters 90.54 and 90.22 RCW and chapter 173-500 WAC, as part of its instream resources protection program. Pursuant to this program, Ecology adopts rules governing new appropriations of water in basins throughout the state.[50] There are many rules governing individual basins throughout the state and, as noted by the Supreme Court, each of the rules governing different basins usually follow the same "general format," but contain different language with key distinctions.[51] Accordingly, courts may not interpret them uniformly or consistently; rather, the specific provisions and language in each must be given its intended effect.[52] In its regulation for WRIA 1 which covers rural Whatcom County, Ecology established minimum instream flows and closed specific sub-basins to new surface water appropriations.[53]

By incorporating Ecology's basin rule for WRIA 1, the County's regulations therefore provide for exactly the kind of cooperation between the County's exercise of its land use authority and Ecology's management of the water resource required under *Kittitas*. Pursuant to its regulations, the County works consistently with Ecology's regulations, expressly precluding development that is premised on a new private well where

---

[49] *See* chap. 173-501 WAC; WAC 173-500-040.
[50] WAC 173-500-020; WAC 173-500-040.
[51] *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 84-86, 11 P.3d 726, 736-737 (2000).
[52] *Id.* (language from basin rule relating to a particular WRIA does not impose a general standard applicable to all WRIAs).
[53] *See* WAC 173-501-030, -040.

Ecology has determined that water is not legally available. The County's approach stands in sharp contrast to the regulations under review in *Kittitas* which allowed applicants to circumvent and evade Ecology's efforts to manage water resources through the water rights permitting process. By contrast, Whatcom County's measures expressly defer to Ecology's water management decisions and use Ecology's determinations as a primary basis for making water availability determinations, thereby ensuring that land use applicants cannot contravene the water code's permitting requirements. Therefore, the County's measures fully address the County's obligations to protect groundwater and surface water availability as interpreted by the Court in *Kittitas*.

3. The Board's Finding of Noncompliance Is Based on an Erroneous Interpretation of *Kittitas* and the Rule for WRIA 1.

The Board concluded that the County's measures that rely on Ecology's rule for WRIA 1 do not comply with the GMA because, according to the Board, the County's code provisions deferring to Ecology's basin rule "is not the standard to determining legal availability of water."[54] By rejecting the County's approach of deferring to Ecology's basin rule, the Board essentially held that the County must independently reach its own conclusions about legal availability, rather than following Ecology's lead. The Board's conclusion is an erroneous interpretation of law.

[54] CP 1555-56.

First, it is inconsistent with *Kittitas*. As noted above, *Kittitas* confirmed that a local jurisdiction must incorporate provisions in its subdivision regulations that prevent applicants from utilizing the land use process to circumvent water rights permitting requirements. The Court did not opine about what else the relevant GMA provisions regarding protection of water resources require, but to the extent that its decision can be extrapolated to other scenarios, the case stands for the proposition that local jurisdictions must exercise planning authority in a manner consistent with Ecology's regulations and interpretations. By ruling that the County's regulations must do *more* than ensure consistency with Ecology's interpretations, the Board erred.

Additionally, the Board's conclusion allows for inconsistent conclusions between the local government and Ecology regarding the legal availability of water for a proposed use. This is more than mere theoretical possibility. In this case, the Board's substantive interpretation mandates an inconsistent conclusion. The Board's focus in its decision, as described above, is on development that relies on permit-exempt withdrawals. In essence, the Board ruled that the County must conclude that WRIA 1 basin rule precludes new permit-exempt groundwater withdrawals as a matter of law, if hydraulically connected to surface water:

> [W]here Ecology has administratively by adoption of rules closed a surface water body as in much of Whatcom County, and an applicant intends to rely on a new withdrawal from a hydraulically connected groundwater body, new water is no longer legally available for

> appropriation and the application must be denied. Likewise where Ecology has set minimum instream flow by rule, as in Nooksack WRIA 1, subsequent groundwater withdrawals may not contribute to the impairment of the flows.[55]

The Board's restrictive interpretation regarding the applicability of the rule to permit-exempt withdrawals directly conflicts with Ecology's historic interpretation of the basin rule. Ecology has historically assumed that the restrictions on new withdrawals in its instream flow rule for WRIA 1 do not apply to permit-exempt withdrawals.[56] In *Steensma v. Ecology,* for example, opponents of a development project in a closed basin in Whatcom County appealed Ecology's determination that the applicant could rely on a permit-exempt well to support a development in WRIA 1.[57] While the Pollution Control Hearings Board declined to reach that question because it lacked jurisdiction, the case documents Ecology's position that the basin closure does not apply to permit-exempt wells; had the basin rule operated to effectively preclude the proposed exempt well, Ecology would not have issued its determination.

Ecology's historic interpretation that the basin rule for WRIA 1 does not apply to permit-exempt withdrawals is supported by several

---

[55] CP 1555.

[56] *See, e.g.*, *Steensma v. Ecology*, PCHB No. 11-053, Order Granting Summary Judgment to Ecology, (Sept. 8, 2011) 2011 WL 4301319 (Wash. Pol Control Bd.). *Steensma* involved a proposed subdivision in Bertrand Creek Basin, which is subject to year-round closure under the WRIA 1 basin rule. See *Steensma*, 2011 WL 4301319 at *5 (indicating that the case involved a "fundamental disagreement with how Ecology is managing water resources in the Bertrand Creek Basin"); WAC 173-501-040(1) (showing Bertrand Creek Basin as subject to year-round closure).

[57] *Steensma*, PCHB No. 11-053, Order Granting Summary Judgment to Ecology, (Sept. 8, 2011).

factors. First, and importantly, the basin rule for WRIA 1 includes an exemption for new single domestic uses.[58] This exemption indicates that the rule was not intended to apply to permit exempt withdrawals.

Second, by its express terms, the rule regulates only water right permits or certificates and not permit-exempt wells. The phrases "permit" or "certificate" are legal terms in the water code that refer to water rights established through the permitting process.[59] Those terms do not include permit-exempt withdrawals, because those withdrawals are expressly exempt from the permit process that results in "permits" and "certificates." Thus, the regulation's restrictions on "permits" or "certificates" do not apply to permit-exempt wells.[60] Indeed, the focus of the rule is on surface water withdrawals.[61] The chapter actually *encourages* groundwater withdrawals as an alternate to surface water diversions.[62] In fact, the basin

---

[58] WAC 173-501-070. While this provision exempts single domestic surface water diversions, it is written to complement the statutory exemption for permit-exempt withdrawals and therefore reflects Ecology's fundamental assumption when drafting the rule that permit-exempt withdrawals are not affected or regulated by the basin rule.
[59] *See R.D. Merrill Co. v. PCHB.*, 137 Wn.2d 118, 129-130, 969 P.2d 458, 464-465 (1999).
[60] WAC 173-501-030(4)(" Future consumptive water right permits issued hereafter for diversion of surface water in the Nooksack WRIA and perennial tributaries shall be expressly subject to instream flows...") (emphasis added); WAC 173-501-060 ("If department investigations determine that there is significant hydraulic continuity between surface water and the proposed groundwater source, any water right permit or certificate issued shall be subject to the same conditions as affected surface waters...")(emphasis added).
[61] WAC 173-501-030 (4)(" Future consumptive water right permits issued hereafter for diversion of surface water in the Nooksack WRIA and perennial tributaries shall be expressly subject to instream flows...") (emphasis added); WAC 173-501-080 (chapter prohibits surface water diversions that conflict with the purpose of the chapter and encourages "the use of alternate sources of water which include (a) groundwater...").
[62] WAC 173-501-080 (2). Its restrictions only apply to groundwater permits or certificates (as distinguished from permit-exempt wells) to the extent that "there is

rule for WIRA 1 contains no reference to permit-exempt wells.[63] By contrast, where Ecology has deliberately intended to regulate permit-exempt wells or close the basin to permit-exempt wells, it has stated so expressly, as it has in recent instream resource regulations in the Kittitas and the Dungeness basins.[64]

Thus, the Board's holding requires the County to reach a legal conclusion regarding water availability pursuant to permit-exempt withdrawals that is contrary to that of Ecology under Ecology's WRIA 1 basin rule, a conclusion that is not supported by the language of the basin rule itself. This result is directly contrary to the cooperative and consistent result that *Kittitas* mandates.

In addition to requiring the County to pursue a legal interpretation of the controlling basin rule that is at odds with that of Ecology, the Board's Order would have the practical effect of requiring the County to collect and evaluate factual evidence of hydraulic connectivity and impairment. Pursuant to the Board's Order, the County would have to

---

significant hydraulic continuity between surface water and the proposed groundwater source." WAC 173-501-060.

[63] As noted above, the rule applies only to "permits" and "certificates." *See* WAC 173-501-030(4), WAC 173-501-060.

[64] *See, e.g.*, WAC 173-539A-025 ("This rule applies to new uses of groundwater relying on the authority of the exemption from permitting found at RCW 90.44.050, as defined in WAC 173-539A-030, and to any new permit authorizing the withdrawal of public groundwater within the upper Kittitas area boundaries issued on or after July 16, 2009."); WAC 173-518-070(3) (regulating new groundwater rights, "including permit-exempt withdrawals under RCW 90.44.050"). Additionally the Skagit Basin rule, which was recently overturned by the Supreme Court because of reservations for domestic and other uses, is an example of a rule in which Ecology directly asserted authority over permit exempt withdrawals. *See* Ecology Order No. 05-13, WSR 06-11-070 (May 15, 2006, effective June 15, 2006) (adopting amended WAC 173-503-073 and -060); WSR 13-21-044 (October 9, 2013).

require land use applicants relying on permit-exempt withdrawals to submit to a water rights impairment analysis that Ecology does not even require for permit-exempt withdrawals.[65]

In essence, the Board's Order requires the County to second-guess and even contradict Ecology's water resource management decisions. In doing so, the Board's decision effectively shifts primary responsibility for interpreting state water laws and regulations from the Ecology to County planning staff. Such a shift is contrary to the Supreme Court's statements in *Kittitas* that "Ecology is the primary administrator of chapter 90.44 RCW" and that "Ecology maintains its role, as provided by statute, and ought to assist counties in their land use planning to adequately protect water resources."[66]

The Board's required approach also potentially exposes the County to claims for damages from applicants for subdivision and building permits which are denied on the basis of water determinations that contradict Ecology's own interpretation of its rule. For example, if an applicant is denied a building permit or subdivision approval on the basis of the County's legal interpretation of Ecology's basin rule, when Ecology does not reach the same conclusion, the property owner could appeal and initiate an action for damages against the County's land use decision

---

[65] Water right permit applicants must satisfy a four part test, including a demonstration that "the appropriation thereof as proposed in the application will not impair existing rights." RCW 90.03.290; RCW 90.44.060. Permit-exempt withdrawals are expressly exempt from that process. RCW 90.44.050.

[66] *Kittitas*, 172 Wn.2d at 178, 180.

pursuant to chapter 64.40 RCW, which provides property owners with an avenue for "relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority."[67] Because the determination of whether a proposed use of water is legal ultimately rests with Ecology, it is appropriate for the County to seek out and defer to Ecology's decision.

Accordingly, the Board failed to give deference to the County's reasonable reliance on Ecology's interpretations of Ecology's instream flow rule.[68] For these reasons, the Board's interpretation and application of the GMA and *Kittitas* was erroneous.

4. The Board's Conclusion Is Not Based on Substantial Evidence.

The Board's conclusion regarding the County's obligations in making water availability determinations in closed basins is not supported by substantial evidence in several respects. First, in reaching its conclusion, the Board relied on evidence of additional permit-exempt withdrawals in areas subject to the WRIA 1 basin rule.[69] However, as noted above, the evidence of new permit-exempt withdrawals is completely consistent with Ecology's past interpretation of WRIA 1. It is not evidence of noncompliance.

Second, the Board incorrectly assumed that Ecology has historically taken a more restrictive approach towards permit-exempt

---

[67] RCW 64.40.020.
[68] *See Kittitas*, 172 Wn.2d at 164 (requiring deference to County's determinations regarding "what measures will best protect rural character.").
[69] CP 1538-39, 1554-56.

withdrawals in WRIA 1, assuming that the rule precludes those new withdrawals.[70] The Board's conclusion was primarily supported by a single piece of evidence: a letter from staff in Ecology's Division of Water Resources to staff in Snohomish County Planning and Development services that, according to the Board, explained "the effect of closed basins and instream flows on residential development."[71] This letter, which is the primary basis for the Board's conclusion, included Ecology's interpretation of the recently overturned Skagit basin rule and does not prove that Ecology has imposed such a requirement in the particular closed basin in Whatcom County at issue in this appeal, WRIA 1.[72] To the contrary, as explained above, the rules that govern each basin are all unique and have different legal ramifications. The Board recognized that "Snohomish County facts differ," but went on to assert that "the applicable legal principles are the same."[73] This assertion is not supported by the record in this case, and it is contrary to Ecology's historic interpretations of the basin rule for WRIA 1.

---

[70] CP 1556-57, n. 154-55 (citing Ex. C-678 found at CP 616-23) ("When a building permit applicant indicates that their water supply will be obtained through a permit-exempt well, because they cannot provide a water right permit or a letter from a purveyor as evidence, the County must require the applicant to provide evidence of the legal availability of water in another form or deny the application, according to Ecology.") (emphasis added); CP 1557 ("Thus, according to Ecology, the County must deny a permit for a new building or subdivision unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows") (emphasis added).

[71] CP 1556, n. 154.

[72] *See* WAC 173-503 (Skagit basin rule). The Skagit basin is located within WRIA 3 and WRIA 4, not WRIA 1.

[73] CP 1556, n. 154.

The Board's interpretation of WRIA 1 as precluding new permit-exempt withdrawals is also erroneous because the Board's interpretation effectively construes all basin rules as having the same effect as those rules in which Ecology has expressly addressed new permit-exempt withdrawals. This interpretation is contrary to the plain language of the rules and inconsistent with the Supreme Court's decision in *Postema*, where the Court held that each basin rule must be evaluated under the particular language in the relevant regulations.[74] As explained above, the WRIA 1 basin rule includes an exemption for single domestic uses and, more generally, applies only to "permits" and "certificates" for new appropriations, and does not apply to permit-exempt withdrawals.

Thus, the Board was simply wrong when it relied on Ecology's letter to Snohomish County and concluded that, "[w]hile the Snohomish County facts differ, the applicable legal principles are the same."[75] Because the evidence of new withdrawals and the letter to Snohomish County is the only evidence offered by the Board to support its determination that Whatcom County's approach is clearly erroneous, the Board's decision is not supported by substantial evidence. Moreover, the Board's interpretation, which equates the Skagit basin rule with the WRIA 1 rule, ignores the clear holding in *Postema* that all basin rules must be

---

[74] *Postema*, 142 Wn.2d at 84-86 (language from basin rule relating to a particular WRIA does not impose a general standard applicable to all WRIAs). The Board also ignored another critical distinction between Postema and the instant case; while *Postema* involved "applications for groundwater appropriation permits," this case involves permit-exempt wells, not new appropriations. *Id.* at 73 (emphasis added).
[75] CP 1556, n. 154.

evaluated on their own language.[76]

5. This Appeal Is Not the Appropriate Forum to Challenge Ecology's Interpretation of WRIA 1.

It should be noted that, while the interpretation of Ecology's instream flow rule involves complicated legal issues, the Board was ultimately faced with a more straightforward question under the legal framework established in *Kittitas*: namely, is Whatcom County's approach of protecting water resources consistent and cooperative with Ecology's management of water resources? Because the letter to Snohomish County failed to show any inconsistency between Whatcom County's approach and Ecology's management of water resources, the Petitioners failed to meet their burden and the Board erred in concluding the County's measures did not comply with the GMA.

Ultimately, it is not the County's burden to defend Ecology's legal interpretation, and, under *Kittitas,* it is not necessary for the Court to evaluate whether Ecology's interpretation is correct. The County's regulations, on their face, require the County's exercise of its land use authority to be consistent with Ecology's water resources management decisions. If Ecology changes its rule or even its interpretation of the existing rule, the County's regulations require the County to follow Ecology's lead on such changes.[77] At its core, the Board's decision (and

---

[76] CP 1556, n. 154; *Postema*, 142 Wn.2d at 84-86 (each basin rule is unique).

[77] WCC 24.11.090(B)(3), Appendix at p. 32; WCC 24.11.160(D)(3), Appendix at p. 37; WCC 24.11.170(E)(4), Appendix at p. 40. (regulations providing that the County will only approve a subdivision or a building permit application that relies on a private well

the Petitioners' appeal) challenges Ecology's controlling interpretation of its rule, but this challenge does not provide a basis for finding the County's regulations out of compliance. The Petitioners have other venues to challenge the legality of Ecology's interpretations of its rules.[78] In any event, neither the GMA nor any other statute requires the County to adopt land use regulations that are based on a more restrictive interpretation of water availability than Ecology rules.

Neither *Kittitas* nor the GMA require the County to act as a water law super-agency that questions Ecology's interpretations of water law and reaches inconsistent conclusions. Nothing in *Kittitas*, the GMA, or any other authority suggests that the Legislature intended such a transfer of responsibility from Ecology to local government.[79] The Court should not require the County to deviate from Ecology's interpretation. To do so would inappropriately force the County to adopt a novel legal interpretation that should be Ecology's to make, and which could expose the County to claims for damages from applicants for subdivisions and building permits.

---

when the well site "proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist.").

[78] To the extent that Petitioners prefer a more strict approach with respect to permit-exempt wells in closed basins, Petitioners should seek recourse with Ecology; they can petition Ecology under the APA to change the basin rule to close basins to permit-exempt wells. *See* RCW 34.05.330(1). Alternatively, the Petitioners can appeal Ecology's interpretation of its rule through an appeal of a County water availability determination under LUPA.

[79] *See Kittitas,* 172 Wn.2d at 178, 180.

C. The County Complied with all GMA Requirements for Protection of Water Quality.

Contrary to the Board's conclusion, the County has adopted rural measures that satisfy GMA requirements to protect water quality. Although the Board identifies several steps the County could take to achieve compliance,[80] the portions of the Board's Order addressing GMA obligations to protect water quality focus on protections from the impacts of two specific aspects of rural development: (1) increased impervious surfaces and stormwater runoff from rural development; and (2) pollution from failing On-Site Sewage (OSS) systems.[81]

In the abstract, the County does not contest the general notion that unmitigated stormwater runoff from impervious surfaces and pollution from failing septic systems can contribute to water quality problems. In fact, the County takes water quality concerns seriously and is an active partner in efforts to protect and even restore water quality in the County. Indeed, as described in further detail below, the County has a series of regulations designed to protect water quality, including regulations addressing stormwater runoff and OSS systems. The Board did not give sufficient weight to these existing regulations that apply throughout the County and provide rigorous water quality protections for rural development.

As discussed below, the Board's conclusion that the County's measures are clearly erroneous is based on general evidence of existing

---

[80] CP 1558.
[81] CP 1548-1558.

water quality problems in the County. On their face, those documents describing generalized problems are insufficient to prove that the County's rural measures are clearly erroneous. Often times, the same documents cited by the Board expressly acknowledge that water quality problems are caused by problems unrelated to rural development, such as agricultural operations. Many of the documents acknowledge and encourage the very approach the County has taken in requiring stormwater treatment for increased impervious surfaces and OSS regulations. More fundamentally, the Board's conclusion that evidence of an existing water quality problem is de facto evidence of GMA noncompliance misinterprets the GMA and its obligations to "protect" (rather than to "restore") water quality. The Board's overly-broad conclusions, which are premised on generalized evidence of water quality problems, creates an unworkable standard for GMA compliance.

1. The County's Rural Element Includes Numerous Measures that Apply to Rural Development and Protect Water Quality.

The County's rural measures list its water quality protections, including rigorous stormwater regulations and OSS regulations that apply throughout the County. The Board did not adequately evaluate or consider these protections.[82]

[82] Indeed, the Board has held that significantly less is required to comply with the GMA requirement to protect surface water and groundwater resources. In *Wilma v. Stevens County*, the Board concluded that three generally worded policies were adequate to bring the County into compliance with respect to its requirement to protect the quality and quantity of groundwater. EWGMHB No. 06-1-0009c Order on Compliance, (May 22, 2008) at 22-24. These three policies included a policy providing for the protection of

a. Stormwater

The County codified its stormwater regulations at WCC 20.80.630 through 20.80.636. The County's general standards apply throughout the County.[83] Small development projects, which are defined as residential development creating less than 10,000 square feet of cumulative impervious surface area or other development creating less than 5,000 square feet of impervious surface area, "shall be required to employ best management practices (BMPs), to control erosion and sediment during construction, to permanently stabilize soil exposed during construction, to protect adjacent properties and water bodies from stormwater effects caused by development, and shall be subject to any other requirements specified under Chapter 2 of the Whatcom County Development Standards, or as specified for special districts identified in WCC 20.80.635."[84]

All other projects are considered "large development" and are required to have an approved preliminary stormwater proposal and, in some instances, an engineered stormwater design report.[85] The County code requires large development projects to include runoff controls that limit the developed conditions' peak rates of runoff to predevelopment

---

critical areas, in general, a policy requiring review and mitigation of adverse water quality impacts during SEPA review for specific projects, and a policy requiring the use of the Ecology manual "as guidance for planning and for implementing stormwater best management practices." *Id.* By contrast, Whatcom County has a rigorous stormwater protections in place that require pollution controls.

[83] WCC 20.80.630(1), Appendix at p. 2.

[84] WCC 20.80.632, Appendix at pp. 3-4.

[85] WCC 20.80.633, Appendix at pp. 3-4.

peak rates for several storm events including the 2 year, 10 year, 25 year and 100 year 24-hour storm events.[86] Large development projects must also include water quality treatment facilities to treat runoff from pollution-generating impervious surfaces.[87] Additionally, they must minimize impervious surface areas while maintaining project function and viability.[88] In addition, large projects: must apply BMPs; cannot be constructed in a way that "materially degrade natural systems such as streams and their banks, wetlands ponds or lakes; and must maintain natural drainage patterns (unless it can be shown that relocation will have no significant adverse impact).[89] Finally, large projects must include erosion and sediment control measures.[90]

The County supplements these regulations with Chapter 2 of the Public Works Development Standards, which further detail County stormwater requirements ("Stormwater Development Standards").[91] The Stormwater Development Standards expressly authorize the County to select and implement source control BMPs and runoff treatment BMPs from the "latest edition" of Ecology's stormwater manual.[92] In other words, to address the water quality issues that are the center of Petitioners' claims, the County utilizes the 2012 Ecology manual for BMPs for large

---

[86] WCC 20.80.634(3), Appendix at p. 5.
[87] WCC 20.80.634(5), Appendix at p. 6.
[88] WCC 20.80.634(1)(C), Appendix at 4.
[89] WCC 20.80.634(1), Appendix at pp. 4-5.
[90] WCC 20.80.634(2), Appendix at p. 5.
[91] *See* WCC 20.80.630(2), Appendix at pp. 2-3. The Development Standards are authorized pursuant to WCC 12.08.035. A copy of Chapter 2 of the Stormwater Development Standards can be found in the Administrative Record at CP 1210-76.
[92] CP 1245-46.

development projects throughout the County.[93]

In addition to these requirements that are applicable throughout the County, the County has also applied even more stringent controls in specific areas of the County where more controls are necessary and appropriate. First, the County complies with the requirements of Phase II of the NPDES Stormwater Municipal General Permit in those areas where the permit is applicable, namely urbanizing areas within the County. The municipal stormwater permits focus on urbanizing areas precisely because those areas are where the impacts of stormwater runoff are problematic.[94] In those areas, the County expressly requires compliance with Ecology's 2012 stormwater manual, unless the provisions of the County Code are more restrictive.[95]

Additionally, the County has established Stormwater Special Districts in the watersheds of Drayton Harbor, Lake Whatcom, Lake Samish, Birch Bay, and Lake Padden. In those areas, permanent onsite stormwater quality and quantity facilities are required on lots less than five acres where the development increases impervious surfaces by more than 500 square feet or the development is a renovation project where the estimated cost of the work exceeds 50 percent of the assessed value of the

---

[93] The development standards uses the title, "Stormwater Management Manual for the Puget Sound Basin," which is the precursor to the Ecology's Stormwater Management Manual for Western Washington. Accordingly, the "latest edition" of that manual is Ecology's 2012 Stormwater Management Manual for Western Washington.

[94] *See, e.g., Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency*, 344 F.3d 832, 841 (9th Cir. 2003) (noting that, in 1985, "three-quarters of the States cited urban stormwater runoff as a major cause of waterbody impairment…").

[95] WCC 20.80.630(3), Appendix at p. 3.

existing structure.[96] Additionally, in these special districts, the County applies special standards titled "Stormwater Special District Standards for Single Family Residences and Duplexes on Existing Lots" ("Special District Standards"). These additional requirements include runoff treatment requirements to prevent pollution, such as bioretention swales and facilities, filter strips and wet ponds.[97] In those same watersheds, the County has created Water Resource Special Management Areas which creates a more stringent standard for clearing activity.[98]

Finally, the County has established a Water Resources Protection Overlay District, an overlay zone in which the County imposes "additional controls to preserve and protect unique and important water resources within Whatcom County," specifically, the Lake Whatcom, Lake Samish and Lake Padden watersheds. In those areas, the County restricts uses beyond the generally applicable zoning code and includes additional development standards designed to minimize impervious surface and mitigate impacts from stormwater runoff.[99] Additionally, the County applies an impervious surface limitation of 20% in the UR, URM and RR zoning districts and a limit of 10% in the R district.[100] Thus, the County's stormwater regulations protect water quality throughout the County, with

---

[96] WCC 20.80.636, Appendix at pp. 6-7.
[97] CP 1278, 1305 (Whatcom County Special District Standards).
[98] WCC 20.80.735, Appendix at pp. 7-13.
[99] *See, e.g.*, WCC 20.71.010; WCC 20.71.150 (Including additional uses processed as conditions uses); .200 (prohibiting certain uses that would otherwise be allowed); .350 (requiring cluster subdivisions for subdivisions that create lots less than five acres); .603 (alternative surfacing methods); .700 (alternate road, curb gutter and sidewalk requirements designed to reduce impervious surfaces).
[100] WCC 20.71.021(1), Appendix at p. 1; WCC 20.71.302(1)(2), Appendix at p. 1.

additional emphasis in areas where demonstrated water quality issues exist.

This approach of requiring treatment of stormwater runoff and minimizing impervious surface (in some cases to a set threshold) is precisely the approach supported by evidence cited by the Board. For example, while many documents acknowledged that increased impervious surface can create water quality impacts, those same documents acknowledge that stormwater facilities to treat and detain stormwater flow from impervious surfaces are an accepted approach to addressing water quality issues that would otherwise be created by increased impervious surfaces.[101]

The Board inexplicably concluded that the County's stormwater regulations in title 20 "inadequately address stormwater" because they only limit structures (i.e., lot coverage) and not all impervious surfaces.[102]

---

[101] CP 831; CP 1015-16; ("The potential impact that could occur from increased impervious surface area would be dependent on the condition of these other factors"). *See also* CP 1547 ("It is imperative that local governments manage stormwater with policies, regulations, and incentive programs (e.g., Low Impact Development (LID) to reduce and treat runoff.") (Quoting WDFW Report). *See also*, Action Agenda §3C2.4, p. 199 ("Stormwater runoff from urban and rural areas is a significant source of toxics, nutrients, and pathogens delivered to Puget Sound. . . . Proper control and treatment of this stormwater . . . is critical to Puget Sound recovery."); *id.* at §3C2, p. 192 (detailing the Puget Sound Partnership's recommendation to "Use a comprehensive approach to manage urban stormwater runoff at the site and landscape scales."); WDFW Report at §3.2.2, p. 41 (recommending that, in order to aid in salmonid protection and recovery, counties and other responsible entities should "Implement a comprehensive stormwater management program to manage runoff from existing development, including: prohibiting, finding and remedying pollution discharges, properly maintaining stormwater systems, conducting public education, implementing source control and retrofits for existing stormwater facilities, and guiding stormwater basin planning.").
[102] CP 1554.

The Board is incorrect. The above-cited regulations limit "impervious surfaces," not just lot coverage.[103]

b. On-Site Sewage System Regulations

With respect to OSS regulations, the Board did not give sufficient weight to the County's OSS regulations that are listed as rural measures. The County's OSS regulations are codified at chapter 24.05 WCC. They are modeled on chapter 246-272A WAC.[104] The code includes design and installation standards.[105] Additionally, they include Operation and Maintenance obligations on the owner, which include requirements for inspections every 3 years for certain systems containing solely a septic tank and annually for every other system.[106] Upon a reported failure, the owner is required to repair the failure.[107] Failure to follow the code subjects the owner to enforcement.[108]

The Board's decision related to the adequacy of the County's OSS regulations and the arguments in the administrative proceedings below focused on portions of the County Code that allow OSS owners to conduct their own inspections.[109] The County's operation and maintenance provisions, including the homeowner inspection provision, were approved

---

[103] *See, e.g.,* WCC 20.80.634(1)(c), Appendix at 4 (all development "shall minimize impervious surface"); WCC 20.71.302, Appendix at 1 (development in certain rural zoning districts sets restrictions on percentage of lot dedicated to "structures and impervious surfaces").
[104] WCC 24.05.030, Appendix at p. 23.
[105] WCC 24.05.100-.150.
[106] WCC 24.05.160, Appendix at pp. 23-25.
[107] WCC 24.05.170, Appendix at pp. 25-27.
[108] WCC 24.05.240, Appendix at pp. 27-30.
[109] CP 1551-53.

by the Department of Health.[110] Annual inspection by owners is consistent with state regulations and a regulatory approach utilized by many jurisdictions.[111] Like the stormwater regulations, these are exactly the type of regulations condoned by the evidence cited by the Board.[112]

2. The Board's Conclusion that the County's Measures Fail to Protect Water Quality Is Not Supported by Substantial Evidence.

The Board's determination that the County's water quality measures are clearly erroneous is not supported by substantial evidence in the record. As noted above, the very evidence cited by the Board addresses water quality issues in very generalized terms, and actually supports the County's approach in this case.

---

[110] *See* WAC 246-272A-0015(9). *See also* CP 1360, Letter of Approval from Department of Health.

[111] *See, e.g.,* Island County Code 8.07D.280(A)(4)(d); King County Board of Health Code 13.20.040, 13.60.010 (Table 13.60-1); Skagit County Board of Health Policy "Homeowner inspection of their own on site sewage system," available at http://www.skagitcounty.net/HealthEnvironmental/Documents/Homeowner%20Inspection%20of%20OSS.pdf. All of these are adopted regulations that were cited in the County's briefing. CP 1020. To the extent required, the County requests that the Court take judicial notice of these adopted regulations pursuant to ER 201.

[112] Action Agenda at §3C5.1, p. 227-28 ("The Washington Department of Health (DOH) administers the state rule for OSS with peak design flows below 3,500 gallons per day (Chapter 246-272A WAC). . . . Once systems are in use, OSS owners are responsible for operating, monitoring, and maintaining their systems to make sure they function properly. . . . The [Government Management, Accountability and Performance] program identifies two measures for OSS. First the state tracks the number of on-site sewage system repairs or replacements funded by Ecology in Puget Sound counties. The target is 39 every 6 months. Ecology passes funding to local health jurisdictions that identify the systems for repair or replacement and oversee the work. Since 2007, performance has been at or above the target. . ."); *see also*, *Id.* at §3C2.4, p. 200 ("Needed work includes carrying out periodic inspections of businesses and industries with high likelihood of discharging pollutants of concern, *working with property owners & operators to use best management practices to reduce discharges*, and using technical assistance, incentives, and enforcement to achieve compliance.") (emphasis added).

The generalized evidence of water quality problems cited by the Board is not de facto evidence that the County's rural measures fail to comply with the GMA. If that were the case, many counties throughout the state would find themselves in noncompliance. Instead, to issue an order finding that the County's measures addressing water quality do not comply, the Board must have been convinced that the County's measures governing rural development were clearly erroneous. The evidence of generalized water quality problems in the County is not substantial evidence supporting the Board's conclusion. It is only evidence of historic problems that are a result of several factors, primarily agriculture, which is not the subject of the rural regulations.

Indeed, many of the issues identified in the evidence cited by the Board are not even attributable to rural development. For example, the evidence in the record makes it clear that the water quality issues in the Sumas-Blaine aquifer on which the Board was focused are 99% attributable to agriculture or natural conditions, neither of which are related to rural development or the sufficiency of the County's regulations protecting water quality from rural development.[113] The document does not attribute the water quality problems to stormwater runoff that would be protected by an impervious surface limitation or by septic

[113] *See* CP 718; CP 740-42, 749. *See also* CP 972-75. The County has adopted regulations to address water quality issues stemming from agricultural activities that are also listed as measures in Policy 2DD-2C. *See* Ch. 16.16 WCC. Property owners can choose to comply with critical areas regulations in chapter 16.16 or can instead meet the requirements in App. A, "Conservation Program on Agricultural Lands," which requires property owners to develop conservation plans for approval.

regulations.[114] Ecology's Sumas-Blaine aquifer Nitrate Contamination Summary to which the Board cites includes recommendations to address the water quality problem, but they are focused on agricultural practices. There is no suggestion for adopting an impervious surface area limitation, OSS regulations, or any land use restrictions on rural development, generally.[115]

The Evidence regarding Drayton Harbor and Birch Bay similarly does not prove the need for a county-wide impervious surface limit. As described above, the unincorporated areas around Drayton Harbor and Birch Bay are already subject to significant, increased protections under the County code as Stormwater Special Districts and Water Resource Special Management Areas. These regulatory efforts are designed to address stormwater issues in the vicinity. Notably, the evidence to which Board cites regarding Birch Bay attribute pollution to "wastewater collection/disposal and agricultural activities" as well as "domestic animals and urban wildlife," not the type of impacts that would be improved with a countywide impervious surface area limitation.[116] While the report upon which the Board relied identified two recommendations related to OSSs, none suggested a deficiency with the County's regulations. Instead, the recommendations were for regular reporting from

---

[114] In Sumas-Blaine, the evidence shows that only 1% of the nitrate loading is attributable to failing septic systems with almost all the rest attributable to agriculture. *See* CP 718; CP 740-742, 749. *See also* CP 972-75.
[115] CP 750; CP 718.
[116] *See* CP 689.

the County health department to the state Department of Health with an eye towards identifying the need for public outreach and a recommendation that the County health department employee prioritize his or her efforts on priority subdrainages of a particular creek based on water quality monitoring.[117] Absolutely none of those recommendations for Birch Bay suggest that the County's regulations are clearly erroneous. Moreover, Ecology has determined that the unincorporated Birch Bay UGA meets the criteria for coverage under the Phase II Municipal general Permit, such that it will be subject to additional requirements that have been adopted by the County.[118]

With respect to Drayton Harbor, the harbor was downgraded to "prohibited" for shellfish harvest in 1995 and, while there are still improvements to be made, the Harbor was upgraded in 2004 to "conditionally approved." There is simply no evidence in the record pertaining to Birch Bay or Drayton Harbor that support the Board's holding that the County is clearly erroneous for failing to adopt an impervious surface area limitation throughout the County or that the County's OSS regulations are clearly erroneous. Indeed, the document upon which the Board relied for Drayton Harbor did not identify the source of the fecal coliform, and, as such, does not support the Board's conclusion. Presence of fecal coliform can be attributed to many sources

---

[117] CP 689-94.

[118] *See* CP 459. Ecology was also petitioned to add Birch Bay and the City of Blaine and Blaine UGA under Phase II stormwater permit. *Id.* Ecology ultimately determined that the City and its UGA do not meet the criteria for coverage. *Id.* Birch Bay was added and will be incorporated in the Phase II program. *Id.*

other than failing OSSs, including sewage treatment outfalls and domestic animals and urban wildlife.[119]

Finally, the Board's general reference to the number of waterbodies listed as "impaired" pursuant to Section 303(d) of the Clean Water Act ("CWA") does not support its conclusion that the County's measures are clearly erroneous. Rather, those listings are evidence of the historic problems and broader regulatory effort in place to address water quality issues.[120] For each of the identified impaired waters, the states must establish a TMDL for each pollutant that prevents the waterbody from attaining water quality standards that will include an implementation plan. 33 U.S.C. § 1313 (d)(1)(C). Moreover, as noted above, the County code requires all large development projects throughout the County and small projects in special stormwater districts to include water quality treatment facilities and water runoff BMPs designed to address pollutants in stormwater runoff.

In addition to the documents that parties presented to the Board, the Board also reached beyond the record and cited to two additional documents.[121] As indicated in further detail, below, the Board's use of these extra-record documents not only violated the Board's rules of

---

[119] CP 689-94.

[120] Section 303(d) establishes the Total Maximum Daily Load (TMDL) program, which is a water-quality-based approach to regulating waters that fail to meet water quality standards. 33 U.S.C. § 1313 (d). States are required to identify waters within their boundaries for which technology-based effluent limits and other pollution control requirements "are not stringent enough to implement any water quality standard applicable to such waters," and then prioritize such waters based upon the severity of the pollution and the use of the waterway. 33 U.S.C. § 1313 (d)(1)(A).

[121] *See supra,* notes 15 and 16, regarding citation to the two extra-record documents.

procedure, but also tacitly acknowledges the lack of substantial evidence in the record supporting its conclusion. Even so, it is important to note that even these two extra-record documents upon which the Board relies do not support the Board's conclusion that the County's measures are clearly erroneous. In citing to the extra-record documents, the Board cites general recommendations that do not support the Board's conclusions, while ignoring the more specific findings for Whatcom County that highlight the success of Whatcom County's existing programs. The documents upon which the Board relied include specific recommendations for Whatcom County which suggest that the County "continue" implementing its various programs, which indicates that the County is on track for meeting the recommendations and goals highlighted.[122] Specifically, the WDFW guidance identifies problems with unmitigated runoff from impervious surfaces. The recommendations are to "reduce and treat" stormwater, which can be done with impervious surface limits, stormwater detention and treatment, or a combination of both, the method used by the County. In particular, the Puget Sound Partnership (PSP)

---

[122] *See* Action Agenda at §3A, p. 38 (indicating Whatcom County is one of the areas that has "identified general strategies to focus land development away from ecologically important and sensitive areas."); §3A2, p. 46 (recommending Whatcom County "continue implementing, enforcing, and monitoring land use measures adopted for watersheds with designated overlay zones."); §3C1, p. 191 (recommending Whatcom County "continue implementing comprehensive stormwater management plans."); and §4, p. 347-348 (further emphasizing that Whatcom County should continue implementing many of its programs, as well as highlighting specific activities occurring in Whatcom County and noting that, "A significant amount of work is underway across [Whatcom County] to advance habitat protection, habitat restoration, reduction of pollution, resolution of instream flow and out of stream water use, infrastructure development and maintenance, and port development.").

document's recommendations for Whatcom County suggest that the County should "implement" its OSS program.[123] Thus, far from calling the County's OSS regulations deficient, the PSP document cited by the Board demonstrates that the County's regulations comply with the GMA.

The Board's conclusion regarding OSS regulations really goes to the alleged lack of enforcement of those provisions, not the adequacy of the provisions themselves. While the County's enforcement is important, the Evidence of the County's enforcement of its regulations does not support their claims that the regulations, themselves are insufficient.[124] The County strictly enforces the inspection requirements in Drayton Harbor, which is identified as a Marine Recovery Area, and Lake Whatcom.[125] In all other areas of the County, the County provides notice of property owners' responsibility to have their OSS evaluated and seeks voluntary compliance rather than imposing the civil penalties authorized under the Code. The County seeks enforcement of any documented failures.[126]

---

[123] *See* Action Agenda at §4, p. 347, 350. The Action Agenda also recommends limiting conversion from agricultural and forest lands, a topic associated with resource designations that are not subject to this appeal. This is at best a topic related to the County's resource designations and zoning districts, and not related to rural development.
[124] *See* RCW 36.70A.290(2) (Board's jurisdiction is limited to specified legislature enactments). The statute does not authorize the Board to rule on the implementation of those legislative actions. Indeed a well-established line of cases has concluded that project permit decisions, analogous to implementation of legislative enactments, are outside the Board's jurisdiction. *See, e.g., B.D. Lawson v. GMHB,* 165 Wn.App. 677, 683-85, 269 P.3d 300 (2011).
[125] CP 718; CP 1346-48.
[126] *See* CP 1351-52.

Accordingly, there is no substantial evidence supporting the Board's conclusions that the County's measures do not comply with the GMA. While the County continues in its efforts to resolve the existing water quality problems within the County, those problems have wide-ranging sources. The evidence in the record does not prove that the County's measures governing rural development are the cause of these problems or that the County's measures are clearly erroneous.

3. The Board's Conclusion Is Based on Unlawful Procedure.

Underscoring the lack of substantial evidence supporting the Board's conclusion, the Board reached beyond the record that the parties presented and considered two additional documents. As explained above, these documents are not substantial evidence supporting the Board's decision; however, the Board's reliance on those documents violates procedures and is further evidence that there was not substantial evidence supporting its decision.

Specifically, the Board took official notice of two documents in its Order but did not follow proper procedures for considering those documents.[127] The Board relied on one of these documents in reaching its conclusion that the County should have adopted a uniform, across-the-board limitation on impervious surface coverage.[128]

The Board purported to take notice of these documents pursuant to

[127] CP 1524, 1546-50.
[128] CP 1549.

WAC 242-03-630 of the Board's rules,[129] which authorizes the Board to officially notice certain matters of law, including "decisions of administrative agencies of the state of Washington."[130] The Board's rules do not, however, authorize the Board to take notice of "a document adopted by a state agency" (the Board's description for the first document) or "a science-based land use planner's guide to salmonid habitat protection and recovery" (the Board's description for the second document).[131] These documents are simply not "matters of law" that the Board is authorized to notice pursuant to WAC 242-03-630.

Nor are these the types of documents that the Board could have noticed pursuant to WAC 242-03-640, which authorizes the Board to officially notice certain material facts. The documents do not constitute "business customs" or "notorious facts" that the Board could have noticed under WAC 242-03-640(2). Nor are the documents "[t]echnical or scientific facts within the board's specialized knowledge" that the Board could have noticed under WAC 242-03-640(1)(c). Moreover, even if the Board could have taken notice of the documents as containing "material facts" under WAC 242-03-6401(c), the Board would have been required to notify the parties "either before or during a hearing of the material fact(s) proposed to be officially noticed," and would also have been required to afford the parties "the opportunity to contest such facts and

---

[129] CP 1524.
[130] WAC 242-03-630(2).
[131] CP 1524.

materials."[132] The Board did not notify the parties before or during the hearing, and the Board did not afford the parties the opportunity to contest the documents that it noticed.

Thus, the Board engaged in unlawful procedure and failed to follow a prescribed procedure under RCW 34.05.570(3)(b), and the Board's Order is inconsistent with the Board's own rules under RCW 34.05.570(3)(h). In reaching beyond the record that was presented to the parties, the Board tacitly acknowledges the lack of substantial evidence supporting its decision within the record presented at hearing.

4. The Board's Conclusion Is Based on an Erroneous Interpretation and Application of the Law by Effectively Requiring the County to Correct Past or Existing Impacts.

The Board's decision on the County's measures protecting water quality from rural development stems from its overly broad interpretation of *Kittitas*.[133] As noted above, the Court in *Kittitas* indicated that the GMA requires the County to exercise its land use planning authority in a manner that is consistent with Ecology's regulation of water resources. The *Kittitas* decision did not obligate the County to exercise current and future land use decisions in a manner that would address or improve water quality conditions already in existence from past or ongoing activities. The Board's decision pertaining to water quality extends the *Kittitas* Court's holding in a manner that is inconsistent with the plain language of the GMA. Plainly stated, the Board interpreted the generic language in the

[132] WAC 242-03-640(3).
[133] 172 Wn.2d 144, 256 P.3d 1193 (2011).

GMA pertaining to "protection" of water quality to suggest that any evidence of water quality problems regardless of source is de facto evidence of noncompliance.

To the extent that the Board can extrapolate the holding in *Kittitas* and extend its interpretation to water quality and not just water availability, it must do so in conjunction with other judicial guidance on GMA interpretation and its applicability to pre-existing conditions. Critically, in this instance, the Board's suggestion that pre-existing water quality issues constitute violations of GMA is inconsistent with the State Court's interpretation of the statutory GMA obligation to "protect" water resources. "Protect" as used in the GMA does not mean "restore" or "enhance" or rectify past impacts. *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board,* 161 Wn.2d 415, 166 P.3d 1198 (2007). In *Swinomish,* the Court relied on the dictionary definition of "protect" to reject arguments that the GMA requirement to "protect" critical areas requires enhancement of areas that are already in a degraded condition. Instead, the Court confirmed that the requirement to protect critical areas is met by preventing new harm. In this case, the Board's reliance on preexisting water quality problems as de facto evidence to find new regulations inadequate implies that the County must resolve those pre-existing problems to satisfy its requirement to "protect" water quality. This assumption contradicts the holding in *Swinomish.* Thus, the presence of pre-existing water quality problems are not de facto evidence of the deficiencies of the County's measures.

V. CONCLUSION

For the reasons stated herein, the Court should reverse the Board's Order. In ruling that the County's measures do not comply with the GMA, the Order impermissibly requires Whatcom County and other counties to tread new ground and to effectively overturn the Department of Ecology's interpretations in the realm of water rights regulation and evaluation of water rights impairment. The Order also holds Whatcom County's rural measures responsible for complex water quality problems whose multi-faceted solutions are beyond the scope and authority of the County's rural measures and regulations.

Respectfully submitted this 27th day of February, 2014.

VAN NESS FELDMAN, LLP

Jay P. Derr, WSBA #12620
Tadas Kisielius, WSBA #28734
Duncan Greene, WSBA #36718
Attorneys for Petitioner

DAVID S. MCEACHRAN
Whatcom County Prosecuting Attorney

for KAREN N. FRAKES, WSBA #13600
Civil Deputy Prosecuting Attorney
Attorney for Petitioner
per telephone authorization

APPENDIX

Whatcom County Code ("WCC") Sections and Stormwater Development Standards

WCC 20.71.021 – Area and applicability.

(1) The Water Resource Protection Overlay District is an overlay zone that covers the entire geographic area of the Lake Samish and Lake Padden watersheds within Whatcom County's jurisdiction. For purposes of this title, the Lake Samish watershed shall consist of that portion of the Friday Creek subbasin of the Samish River watershed that lies within Whatcom County.

(2) This district may be expanded to include other areas through the annual zoning text amendment process.

(3) The Lake Samish and Lake Padden watersheds are also designated as stormwater special districts pursuant to WCC 20.80.635 and water resource special management areas pursuant to WCC 20.80.735.

(4) In the event that the provisions of this chapter conflict with the provisions of the Shoreline Management Program (WCC Title 23), Chapter 16.16 WCC, Critical Areas, the Whatcom County Development Standards, the provisions of the underlying zoning district or other applicable county policies or regulations, then the most restrictive shall apply; provided, that the minimum setback provisions established in WCC 20.71.401 shall prevail. (Ord. 2013-043 § 1 Exh. B, 2013; Ord. 2009-009 Exh. A, 2009; Ord. 2005-085 § 1, 2005; Ord. 2004-007 § 1, 2004; Ord. 2003-049 § 1, 2003; Ord. 2003-032 Exh. A, 2003; Ord. 2002-075, 2002; Ord. 2002-034, 2002; Ord. 2001-021 § 1, 2001; Ord. 99-086, 1999).

WCC 20.71.302 – Impervious surface requirements shall be as follows:

(1) For uses in the UR, URM and RR Zone Districts, at least 80 percent of the lot or parcel shall be kept free of structures and impervious surfaces.

(2) For uses in the R Zone District, at least 90 percent of the lot or parcel shall be kept free of structures and impervious surfaces.

(3) Where subsection (1) or (2) of this section does not allow 2,500 square feet of total impervious surface area, 2,500 square feet shall be allowed.

(4) Two or more lots of record consolidated pursuant to the provisions of WCC 20.83.070 shall be treated as one undivided parcel for the purpose of calculating total allowable impervious surface. Where two or more lots or parcels are consolidated; are not subject to the provisions of WCC

20.83.070; and are not subject to a permanent restrictive covenant that precludes development of buildings, structures or other improvements not otherwise identified by said covenant, 4,000 square feet of impervious surface shall be allowed.

(5) Preexisting nonconforming impervious surfaces may be routinely maintained/repaired or redeveloped; provided, that if 50 percent or greater of the preexisting nonconforming impervious area is to be redeveloped, then the applicable impervious surface limitations of subsections (1), (2) and (3) of this section shall apply. However, if a legal nonconforming structure is destroyed, the nonconforming use may be reconstructed using the pre-existing footprint. Expansion of nonconforming impervious surfaces shall be prohibited.

(6) A mobile home within an existing mobile home park may be replaced with a larger mobile home (not to exceed a maximum of 1,500 square feet), provided there is not an increase in the overall number of mobile homes in the park or any increase in other impervious surfaces beyond the new mobile home footprint.

(7) For properties within the jurisdiction of the Shoreline Management Program (WCC Title 23), submerged lands and/or tidelands within the boundaries of any waterfront parcel that are located waterward of the ordinary high water mark shall not be used in impervious/pervious surface calculations.

(8) Any portion of a roof overhang or other overhanging architectural feature which projects further than three feet from the footprint of a structure shall be calculated as impervious surface.

(9) Alternative surface methods described in WCC 20.71.603 may be used. (Ord. 2013-043 § 1 Exh. B, 2013; Ord. 2009-009 Exh. A, 2009; Ord. 2005-085 § 1, 2005; Ord. 2005-079 § 1, 2005; Ord. 2004-007 § 1, 2004; Ord. 2003-049 § 1, 2003; Ord. 2003-032 Exh. A, 2003; Ord. 2002-075, 2002; Ord. 2002-034, 2002; Ord. 2001-063 § 1, 2001; Ord. 2001-021 § 1, 2001; Ord. 99-086, 1999).

WCC 20.80.630 –Stormwater and drainage. (Adopted by reference in WCCP Chapter 2.)

(1) All development activity within Whatcom County shall be subject to the stormwater management provisions of the Whatcom County Development Standards or the provision addressed herein, as applicable, unless specifically exempted.

(2) No project permit shall be issued prior to meeting the stormwater requirements of this chapter and/or Chapter 2 of the Whatcom County Development Standards. Advisory Note: Certain stormwater discharges to

natural receiving waters are subject to state water quality standards and the requirements of the National Pollutant Discharge Elimination System (NPDES). Hydraulic Project Approval (HPA) may also be required if stormwater is discharged to a water body or stream that provides, or could provide, habitat for fish.

(3) Unless other county stormwater management provisions are more restrictive, all development activity within NPDES Phase II area boundaries (excepting areas within the Birch Bay NPDES Phase II area boundary), as delineated at the time that the county determines that the development application is complete, shall comply with the most current editions of:

- The Washington State Department of Ecology Stormwater Management Manual for Western Washington; and

- Appendix 1, Minimum Technical Requirements for New Development and Redevelopment, of the Western Washington Phase II Municipal Stormwater Permit; and

- Appendix 7, "Determining Construction Site Sediment Damage Potential," of the Western Washington Phase II Municipal Stormwater Permit.

(4) Development activity within the Birch Bay NPDES Phase II area boundary shall be subject to this chapter or the 2005 Department of Ecology Stormwater Management Manual for Western Washington and Appendices 1 and 7 of the NPDES Phase II 2012-2013 permit, whichever is more restrictive. (Ord. 2013-057 § 1 (Exh. A), 2013; Ord. 2013-050 § 1 Exh. A, 2013; Ord. 2010-003 Exh. A, 2010; Ord. 2003-049 § 1, 2003; Ord. 2003-032 Exh. A, 2003; Ord. 2002-075, 2002; Ord. 2002-034, 2002; Ord. 96-056 Att. A §§ A2, S9, 1996; Ord. 94-022, 1994).

WCC 20.80.632 - Small development requirements.

The following activities are considered small developments:

(1) Individual detached single-family residences, duplexes and accessory development creating less than 10,000 square feet of cumulative impervious surfaces.

(2) All other development resulting in the creation or addition of less than 5,000 square feet of impervious surface area.

Small development activities shall be required to employ best management practices (BMPs), to control erosion and sediment during construction, to permanently stabilize soil exposed during construction, to protect adjacent properties and water bodies from stormwater effects

caused by development, and shall be subject to any other requirements specified under Chapter 2 of the Whatcom County Development Standards, or as specified for special districts identified in WCC 20.80.635. (Ord. 2003-049 § 1, 2003; Ord. 2003-032 Exh. A, 2003; Ord. 2002-075, 2002; Ord. 2002-034, 2002; Ord. 2001-021 § 1, 2001; Ord. 2000-066 § 1, 2000; Ord. 99-086, 1999; Ord. 94-022, 1994).

WCC 20.80.634 – Stormwater conformance.

All development shall conform to the following requirements:

(1) General.

(a) Stormwater discharges must be controlled and treated as required by law.

(b) Best management practices (BMPs) shall be used to comply with the regulations in this chapter. If appropriate BMPs are not referenced in the Whatcom County Development Standards, experimental BMPs may be considered. However, experimental BMPs must be approved by the county technical administrator prior to implementation.

(c) Development shall minimize impervious surface areas while maintaining project function and viability. Protection of ground water and aquifer recharge are important objectives which shall be incorporated in required surface water management facilities consistent with established BMPs.

(d) Stormwater systems shall not be constructed in such a manner that they materially degrade natural systems such as streams and their banks, wetlands, ponds or lakes.

(e) Natural drainage patterns shall be maintained and discharges from the site shall occur at the natural location, unless it can be shown that relocation will have no significant adverse impact to either built or natural systems as a result of the relocation.

(f) The design of stormwater systems shall be an integral part of the overall development design and, in addition to the primary storage and conveyance function, should incorporate multiple use provisions to enhance the project, such as the following:

(i) Recreation;

(ii) Public safety;

(iii) Economical maintenance;

(iv) Aesthetic integration into the landscape and project design;

(v) Wildlife habitat;

(vi) Education;

(vii) Open space.

(2) Erosion and Sediment Control.

(a) All proposed projects that will clear, grade, or otherwise disturb the site shall provide erosion and sediment control (ESC) that prevents the transport of sediment from the site to drainage facilities, water resources and adjacent properties.

(b) Projects exceeding the small development thresholds in WCC 20.80.632 shall submit a preliminary temporary erosion and sediment control (TESC) plan and, if required, a large development temporary erosion and sediment control plan, for approval by the county engineer.

(c) Erosion and sediment controls shall be applied in accordance with Whatcom County Development Standards, Chapter 2 – Stormwater Management.

(3) Runoff Control.

(a) Proposed large development projects, except as noted below, shall provide runoff controls to limit the developed conditions' peak rates of runoff to the predevelopment peak rates for the following storm events:

(i) The one-year, 24-hour, storm event when stormwater is discharged to a stream or to a drainage basin within 1,000 feet of a stream or when the project is located in a stormwater special district;

(ii) The two-year, 24-hour, storm event;

(iii) The 10-year, 24-hour, storm event;

(iv) The 25-year, 24-hour, storm event;

(v) The 100-year, 24-hour, storm event.

(b) Exceptions. Direct discharge to a regional facility, marine water body, rivers or lakes when demonstrated there is no significant adverse impact to the conveyance system and the receiving waters.

(4) Conveyance. All engineered conveyance system elements for proposed projects shall be analyzed, designed and constructed to prevent overtopping, flooding, erosion and structural failure as specified by the conveyance requirements for new and existing systems and conveyance implementation requirements described in the Whatcom County Development Standards, Chapter 2 – Stormwater Management.

(5) Water Quality. Proposed large development projects shall provide appropriate water quality treatment facilities to treat runoff from pollution-generating impervious surfaces.

(6) Maintenance. All stormwater facilities shall be maintained in accordance with the stormwater system maintenance requirements of the Whatcom County Development Standards, Chapter 2 – Stormwater Management. Maintenance plans, responsibilities, and the method of financing said maintenance shall be established by the applicant or property owner prior to final approval of any development activity directly associated with the development proposal. (Ord. 2003-049 § 1, 2003; Ord. 2003-032 Exh. A, 2003; Ord. 2002-075, 2002; Ord. 2002-034, 2002; Ord. 2001-021 § 1, 2001; Ord. 2000-066 § 1, 2000; Ord. 99-086, 1999; Ord. 99-071, 1999; Ord. 96-056 Att. A § S10, 1996; Ord. 94-022, 1994. Formerly 20.80.635).

WCC 20.80.636 – Stormwater special district requirements.

In areas designated as stormwater special districts (per WCC 20.80.635), permanent on-site stormwater quality and quantity facilities shall be required on all lots less than five acres in size for projects that meet either of the following criteria:

(1) New construction or remodels that increase impervious surfaces by more than 500 square feet; or

(2) Renovation projects where the estimated cost of the work exceeds 50 percent of the assessed value of the existing structure. Interior remodels, nonpolluting roof replacements, house maintenance and energy upgrades shall be exempt from this requirement.

If stormwater quality and quantity facilities are required based on either of these criteria, the provisions of the Whatcom County Development Standards, Chapter 2, Section 221, shall apply to the entire property, unless it can be demonstrated that off-site facilities would provide better treatment, or unless common detention and water quality facilities meeting the standards of the 1996 Whatcom County Development Standards or the 1992 Department of Ecology Stormwater Management Manual for the Puget Sound Basin (or more current versions) have been approved as part of a comprehensive stormwater management plan for that subdivision,

binding site plan, short subdivision, or major development approval. (Ord. 2013-043 § 1 Exh. B, 2013; Ord. 2009-009 Exh. B, 2009; Ord. 2005-030 § 1 Exh. A, 2005; Ord. 2003-049 § 1, 2003; Ord. 2003-032 Exh. A, 2003; Ord. 2002-075, 2002; Ord. 2002-034, 2002; Ord. 2001-021 § 1, 2001; Ord. 2000-066 § 1, 2000).

WCC 20.80.735 – Water resource special management areas.

The purpose of a water resource special management area is to establish a more stringent standard for clearing activity in highly valued water resource areas, environmentally sensitive areas, or areas where natural conditions are so unstable that clearing activity in the areas can result in hazardous conditions. Implementation of best management practices, including phased clearing, tree retention and seasonal clearing limitations, is intended to limit the amount of exposed soils on site that are susceptible to erosion at any one time, thereby improving site stability during development and reducing potential for transport of dissolved pollutants and sediments off site. Preservation of existing trees on site also reduces the quantity and maintains the quality of stormwater leaving a site during and after development activities by encouraging interception, infiltration and evapotranspiration of rainfall and surface runoff.

Whatcom County shall establish the following geographic areas as water resource special management areas:

• Drayton Harbor watershed;

• Lake Padden watershed;

• Lake Samish watershed; and

• Birch Bay watershed.

(1) Water Resource Special Management Area Review Thresholds. County review and approval shall be required for clearing activities which exceed the following thresholds. If the clearing activity does not meet the threshold criteria, county review is not required. However, the owner is still subject to, and must comply with, the minimum requirements established in this chapter and in the Whatcom County Development Standards.

(a) Lake Samish and Lake Padden Watersheds. County review and approval shall be required for all clearing activities associated with a fill and grade permit, building permit or other development proposal. Clearing activities which are not associated with a development permit shall require county review if they are:

(i) Five thousand square feet or greater during the dry season, June 1st through September 30th; or

(ii) Five hundred square feet or greater during the wet season, October 1st through May 31st.

(2) Within water resource special management areas, clearing activity must conform to the following conditions:

(a) Temporary erosion and sediment control shall be installed and inspected prior to any clearing activity. The technical administrator shall conduct periodic inspections to ensure the integrity of temporary erosion and sediment controls. Temporary erosion and sediment control measures include, but are not limited to, installation of silt fencing, installation of check dams, covering of excavation piles, and mulching of exposed soils, as specified in the Whatcom County Development Standards.

(b) Phased Clearing. Construction activities and clearing activities shall be phased to limit the amount of exposed soil that occurs at any one time, if determined to be appropriate by the technical administrator, based on site characteristics or constraints including, but not limited to, slopes, proximity to shorelines and wetlands. A phased clearing plan may be required. A phased clearing plan, if required, shall be submitted for review and approval by the technical administrator prior to any clearing activity and shall contain a detailed construction schedule or timeline.

(c) Soil Stabilization. All disturbed areas shall be provided with soil stabilization within two days of the time of disturbance. The technical administrator may approve an exemption to this requirement when a tree canopy area retention plan includes a soil stabilization plan. This plan component must specifically detail erosion and sediment control and stormwater runoff measures that provide runoff control equal to or greater than the protection provided by the standard two-day soil stabilization requirements of this section.

(d) Tree Canopy Area Retention. In the Lake Samish and Lake Padden watersheds, in addition to compliance with all other requirements of this title and other titles of the Whatcom County Code, clearing activities on any lot or parcel, with the exception of nonconversion forest practices occurring on lands platted after January 1, 1960, shall comply with the following provisions:

(i) Existing tree canopy areas, as defined by the dripline of the tree(s), may be removed for purposes of a building site, driveways, parking areas, and areas to be landscaped, but such areas shall not

exceed a cumulative total of 5,000 square feet or 35 percent of the existing tree canopy area, whichever is greater.

(ii) The following criteria shall be used to determine which tree canopy areas are to be prioritized for retention:

(A) Stands of mature native trees;

(B) Trees on sensitive slopes, on lands classified as having landslide hazards, or high erosion hazards, as defined under the Critical Areas Ordinance;

(C) Trees within critical areas or their associated setback and/or buffer areas as defined under WCC Title 16 or 23; or

(D) Trees with significant habitat value as identified by a qualified wildlife biologist or by the technical administrator, per WCC Title 16.

(iii) Existing trees and vegetation may be used to meet all or part of the landscaping requirements of this title.

(iv) The county shall require that tree canopy areas to be retained are identified on a site plan and clearly flagged, or delineated, on the site. A tree canopy area retention plan must accompany a project or clearing permit application and be approved by the technical administrator before clearing activity takes place. The plan shall contain the following components:

(A) A scaled drawing identifying the following:

1. North arrow;

2. Property boundaries;

3. Existing structures;

4. Site access;

5. Tree canopy areas to be removed;

6. The outer dripline of tree canopy areas to be retained;

7. Critical areas including, but not limited to, slopes, wetlands, and habitat conservation areas;

8. Protection measures to be utilized for areas that will be undisturbed; and

9. Areas to be replanted pursuant to subsection (2)(d)(vii) of this section;

(B) A planting schedule that indicates the time frame for replanting of trees as applicable; and

(C) Provisions for maintenance and monitoring.

(v) Prior to any clearing activity or development activity, any tree canopy area designated for retention shall be delineated by temporary fencing, tape, or other indicators around the outer dripline of the trees. Temporary fencing, tape, or other indicators shall be clearly visible and shall be maintained for the duration of the proposed clearing or development activity. Any tree canopy areas designated for retention shall be field verified by the technical administrator before clearing activities begin. Trees within canopy areas designated for retention shall not be damaged by clearing, excavation, ground surface level changes, soil compaction, or any other activities that may cause damage to roots or trunks. Machinery, impervious surfaces, fill and storage of construction materials shall be kept outside of the dripline of the tree canopy areas designated for retention.

(vi) Tree canopy areas may be removed when limited to those canopy areas affected under the following circumstances:

(A) Fire prevention methods when supported by the county fire marshal;

(B) Hazard trees, as defined in Chapter 20.97 WCC, are identified (an evaluation and determination by a licensed arborist or forester may be required);

(C) Encroachments where the trunk, branches or roots would be, or are, in contact with main or accessory structures; or

(D) Where installation and/or maintenance of roads or utilities would unavoidably require removal or cutting through the root system.

(vii) In the event that tree canopy areas in excess of the applicable threshold must be removed to facilitate reasonable use of the site, or to eliminate hazard trees, not less than two replacement trees shall be planted for every tree removed. Replacement trees shall:

(A) Be of the same, or similar, native species as those trees removed from site;

(B) Be planted to reestablish tree clusters where they previously existed, or to enhance protected tree clusters;

(C) Be planted in locations appropriate to the species' growth habitat and horticultural requirements; and

(D) Be located away from areas where damage is likely.

(viii) If any trees within canopy areas designated for retention are damaged or destroyed through the fault of the applicant, agent or successor, the applicant, their agent or successor shall restore the site pursuant to a restoration plan approved by the county.

(ix) The county may require a bond or other security in an amount not to exceed 125 percent of the merchantable timber to guarantee retention of existing trees within designated canopy areas during construction. In the event of a dispute between the landowner and the county over the established value, an assessment will be made by a professional forester or arborist whose selection will be made by mutual agreement between the county and the landowner. The fee for the services of the professional forester or arborist shall be paid by the landowner or responsible party. In the event any trees designated to be retained are removed, the county shall require that sufficient trees be re-planted to replace those previously in existence. In the event that replanting does not occur, the county may enforce upon any bond posted. Each tree removed or destroyed shall constitute a separate violation.

(e) Seasonal Clearing Activity Limitations. In the Lake Samish and Lake Padden watersheds, clearing activity, as defined in WCC 20.97.054, that will result in exposed soils exceeding 500 square feet shall not be permitted from October 1st through May 31st; provided, that:

(i) In addition to the clearing activities exempted under WCC 20.80.733, the zoning administrator may approve an exemption to this requirement for the following activities:

(A) Routine maintenance and repair of erosion and sediment control measures;

(B) Activities located at or waterward of the ordinary high water mark subject to state, federal, and/or local (per Chapter 16.16 WCC and/or WCC Title 23) conditions of

approval requiring commencement of clearing activity during the wet season, as defined in subsection (1)(a)(ii) of this section, for purposes of minimizing surface water disturbance and site inundation by high water or wave action;

(C) Activities necessary to address an emergency that presents an unanticipated and imminent threat to public health, safety or the environment that requires immediate action within a time too short to allow full compliance with this section. Upon abatement of the emergency situation, the clearing activity shall be reviewed for consistency with this chapter and may be subject to additional permit requirements; provided, that the applicant shall make a reasonable attempt to contact the zoning administrator prior to the activity. When prior notice is not feasible, notification of the action shall be submitted to the zoning administrator as soon as the emergency is addressed and no later than two business days following such action. Emergency construction does not include development of new permanent protective structures where none previously existed.

(ii) To ensure compliance with subsection (2)(e) of this section, Whatcom County planning and development services shall not issue development permits requiring more than 500 square feet of land disturbance located within the Lake Samish or Lake Padden watersheds within two weeks prior to the watershed seasonal closure on October 1st.

(iii) Soil disturbance associated with an exempt clearing activity shall be minimized to the maximum extent practicable. The zoning administrator shall have the authority to condition an exempt activity to ensure that temporary erosion and sediment control measures will be implemented.

(iv) An exemption from the seasonal land clearing requirements of this section does not grant authorization for any work to be done in a manner that does not comply with other provisions of this chapter or other applicable development regulations.

(f) One Hundred Fifty Percent Violation Fines. When a violation occurs in an area designated as a water resource special management area, the total fine assessment shall be increased to 150 percent of the standard penalty as provided for in Chapter 20.94 WCC, Enforcement and Penalties. (Ord. 2013-043 § 1 Exh. B, 2013; Ord. 2010-006 Exh. A, 2010; Ord. 2010-001 Exh. A, 2010; 2009-056 Exh. A, 2009; Ord. 2009-009 Exh. B, 2009; Ord. 2005-074 § 1, 2005; Ord. 2005-061

Exh. A, 2005; Ord. 2005-032 Exh. A, 2005; Ord. 2005-030 § 1 Exh. A, 2005; Ord. 2004-051 Exh. A, 2004; Ord. 2003-049 § 1, 2003; Ord. 2003-032 Exh. A, 2003; Ord. 2002-075, 2002; Ord. 2002-053, 2002; Ord. 2002-034, 2002).

WCC 21.01.040 – Applicability and exemptions.

(1) This title shall apply to property boundary actions as defined in this title.

(2) The subdivision and short subdivision provisions of this title shall not apply to:

(a) Cemeteries and other burial plots while used for that purpose;

(b) Divisions of land into lots or tracts none of which are smaller than 20 acres or 1/32 of a section of land and not containing a dedication; provided, that a certificate of exempt land division is obtained from Whatcom County in accordance with this title;

(c) Divisions made by testamentary provisions, or the laws of descent;

(d) Divisions of land into lots or tracts classified for industrial or commercial use when Whatcom County has approved a binding site plan for the use of the land in accordance with this title;

(e) A division for the purpose of lease when no residential structure other than mobile homes or travel trailers are permitted to be placed upon the land when Whatcom County has approved a binding site plan for the use of the land;

(f) A division made for the purpose of alteration by adjusting boundary lines, between platted or unplatted lots or both, which does not create any additional lot, tract, parcel, site, or division nor create any lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site in accordance with the provisions of this title;

(g) Divisions of land into lots or tracts pursuant to RCW 58.17.040(7); condominiums when Whatcom County has approved a binding site plan in accordance with the provisions of this title;

(h) A division for the purpose of leasing land for facilities providing personal wireless services while used for that purpose. "Personal wireless services" means any federally licensed personal wireless service. "Facilities" means unstaffed facilities that are used for the transmission or reception, or both, of wireless communication

services including, but not necessarily limited to, antenna arrays, transmission cables, equipment shelters, and support structures;

(i) A division of land into lots or tracts of less than three acres that is recorded in accordance with Chapter 58.09 RCW and is used or to be used for the purpose of establishing a site for construction and operation of consumer-owned or investor-owned electric utility facilities. For purposes of this subsection, "electric utility facilities" means unstaffed facilities, except for the presence of security personnel, that are used for or in connection with or to facilitate the transmission, distribution, sale, or furnishing of electricity including, but not limited to, electric power substations. This subsection does not exempt a division of land from the zoning and permitting laws and regulations of cities, towns, counties, and municipal corporations. Furthermore, this subsection only applies to electric utility facilities that will be placed into service to meet the electrical needs of a utility's existing and new customers. "New customers" are defined as electric service locations not already in existence as of the date that electric utility facilities subject to the provisions of this subsection are planned and constructed;

(j) Agricultural Lease. Divisions made for the purpose of lease for agricultural uses; provided, that each such leased parcel is a minimum of five acres or 1/128 of a section of land. The remaining portion of the parcel shall also be a minimum of five acres or 1/128 of a section of land. This exemption authorizes leasing the parcel but shall not authorize the sale of the parcel;

(k) Environmental Mitigation. Divisions of land for environmental mitigation, conservation or restoration; provided, that all of the following conditions are met:

(i) All lots are a minimum of five acres or 1/128 of a section of land.

(ii) Except as provided in subsection (k)(iii) of this section, all lots shall be used exclusively for:

(A) Environmental mitigation required under local, state or federal law; or

(B) Environmental conservation or restoration when a nonprofit nature conservancy corporation or association as defined by RCW 84.34.250 or public agency will own the lots.

(iii) If residential, commercial, or industrial buildings already exist, then one lot containing these buildings shall be created. This one

lot shall not be subject to the requirements of subsection (k)(iv) of this section.

(iv) A permanent covenant acceptable to the director of planning and development services shall be recorded against each lot, except as provided in subsection (k)(iii) of this section. This covenant shall state the following:

(A) The lot shall be used exclusively for environmental mitigation, conservation or restoration.

(B) The lot shall not be further divided.

(C) New structures not necessary for environmental mitigation, conservation or restoration including residential, commercial and industrial development shall be prohibited.

(D) After recording, if the original purposes underlying the covenant can no longer be fulfilled and changed conditions warrant, the covenant may be revised with the consent of the county council, consistent with then-applicable policies and regulations.

(v) A legal description of the parcels created for environmental mitigation, conservation or restoration, prepared by a surveyor, shall be submitted to the planning and development services department for final approval and recordation.

(vi) Legal ingress and egress access of record is provided to the lots created by the exemption and verified by Whatcom County engineering. All access points to public roads shall be approved by the Whatcom County engineer or designee;

(l) Divisions of land into parcels of less than 40 acres but greater than 10 acres within the area zoned and designated as Agriculture in the Comprehensive Plan for Whatcom County proceeding in accordance with WCC 20.40.254(5).

(3) The following rules shall govern questions of precise applicability of these regulations to land divisions:

(a) Contiguous Parcels. All contiguous parcels of land in the same ownership shall be included within the boundaries of any proposed long or short subdivision of any of the properties. For the purpose of this section, the lots so situated shall be considered as one parcel; provided, that any of the contiguous parcels that are within a recorded long or short plat that was filed with the county auditor at least five

years prior to the new land division shall not be required to be included if the lot or lots are in conformance with the applicable zoning standards.

(b) Pre-1972 Parcels. Parcels of land legally divided prior to the effective date of the ordinance codified in this title (as originally adopted February 3, 1972) shall be considered in accordance with land division laws and resolutions applicable at the time of plat recording per RCW 58.17.170 or other division. (Ord. 2013-040 Exh. 1; Ord. 2009-007 § 1; Ord. 2000-056 § 1).

WCC 21.04.034 – Application procedures.

(1) Notice and Distribution.

(a) The subdivision administrator shall distribute application materials to appropriate county and city staff within 10 working days of the determination of completeness.

(b) Whenever a short subdivision is located adjacent to the right-of-way of a state highway or will depend on access from a state highway, the subdivision administrator shall give written notice of the application, including a legal description of the short subdivision and a location map, to the Washington State Department of Transportation (WSDOT). WSDOT shall, within 14 days after receiving the notice, submit to the subdivision administrator a statement with any information that the department deems to be relevant about the effect of the proposed short subdivision upon the legal access to the state highway, the traffic carrying capacity of the state highway and the safety of the users of the state highway.

(c) The subdivision administrator shall notify and provide copies of project plans to a city when the subdivision is within that city's urban growth area, agencies potentially having jurisdiction relevant to the application, and public utilities if within 660 feet (one-eighth mile) of the area submitted in the application. Such cities, agencies, and utility organizations shall be given 14 days to respond. If they do not respond within 14 days, the administrator, SEPA official and technical review committee may conclude their review of the application without such comments.

(2) Decision on Application. The subdivision administrator shall, within 90 calendar days of the date of determination of completeness, issue a notice of preliminary approval, issue a notice of additional requirements to obtain preliminary approval, or deny the application. An applicant may have up to 180 days in which to submit additional requirements unless a longer time period is authorized by the subdivision administrator for circumstances beyond the control of the applicant. Preliminary approval of

a short subdivision shall be accompanied by written findings by the county that:

(a) Appropriate provisions have been made for the public health, safety, and general welfare and for such drainage ways, stormwater management, streets or roads, potable water supplies, sanitary wastes, and sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school, and the public use and interest will be served by the platting of such short subdivision and dedication; and

(b) The short subdivision is in conformity with applicable land division, zoning, critical areas, shoreline management, and other land use regulations. (Ord. 2009-007 § 1).

WCC 21.04.040 – Restriction of further division.

Land in short subdivisions may not be further divided in any manner within a period of five years except through the long subdivision process which requires the filing of a final plat or through the binding site plan process which requires the filing of a general and specific binding site plan. However, if the short subdivision contains fewer than four parcels, nothing in this section shall prevent the owner who filed the short plat from filing an alteration within the five-year period to create up to a total of four lots within the original short subdivision boundaries. (Ord. 2009-007 § 1).

WCC 21.04.090 – Water supply.

(1) Water from a public water system(s) shall be provided to serve each lot in a short plat, except as specified in subsection (2) of this section.

(2) For a residential short subdivision, private water supplies may be utilized under the following circumstances:

(a) All lots served by the private water supplies are five acres or larger, unless smaller because of clustering. If the lots are smaller because of clustering, the gross density of the short subdivision shall not exceed one dwelling per five acres; and

(b) The withdrawal is not from a defined portion of an aquifer of known regional ground water contamination that exceeds state standards and that has been identified by the director of the health department and confirmed by the board of health; and

(c) The water source is ground water and not surface water; and

(d) If the short subdivision is within the designated water service area of a public water purveyor that is shown on the coordinated water system plan map or within one-half mile of an existing water purveyor's water lines:

(i) The water cannot be provided to the applicant within 120 calendar days of submitting a written request and applicable fees to the purveyor unless specified otherwise by the hearing examiner or county council; or

(ii) The purveyor states in writing that it is unable or unwilling to provide the service; or

(iii) The purveyor and applicant are unable to achieve an agreement on the schedule and terms of provision of service within 120 calendar days.

(3) If a public water supply is required, all the requirements of Chapter 246-290 WAC, Group A Public Water Systems, or Chapter 246-291 WAC, Group B Public Water Systems, must be met prior to final plat approval. (Ord. 2009-007 § 1).

WCC 21.04.150 – Requirements for a fully completed application for short subdivisions.

Upon completion of the pre-application review, and in response to the pre-application review letter, the applicant is authorized to prepare the short subdivision application materials. The following requirements for a fully completed application, and any other information on a form prescribed by the subdivision administrator, must be provided in order to initiate a review for a determination of completeness.

(1) Written and Other Data and Fees.

(a) Name, address and phone number of owner(s), applicant, and contact person.

(b) Intended uses.

(c) List of variances and waivers requested.

(d) General written proposal of water supply and sewage disposal method, including letter from public water or sanitary sewer providers stating their willingness and ability to serve the proposed land division.

(e) Preliminary stormwater proposal.

(f) Preliminary traffic proposal and transportation concurrency analysis, as required by Chapter 20.78 WCC.

(g) Assessor's parcel number (of the parent parcel). (h) Fees as specified in the Unified Fee Schedule.

(i) Critical areas assessment report pursuant to WCC 16.16.255 when the written findings of the pre-application review identify the need for this report.

(j) Preliminary title report issued no more than 60 calendar days prior to application.

(k) Net and gross lot size to determine minimum lot size and density requirements as required by the Zoning Ordinance.

(l) Signature of property owners or applicant attesting by written oath to the accuracy of all information submitted for the application.

(2) Map Data.

(a) Name of owner(s).

(b) Name of proposed land division.

(c) General layout of proposed land division.

(d) Common language description of the general location of the land division.

(e) Approximate locations of existing roads, utilities, and infrastructure.

(f) Vicinity map.

(g) Short plat map with a common engineering scale with north arrow and sheet numbers (on each sheet containing a map).

(h) Section, township, range and municipal and county lines in the vicinity.

(i) Boundaries of the site with general dimensions shown that are prepared by a licensed surveyor.

(j) General direction and gradient of slope. (k) Legal description of the land.

(l) Proposed location and means of proposed water service and sewage disposal.

(m) Proposed location and means of proposed access (including proposed improvements to on-site and off-site roadways, and site distance).

(n) Other proposed on-site and off-site utilities and facilities.

(o) Location of existing roads, rights-of-way, buildings, parking, and drainage on-site.

(p) Where appropriate, location of natural features, including bodies of water, natural drainage areas, critical areas, and buffers.

(q) Location of existing sanitation and water facilities and easements (where appropriate).

(r) Existing and proposed street names.

(s) Names or numbers of any adjacent divisions.

(t) Sequential numbers or letters to all lots within the short subdivision.

(u) Topographic map of sufficient contour interval, acceptable to the county engineer or director of planning and development services or their designee, to show the topography of the land to be divided.

(v) Location of critical areas, shorelines and base flood elevation, where applicable.

(3) Seven sets of the above required information shall be submitted. The subdivision administrator may require the applicant to submit the information in an electronic format, and may reduce the number of required sets if provided in an alternative format. (Ord. 2009-007 § 1).

WCC 21.05.037 – Hearing examiner notice, hearing and decision.

The hearing examiner shall schedule and hold an open record hearing, review the application and make a decision or recommendation, as appropriate, in accordance with the provisions of Chapter 20.92 WCC. Notice of the open record hearing shall be as set forth in Chapter 2.33 WCC.

(1) Review of a preliminary long subdivision shall be accompanied by written findings of fact and conclusions regarding the proposed development's provisions for the following standards and criteria:

(a) Open spaces;

(b) Drainage ways and stormwater management;

(c) Streets or roads, pedestrian and bicycle paths, alleys, other public ways, transit stops, and other transportation facilities as required by concurrency standards;

(d) Potable water supplies;

(e) Sanitary wastes;

(f) Parks and recreation facilities and playgrounds;

(g) Schools and schoolgrounds, including sidewalks and other planning features that assure safe walking conditions for students who walk to and from school;

(h) Conformity with the Whatcom County Comprehensive Plan;

(i) Conformity with applicable land division, zoning and development standards;

(j) Conformity with critical areas, shoreline management, other land use regulations;

(k) Conformity with Chapter 58.17 RCW; and

(l) A summary finding that the public health, safety, general welfare, use and public interest will be served by the platting of such subdivision and dedication.

(2) If the hearing examiner finds that all of the above standards and criteria have been met, the examiner may issue an approval of the proposed preliminary long plat application.

(3) If the hearing examiner finds that the above criteria are not met, the hearing examiner may take one of the following actions:

(a) Specify the issues that require additional information and give the applicant a period of time up to three months to address those issues and return to the hearing examiner for further consideration.

(b) Issue a conditional approval specifying the actions needing to be taken to resolve minor nonconformance with the standards and criteria, and granting a specific limited time, typically 30 days, within which the applicant is to return to the hearing examiner for review.

(c) Deny the application. (Ord. 2009-007 § 1).

WCC 21.05.080 – Water Supply.

(1) Water from a public water system(s) shall be provided to serve each lot in a subdivision, except as specified in subsection (2) of this section.

(2) For a residential subdivision with six or fewer residences, private water supplies may be utilized under the following circumstances:

(a) All lots served by the private water supplies are five acres or larger, unless smaller because of clustering. If the lots are smaller because of clustering, the gross density of the subdivision shall not exceed one dwelling per five acres and the number of clustered lots shall not exceed four; and

(b) The withdrawal is not from a defined portion of an aquifer of known regional ground water contamination that exceeds state standards and that has been identified by the director of the health department and confirmed by the board of health; and

(c) The water source is ground water and not surface water; and

(d) If the subdivision is within the designated water service area of a public water purveyor that is shown on the coordinated water system plan map or within one-half mile of an existing water purveyor's water lines:

(i) The water cannot be provided to the applicant within 120 calendar days of submitting a written request and applicable fees to the purveyor unless specified otherwise by the hearing examiner or county council; or

(ii) The purveyor states in writing that it is unable or unwilling to provide the service; or

(iii) The purveyor and applicant are unable to achieve an agreement on the schedule and terms of provision of service within 120 calendar days.

(3) The applicant shall demonstrate that adequate water right(s) exist to serve the subdivision, except when water withdrawal is exempt from obtaining a water right permit under RCW 90.44.050.

(4) If a Group B public water system is created to serve the subdivision, the number of wells shall be limited to the minimum needed to serve the water needs of the subdivision as determined by the health department.

(5) If a public water supply is required, all the requirements of Chapter 246-290 WAC, Group A Public Water Systems, or Chapter 246-291 WAC, Group B Public Water Systems, must be met prior to final plat approval. (Ord. 2009-007 § 1).

WCC 24.05.030 – Adoption by reference.

Chapter 246-272A WAC, On-Site Sewage System Rules and Regulations, is hereby adopted by reference. If a conflict arises between Chapter 246-272A WAC and this chapter, the more restrictive regulation shall prevail. Any subsequent amendment to Chapter 246-272A WAC shall be considered to have been incorporated into this chapter without the need for further amendment. (Ord. 2006-056 Exh. A).

WCC 24.05.160 – Operation and maintenance.

A. The OSS owner is responsible for properly operating, monitoring and maintaining the OSS to minimize the risk of failure, and to accomplish this purpose shall:

1. Obtain approval from the health officer before repairing, altering or expanding an OSS;

a. All systems which were legally permitted at time of installation and which are not currently functional due to failing and/or broken component parts will be allowed to be repaired to functionality. Also see WCC 24.05.090(C);

2. Secure and renew contracts for periodic maintenance where required by the WCHD;

3. Obtain and renew operation permits if required by the WCHD;

4. Assure a complete evaluation of the system components and/or property to determine functionality, maintenance needs and compliance with this chapter and any permits. A report of system status shall be completed at the time of the evaluation and submitted to the WCHD;

5. Assure subsequent evaluations of the system components and/or property are completed as follows:

a. At least once every three years for all systems consisting solely of a septic tank and gravity SSAS;

b. Annually for all other systems unless more frequent inspections are specified by the health officer;

6. Employ an approved pumper to remove the septage from the tank when the level of solids and scum indicates that removal is necessary;

7. Provide maintenance and needed repairs to promptly return the system to a proper operating condition;

8. Protect the OSS area and the reserve area from:

a. Cover by structures or impervious material;

b. Surface drainage and direct drains, such as footing or roof drains. The drainage must be directed away from the area where the OSS is located;

c. Soil compaction, for example by vehicular traffic or livestock; and

d. Damage by soil removal and grade alteration;

9. Keep the flow of sewage to the OSS at or below the approved operating capacity and sewage quality;

10. Operate and maintain systems as directed by the health officer;

11. Request assistance from the health officer upon occurrence of a system failure or suspected system failure;

12. Ensure that a current report of system status by a licensed O&M specialist is on file with WCHD when a property with an OSS is offered for sale;

13. At the time of property transfer, provide to the buyer a copy of the current report of system status on file with the Whatcom County health department, and any available maintenance records, in addition to the completed seller disclosure statement in accordance with Chapter 64.06 RCW for residential real property transfers.

B. OSS owners may perform their own OSS evaluation in accordance with subsection C of this section except for the following:

1. OSS technologies that are listed as proprietary on the Washington State DOH list of registered on-site treatment and distribution products where the contract with the private proprietary manufacturer prohibits homeowner evaluations;

2. Community drainfields;

3. Nonconforming replacement systems that do not meet vertical and horizontal separation installed as a result of a system failure;

4. OSS serving food service establishments.

C. OSS owners who choose to perform their own evaluations shall complete O&M homeowner training as approved by the health officer. Upon completion of training, OSS owners may perform their own evaluations until property transfer. In cases of hardship, the health officer may approve the homeowner's selection of a designee who has completed the appropriate class to perform the evaluation. If OSS owners are discovered to be noncompliant with this section, the health officer may proceed with legal remedies in accordance with Chapter 24.07 WCC.

D. Persons shall not:

1. Use or introduce strong bases, acids or chlorinated organic solvents into an OSS for the purpose of system cleaning;

2. Use a sewage system additive unless it is specifically approved by WDOH; or

3. Use an OSS to dispose of waste components atypical of residential wastewater. E. The health officer shall require annual inspections of OSS serving food service establishments and may require pumping as needed. (Ord. 2010-009 Exh. A; Ord. 2008-015 Exh. A; Ord. 2006-056 Exh. A).

WCC 24.05.170 – Repair of Failures.

A. When an OSS failure occurs, the OSS owner shall:

1. Repair or replace the OSS with a permitted conforming system or component, or a system meeting the requirements of Table VII either on the:

a. Property served; or

b. Nearby or adjacent property if easements are obtained; or

2. Connect the residence or facility to a:

a. Publicly owned LOSS; or

b. Privately owned LOSS where it is deemed economically feasible; or

c. Public sewer; or

3. Perform one of the following when requirements in subsection (A)(1) or (A)(2) of this section are not feasible:

a. Use a holding tank for an interim period prior to installing a permitted repair; or

b. Obtain a National Pollution Discharge Elimination System or state discharge permit from the WDOE issued to a public entity or jointly to a public entity and the system owner only when the health officer determines:

i. An OSS is not feasible; and

ii. The only realistic method of final disposal of treated effluent is discharge to the surface of the land or into surface water; or

c. Abandon the property.

B. Prior to replacing or repairing the soil dispersal component, the OSS owner shall develop and submit information required under WCC 24.05.090(A).

C. The health officer shall permit a Table VII repair only when:

1. Installation of a conforming system is not possible; and

2. Connection to either an approved LOSS or a public sewer is not feasible.

D. The person responsible for the design shall locate and design repairs to:

1. Meet the requirements of Table VII if the effluent treatment and soil dispersal component to be repaired or replaced is closer to any surface water, well, or spring than prescribed by the minimum separation required in WCC 24.05.100, Table I. Pressure distribution with timed dosing in the soil dispersal component is required in all cases where a conforming system is not feasible;

2. Protect drinking water sources and shellfish harvesting areas;

3. Minimize nitrogen discharge in areas where nitrogen has been identified as a contaminant of concern in the local plan under WCC 24.05.050;

4. Prevent the direct discharge of sewage to ground water, surface water, or upon the surface of the ground;

5. Meet the horizontal separations under WCC 24.05.100(A) to public drinking water sources;

6. Meet other requirements of this chapter to the maximum extent permitted by the site;

7. Maximize the:

a. Vertical separation;

b. Distance from a well, spring, or suction line; and

c. Distance to surface water.

E. Prior to designing the repair system, the designer shall consider the contributing factors of the failure to enable the repair to address identified causes.

F. If the vertical separation is less than 12 inches, the health officer may permit ASTM C-33 sand or coarser to be used as fill to prevent direct discharge of treated effluent to ground water, surface water, or upon the surface of the ground.

G. For a repair using the requirements of Table VII, disinfection may not be used to achieve the fecal coliform requirements to meet:

1. Treatment levels A or B where there is less than 18 inches of vertical separation;

2. Treatment levels A or B in type one soils; or

3. Treatment level C.

H. The health officer shall identify Table VII repair permits for the purpose of tracking future performance.

I. An OSS owner receiving a Table VII repair permit from the health officer shall:

1. Immediately report any failure to the health officer;

2. Comply with all local and state requirements stipulated on the permit. (Ord. 2006-056 Exh. A).

WCC 24.05.240 – Enforcement.

A. The health officer:

1. Shall enforce this chapter;

2. May refer cases within their jurisdiction to the prosecutor's office.

B. When a person violates the provisions under this chapter, the health officer or prosecutor's office may initiate enforcement or disciplinary actions, or any other legal proceeding authorized by law, including but not limited to any one or a combination of the following:

1. Informal administrative conferences, convened at the request of the health officer or owner, to explore facts and resolve problems;

2. Orders directed to the owner and/or operator of the OSS and/or person causing or responsible for the violation of the rules of this chapter;

3. Denial, suspension, modification, or revocation of permits, approvals, or certification; and

4. Civil action as per Chapter 24.07 WCC or criminal action.

C. Orders authorized under this section include the following:

1. Orders requiring corrective measures necessary to effect compliance with this chapter which may include a compliance schedule; and

2. Orders to stop work and/or refrain from using any OSS or portion of the OSS or improvements to the OSS until all permits, certifications, and approvals required by rule or statute are obtained.

D. Enforcement orders issued under this section shall:

1. Be in writing;

2. Name the person or persons to whom the order is directed;

3. Briefly describe each action or inaction constituting a violation of the rules of this chapter;

4. Specify any required corrective action, if applicable;

5. Specify the effective date of the order and a period of 30 days for correction of the violation;

6. Provide notice of the consequences of failure to comply or repeated violation, as appropriate. Such notices may include a statement that continued or repeated violation may subject the violator to:

a. Denial, suspension, or revocation of a permit approval, or certification if violations are not corrected within 90 days; and/or

b. Referral to the office of the county prosecutor; and/or

c. Other appropriate remedies;

7. Provide the name, business address, and phone number of an appropriate staff person who may be contacted regarding an order.

E. Enforcement orders shall be personally served in the manner of service of a summons in a civil action or in a manner showing proof of receipt.

F. The health officer shall have cause to deny the application or reapplication for an operational permit or to revoke, suspend, or modify a required operational permit of any person who has:

1. Failed or refused to comply with the provisions of this chapter, or any other statutory provision or rule regulating the operation of an OSS; or

2. Obtained or attempted to obtain a permit or any other required certificate or approval by misrepresentation.

G. For the purposes of subsection F of this section, a "person" is defined to include:

1. Applicant;

2. Re-applicant;

3. Permit holder; or

4. Any individual associated with subsection (G)(1), (2) or (3) of this section including, but not limited to:

a. Board members;

b. Officers;

c. Managers;

d. Partners;

e. Association members;

f. Agents;

g. Third persons acting with the knowledge of such persons.

H. Should any person refuse to allow the health officer to enter onto property for the purpose of enforcing these rules and regulations, the health officer may, with the assistance of the prosecuting attorney, present an affidavit, naming the person so refusing, the property involved and the reason entry is necessary, to the Whatcom County district court, from which an authorizing warrant may issue.

I. Any violation of this chapter, or as amended, is a misdemeanor as defined by RCW
9A.04.040.

J. The health officer shall have the right of entry to inspect any sewage disposal system. (Ord. 2006-056 Exh. A).

WCC 24.11.060 – Water availability required.

Prior to issuance of a building permit the applicant must provide evidence of an adequate water supply to Whatcom County planning and development services (PDS) except when:

A. A building does not require potable water.

B. A residential remodeling does not add additional bedrooms or result in an increase of floor space of more than 50 percent.

C. PDS determines that the building will replace a demolished or removed building and the building will not have more bedrooms or more than 50 percent greater floor space than the previous building. (Ord. 2002-024).

WCC 24.11.070 Determining adequacy of water supply for building permit applications proposing to use an existing public water system.

A. Prior to director approval of evidence of an adequate water supply where the applicant proposes to obtain water from an existing public water system the applicant must:

1. Submit to the director, an Availability Notification for Public Water form (as amended) signed by an authorized representative of the water system proposing to serve water to the building. The authorized representative:

a. Must indicate on the form that the water system will provide water to the proposed building.

b. Must sign a statement that they have reviewed the system records and ensures that the water system complies with Chapters 246-290 and 246-291 WAC and department requirements.

B. The director will review the completed Availability Notification For Public Water (form) for approval. The director will approve the completed form if:

1. The applicant and the authorized representative met all the criteria listed on the form.

2. The purveyor of the water system has the approval from DOH or the department to provide water to the building. (Ord. 2002-024).

WCC 24.11.080 Determining adequacy of water supply for of building permit applications proposing to create a new public water system.

Prior to director approval of evidence of an adequate water supply, an applicant proposing to create a new public water system must comply with:

A. Provisions of the Whatcom County Coordinated Water System Plan.

B. Chapters 246-290 and 246-291 WAC, and all other applicable local and state regulations for public water supplies.

C. The applicable sections of this chapter pertaining to public water supplies. (Ord. 2002-024).

WCC 24.11.090 – Determining adequacy of water supply for building permit applications proposing to use a well to serve one single-family dwelling or one single-family living unit.

A. Prior to director approval of evidence of an adequate water supply where the applicant proposes to use a private well, the applicant must submit a completed Water Availability Notification Private – 1 Home Well form (as amended) and all required documents to the director for approval.

B. The director will review the completed form and required documents submitted by the applicant for approval. The director will approve the form if:

1. The applicant met all the criteria listed on the form.

2. The applicant submitted all of the required documents.

3. The well site proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist.

4. The well construction and well site proposed by the applicant meets the requirements listed in Chapter 173-160 WAC. Except, siting requirements for private wells relating to roads and property lines do not apply to wells drilled prior to October 10, 1990, when:

a. The applicant provides a well log documenting the well drilling date.

b. The director determines the existing well site does not threaten public health.

5. The well site proposed by the applicant meets the following minimum setback requirements except as noted in subsection (B)(4) of this section. Well site to:

a. Building or building overhang, five feet.

b. Septic tank, 50 feet.

c. Edge of on-site sewage system absorption field, 100 feet.

d. Privies, 100 feet.

e. Sewer line, 50 feet.

f. Sewage or manure lagoon, 200 feet.

g. Property line of any parcel containing an active solid waste landfill, inactive solid waste landfill, closed solid waste landfill or illegal solid waste landfill, 1,000 feet.

h. Easements for ingress and egress, 100 feet except the director may approve a reduction to 50 feet when the well location would result in obtaining water from:

i. A consolidated formation where the well draws water from at least 30 feet below the ground surface and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

ii. An unconsolidated formation protected by at least a six-foot clay or other poorly permeable layer, and the well is at least 100 feet from the edge of an on-site sewage system

absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

i. County road or state highway right-of-way and/or easement, 100 feet, except the director may approve a reduction to 50 feet when the well location would result in obtaining water from:

i. A consolidated formation where the well draws water from at least 30 feet below the ground surface and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

ii. An unconsolidated formation protected by at least a six-foot clay or other poorly permeable layer, and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

6. For wells constructed after October 1, 1990, the applicant submitted a copy of a declaration of covenant and/or a restrictive covenant, recorded with the Whatcom County auditor's office for a sanitary control area which includes all property not owned by the applicant within a 100-foot radius of the well, and/or any property within a 100-foot radius of the well located on any adjacent parcel. However, the director may approve a reduction of the sanitary control area to a 50-foot radius when the well location would result in obtaining water from:

a. A consolidated formation where the well draws water from at least 30 feet below the ground surface and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

b. An unconsolidated formation protected by at least a six-foot clay or other poorly permeable layer, and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

7. The source provides a minimum of 400 gallons of water for each single-family dwelling and single-family living unit in a 24-hour period. To demonstrate quantity:

a. The applicant must provide to the director the results of an approved water yield test. The applicant may determine the water yield from the source by using a pump test, bailer test or air test conducted for a minimum of one hour.

b. The director may require the applicant to provide the results of a four-hour pump test conducted during the dry season when a source yields less than one gpm.

c. The director may require the applicant to provide the results of a four-hour pump test conducted during the dry season when the distance from the bottom of the well to the top of the aquifer for a source is less than 10 feet.

8. The source provides a minimum of four gpm, except the director may approve a yield less than four gpm if the applicant provides the director with plans for an approved water reservoir large enough to meet peak household flows.

9. Certified laboratory results of an untreated water sample show satisfactory results for:

a. Coliform bacteria analyzed from a sample containing no residual chlorine.

b. The inorganic chemicals: arsenic, barium, cadmium, chromium, lead, mercury, fluoride, nitrate, selenium, and silver.

10. The applicant has submitted all other satisfactory analytical water sampling results for contaminants the director deemed significant based on:

a. Local trends in water quality.

b. The vulnerability of the source to known or suspected water quality or quantity problems or if the location of the source falls within the boundary of an area of known groundwater contamination.

11. When untreated water sample analyses required in subsections (B)(9) or (10) of this section confirm that the water exceeds any State Department of Health maximum contaminant levels (MCL) or if the arsenic level exceeds 10 parts per billion the applicant has:

a. Designed and installed a treatment system meeting the requirements of Whatcom County health and human services water Availability Approval for a Contaminated Well Source (as amended) to reduce the levels of the contaminants to below the MCL or below 10 parts per billion for arsenic.

b. Signed and recorded with the Whatcom County auditor's office the following documents:

i. A document stating which contaminate the untreated source water exceeded.

ii. A document stating that the applicant has had a water treatment system designed that meets Whatcom County health and human services Water Availability Approval for a Contaminated Well Source (as amended) and secures a potable water supply for the building.

iii. A document stating that the applicant has installed a treatment system according to the design reviewed by the director and treated water sample results that verify system performance.

iv. A document stating that the applicant agrees to adhere to the operation, maintenance, and monitoring plan for the designed treatment system.

v. A document stating that the applicant understands that the obligation to comply with treatment system design, installation, operation and monitoring lies with the applicant and not Whatcom County.

vi. When the public system is available, any person obtaining water from contaminated source must provide current test results showing water treatment is adequately maintaining water quality below maximum contaminant levels (MCL). If the quality does not meet the MCL, the applicant is required to hook up to a public system. (Ord. 2002-024).

WCC 24.11.140 – Determining adequacy of water supply for short subdivisions, long subdivisions or binding site plans proposing to use an existing public water system.

A. Prior to director approval of availability of an adequate water supply where the applicant proposes to obtain water from an existing public water supply to service lots of a short subdivision, long subdivision, or a binding site plan the applicant must:

1. Provide to the director an Availability Notification for Public Water (as amended) form or a letter signed by an authorized representative of the water system proposing to serve water to each lot. The authorized representative of the public water system:

a. Must indicate that the water system will provide water to each proposed lot.

b. Must sign a statement that they have reviewed the system records and ensures that the water system is in compliance with Chapters 246-290 and 246-291 WAC and department requirements.

B. The director will review the completed form or letter to determine the availability of adequate water. The director will make a determination of adequate water when:

1. The applicant and the authorized representative meet all the criteria listed on the form.

2. The purveyor of the water system has the approval from DOH or the department to provide water to the short subdivision, long subdivision or binding site plan, except for Group A water systems the following conditions also apply:

a. DOH has issued a green operating permit to the purveyor; or

b. DOH has determined that the purveyor significantly complies with Chapter 246-290 WAC. (Ord. 2002-024).

WCC 24.11.150 – Determining adequacy of water supply for short subdivisions, long subdivisions or binding site plans proposing to use a new public water system.

Prior to director approval of availability of an adequate water supply where the applicant proposes to create a new public water supply to service lots of a short subdivision, long subdivision, or a binding site plan the applicant must comply with:

A. Provisions of the Whatcom County Coordinated Water System Plan.

B. Chapters 246-290 and 246-291 WAC, and all other applicable local and state regulations for public water supplies.

C. The applicable sections of this chapter pertaining to public water supplies. (Ord. 2002-024).

WCC 24.11.160 – Determining adequacy of water supply for short subdivisions or long subdivisions proposing to use a private well or private wells to serve one single-family dwelling or one single-family living unit.

A. Prior to director approval of availability of an adequate water supply where the applicant proposes to use a private well or private wells to service lots of a short subdivision or long subdivision the applicant must:

1. Notify the director of the intent to use a private well or wells.

2. Request that the director conduct a site inspection and approve the proposed well sites.

B. Upon request from the applicant, the director will conduct a site inspection for the purpose of approving the location. If the director cannot approve a well location the director will deny the application and give the reasons for denial.

C. If the director approves the well locations the applicant shall submit a completed Subdivision Water Availability form (as amended) and all required documents for each well to the director for approval.

D. The director will review each completed form and required documents for approval. The director will approve the availability of adequate water when:

1. The applicant met all the criteria listed on the form.

2. The applicant submitted all of the required documents.

3. The well site or well sites proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist.

4. The director has determined the well and well site proposed by the applicant meets the requirements listed in Chapter 173-160 WAC.

5. The applicant can maintain the minimum following setbacks between any well and:

a. Building or building overhang, five feet.

b. Septic tank, 50 feet.

c. Edge of on-site sewage system absorption field, 100 feet.

d. Privies, 100 feet.

e. Sewer line, 50 feet.

f. Sewage or manure lagoon, 200 feet.

g. Property line of any parcel containing an active solid waste landfill, inactive solid waste landfill, closed solid waste landfill or illegal solid waste landfill, 1,000 feet.

h. Easements for ingress and egress, 100 feet except the director may approve a reduction to 50 feet when the well location would result in obtaining water from:

i. A consolidated formation where the well draws water from at least 30 feet below the ground surface and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

ii. An unconsolidated formation protected by at least a six-foot clay or other poorly permeable layer, and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

i. County road or state highway right-of-way and/or easement, 100 feet, except the director may approve a reduction to 50 feet when the well location would result in obtaining water from:

i. A consolidated formation where the well draws water from at least 30 feet below the ground surface and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

ii. An unconsolidated formation protected by at least a six-foot clay or other poorly permeable layer, and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

6. The applicant submitted a copy of a declaration of covenant and/or a restrictive covenant recorded with the Whatcom County auditor's office for a sanitary control area which includes all property within a 100-foot radius of any well, except:

a. The director may approve a reduction of the sanitary control area to a 50-foot radius when the well location would result in obtaining water from:

i. A consolidated formation where the well draws water from at least 30 feet below the ground surface and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon, or a privy.

ii. An unconsolidated formation protected by at least a six-foot clay or other poorly permeable layer and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

7. The source provides a minimum of 400 gallons for each single-family dwelling or single-family living unit residence in a 24-hour period. To demonstrate quantity:

a. The applicant must provide to the director the results of an approved water yield test. The applicant may determine the water yield from the source by using a pump test, bailer test, or air test conducted for a minimum of one hour.

b. The director may require the applicant to provide results of a four-hour pump test conducted during the dry season when the source yields less than one gpm.

c. The director may require the applicant to provide the results of a four-hour pump test conducted during the dry season when the distance from the bottom of the well to the top of the aquifer for a source is less than 10 feet.

d. The director may require the applicant to provide the results of four-hour pump tests the applicant conducted simultaneously for all wells spaced less than 50 feet apart.

8. The source provides a minimum of four gpm, except the director may approve a yield less than four gpm if the applicant provides the director with plans for an approved water reservoir large enough to meet peak household flows.

9. Certified laboratory results of an untreated water sample show satisfactory results for:

a. Coliform bacteria analyzed from a sample containing no residual chlorine.

b. The inorganic chemicals: for arsenic, barium, cadmium, chromium, lead, mercury, fluoride, nitrate, selenium, and silver.

10. The applicant has submitted all other satisfactory analytical water sampling results for contaminants the director deemed significant based on:

a. Local trends in water quality.

b. The vulnerability of the source to known or suspected water quality or quantity problems or if the location of the source falls within the boundary of an area of known groundwater contamination. (Ord. 2002-024).

WCC 24.11.170 – Determining adequacy of water supply for short subdivisions or long subdivisions proposing to use a well to serve two single-family dwellings or two single-family living units.

A. The applicant shall create a Group B Public water supply as defined in Chapter 246-291 WAC when WCC Title 21 requires the applicant to provide public water service to each lot. This includes a water system where one well services two lots.

B. Prior to director approval of availability of an adequate water supply where the applicant proposes to use one well to service two lots of a short subdivision or long subdivision when public water is not required the applicant must:

1. Notify the director of the intent to use a well or wells.

2. Request that the director conduct a site inspection and approve the proposed well sites.

C. Upon request from the applicant, the director will conduct a site inspection for the purpose of approving the location. If the director cannot approve a well location the director will deny the application and give the reasons for denial.

D. If the director approves the well locations the applicant shall submit a completed Subdivision Water Availability form (as amended) and all required documents for each well to the director for approval.

E. The director will review each completed form and required documents for approval. The director will approve the availability of adequate water when:

1. The applicant met all the criteria listed on each of the forms.

2. The applicant submitted all of the required documents.

3. The well site or well sites proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist.

4. The director has determined the well and well site proposed by the applicant meets the requirements listed in Chapter 173-160 WAC.

5. The applicant can maintain the minimum following setbacks between the well and:

a. Building or building overhang, five feet.

b. Septic tank, 50 feet.

c. Edge of on-site sewage system absorption field, 100 feet.

d. Privies, 100 feet.

e. Sewer line, 50 feet.

f. Sewage or manure lagoon, 200 feet.

g. Property line of any parcel containing an active solid waste landfill, inactive solid waste land fill, closed solid waste landfill or illegal solid waste landfill, 1,000 feet.

h. Easements for ingress and egress, 100 feet except the director may approve a reduction to 50 feet when the well location would result in obtaining water from:

i. A consolidated formation where the well draws water from at least 30 feet below the ground surface and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

ii. An unconsolidated formation protected by at least a six-foot clay or other poorly permeable layer, and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

i. County road or state highway right-of-way and/or easement, 100 feet, except the director may approve a reduction to 50 feet when the well location would result in obtaining water from:

i. A consolidated formation where the well draws water from at least 30 feet below the ground surface and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

ii. An unconsolidated formation protected by at least a six-foot clay or other poorly permeable layer, and the well is at least 100 feet from the edge of an on-site sewage system

absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

6. The applicant submitted a copy of a declaration of covenant and/or a restrictive covenant recorded with the Whatcom County auditor's office for a sanitary control area which includes all property within a 100-foot radius of the well, except:

a. The director may approve a reduction of the sanitary control area to a 50-foot radius when the well location would result in obtaining water from:

i. A consolidated formation where the well draws water from at least 30 feet below the ground surface and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

ii. An unconsolidated formation protected by at least a six-foot clay or other poorly permeable layer, and the well is at least 100 feet from the edge of an on-site sewage system absorption field, and at least 200 feet from a sewage or manure lagoon or a privy.

7. Each source provides a minimum of 400 gallons for each single-family dwelling or single-family living unit residence in a 24-hour period. To demonstrate quantity:

a. The applicant must provide to the director the results of an approved water yield test. The applicant may determine the water yield from the source by using a pump test, bailer test, or air test conducted for a minimum of one hour.

b. The director may require the applicant to provide results of a four-hour pump test conducted during the dry season when the source yields less than one gpm.

c. The director may require the applicant to provide the results of a four-hour pump test conducted during the dry season when the distance from the bottom of the well to the top of the aquifer for a source is less than 10 feet.

d. The director may require the applicant to provide the results of four-hour pump tests the applicant conducted simultaneously for all wells spaced less than 50 feet apart.

8. The source provides a minimum of eight gpm, except the director may approve a yield less than eight gpm if the applicant provides the

director with plans for an approved water reservoir large enough to meet peak household flows.

9. Certified laboratory results of an untreated water sample for each well show satisfactory results for:

a. Coliform bacteria analyzed from a sample containing no residual chlorine.

b. The inorganic chemicals: for arsenic, barium, cadmium, chromium, lead, mercury, fluoride, nitrate, selenium, and silver.

10. The applicant has submitted all other satisfactory analytical water sampling results for contaminants the director deemed significant based on:

a. Local trends in water quality.

b. The vulnerability of the source to known or suspected water quality or quantity problems or if the location of the source falls within the boundary of an area of known groundwater contamination. (Ord. 2002-024).