

NO. 70796-5-I

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

WHATCOM COUNTY,

Appellant/Cross Respondent,

v.

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

Respondents/Cross Appellants.

AMICUS CURIAE BRIEF OF WASHINGTON STATE
ASSOCIATION OF COUNTIES

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I. INTRODUCTION

The Washington State Association of Counties (WSAC) submits this amicus brief concerning Appellant Whatcom County's Issue 1 arising from the June 7, 2013, Final Decision and Order of the Western Washington Growth Management Hearings Board ("Board"):

Did the Board err by ruling that the [Growth Management Act, chapter 36.70A RCW] 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?

The Board erred when it concluded that the County's measures did not adequately protect surface water and groundwater resources as required in the Growth Management Act (GMA). Whatcom County appropriately relied on the Washington State Department of Ecology's ("Ecology") interpretation of its water resource management regulations applicable in Whatcom County. Specifically, the County's measures do not allow development that is premised on a private well that is inconsistent with the Instream Resources Protection Program – Nooksack Water Resource Inventory Area (WRIA 1), chapter 173-501 WAC ("the Nooksack Rule").

Counties should be able to reasonably rely on relevant water resource management regulations, as drafted and interpreted by Ecology, in planning for the protection of surface water and groundwater resources under the GMA and making water availability determinations required for

subdivisions (RCW 58.17.110) and building permits (RCW 19.27.097). Requiring counties to second-guess Ecology's implementation of its water resource management rules is problematic for a number of reasons.

First, The Board's decision unfairly complicates a county's ability to comply with its GMA obligations. Given the myriad responsibilities placed on counties under the GMA, counties must be afforded the ability to rely on state agency expertise in formulating their comprehensive plans and development regulations. In most cases, counties do not have the resources or specialized knowledge needed to step into Ecology's shoes to perform the complicated water law and availability analysis that the Board appears to require in this matter.

Second, the GMA does not require counties to second-guess Ecology. As noted by the court in *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011), a cooperative approach that ensures the County does not exercise its land use authority in a manner inconsistent with Ecology's management of water resources is sufficient to comply with the GMA.

Third, compelling counties to disregard Ecology's water resource management rules and make a separate and independent determination of surface flow impairment and the status of existing water rights exposes

counties to liability for water availability determinations inconsistent with Ecology's applicable regulations and interpretations.

WSAC asks this Court to reverse the Board's determination of noncompliance with RCW 36.70A.070(5)(c)(iv), because counties should be able to rely on Ecology's water resource management regulations as was done here.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WSAC is described in its Motion for Leave to File Amicus Curiae Brief filed herewith. WSAC and its members – elected county officials from all of Washington's 39 counties – have an interest in this matter, which will have statewide implications for counties planning under the GMA. WSAC's interest is in ensuring that counties are afforded the ability to rely on state agency expertise in meeting their obligations under the GMA. Reliance on applicable water resource management regulations established by Ecology is an important tool and assists counties in planning for the protection of surface water and groundwater resources under RCW 36.70A.070(5)(c)(iv) and making water availability determinations pursuant to RCW 19.27.097 (building permits) and RCW 58.17.110 (subdivisions), while preserving the partnership with Ecology recognized in *Kittitas County, supra*. WSAC has an interest in ensuring that counties are not needlessly and unlawfully deprived of this resource.

III. STATEMENT OF THE CASE

WSAC adopts the Statement of the Case set forth in the Brief of Appellant Whatcom County in No. 70796-5-I.

IV. ARGUMENT

In holding that Whatcom County failed to comply with RCW 36.70A.070(5)(c)(iv), the Board concluded that Whatcom County's alignment of its regulations with the Nooksack Rule was insufficient. Instead, the Board advanced an interpretation of the Nooksack Rule that is inconsistent with Ecology's interpretation and, according to which, no further permit-exempt withdrawals are permitted in closed basins. The Board concluded that Whatcom County must presume that water is not legally available if a basin is closed to new surface appropriations or where Ecology has set instream flows that are not consistently met.¹ The Board further concluded that Whatcom County must deny a building or subdivision permit application unless the applicant can demonstrate that a proposed new permit-exempt groundwater withdrawal will not adversely impact the flow of an impaired, hydraulically connected surface water body.² The Board's conclusion was in error.

¹ CP 1551.

² CP 1551-52.

A. The Board's Holding is Inconsistent with Ecology's Water Resource Management Regulation

The Board's holding is not consistent with the Nooksack Rule. The Nooksack Rule, as adopted and interpreted by Ecology, is not applicable to permit-exempt wells identified in RCW 90.44.050. Ecology's Amicus Brief at 13-18 makes this clear, citing (1) WAC 173-501-030(4), which provides that "future consumptive water rights permits" for surface waters are expressly subject to the instream flows, (2) WAC 173-501-060, which references only "water right permit or certificate" or "applications to appropriate public groundwaters" concerning groundwater resources subject to the instream flows, and (3) WAC 173-501-070, which provides an exemption for single domestic use of surface and ground water, except in Whatcom Creek. Not all instream flow rules are the same.³ Nevertheless, the Board relied on Ecology's interpretation of a different rule, chapter 173-503 WAC, applicable to the lower and upper Skagit in Snohomish and Skagit counties, to reach its conclusion that Whatcom County failed to comply with the GMA.⁴ The Board's conclusion that

³ *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 87, 11 P.3d 726 (2000) ("...we too decline to search for a uniform meaning to rules that simply are not the same"). Compare WAC 173-539A-025 (making specifically applicable to permit-exempt groundwater withdrawals the Kittitas groundwater rule) and WAC 173-507-010, -040 (applying the Snohomish River Basin rule to surface waters and "future permitting actions relating to groundwater withdrawals").

⁴ CP 1551.

Whatcom County must treat instream rules as interchangeable is not reasonable or consistent with law.

B. Whatcom County Satisfied the GMA by Adopting a Regulatory Approach Consistent with Ecology's

It is not unreasonable or contrary to law for Whatcom County to rely on Ecology's water resource management regulations because Ecology is the agency with expertise in water resource allocation and is specifically charged with establishing instream flow rules.⁵ Ecology promulgated water resource management regulations for many of the 62 WRIAs established throughout the state and those regulations are unique in scope and applicability depending on local circumstances.⁶ Nowhere in the GMA is there a requirement that counties must regulate differently or more restrictively than Ecology in its exercise of its water resource management authority.

To the contrary, the GMA contemplates an approach that is consistent with Ecology's water resource management regulations. The court in *Kittitas County* also addressed the question of whether a county protected water resources as required by the GMA.⁷ In that case, the Court observed that "[i]n recognizing the role of counties to plan for land

⁵ See RCW 90.03.247 (Ecology's authority to establish instream flows is "exclusive").

⁶ See chapter 173-501 WAC through chapter 173-591 WAC.

⁷ *Kittitas County*, 172 Wn.2d at 175, citing RCW 36.70A.020(10), RCW 36.70A.070(1), and RCW 36.70A.070(5)(c)(iv)).

use in a manner that is *consistent* with the laws regarding protection of water resources and establishing a permitting process, we do not intend to minimize the role of Ecology.”⁸ The Court rejected Kittitas County’s contention that it is preempted from adopting regulations related to the protection of groundwater resources, citing RCW 90.44.040. Instead, the Court concluded that while that statute means Kittitas County cannot separately appropriate groundwaters, “nothing in the text of chapter 90.44 RCW expressly preempts *consistent* local regulation.”⁹

Washington Administrative Code guidance provided to counties and cities for the adoption of comprehensive plans and development regulations that meet the goals and requirements of the GMA related to potable water specifically provides that

[i]f the department of ecology has adopted rules on this subject, or any part of it, local regulations should be *consistent* with those rules. Such rules may include instream flow rules, which may limit the availability of additional ground or surface water within a specific geographic area.^[10]

And chapter 90.54 RCW, which includes direction to Ecology to adopt and modify regulations for the development of a “comprehensive state water resources program which will provide a process for making

⁸ *Kittitas County*, 172 Wn.2d at 180 (emphasis added).

⁹ *Kittitas County*, 172 Wn.2d at 178 (emphasis added).

¹⁰ WAC 365-196-825(3) (emphasis added).

decisions on future water resource allocation and use,”¹¹ specifically directs state and local governments, “whenever possible,” to “carry out powers vested in them in manners which are *consistent* with the provisions of this chapter.”¹²

Whatcom County’s reliance on, and incorporation of, the Nooksack rule was not unreasonable or contrary to law.

C. Counties Must Be Able to Use and Rely on All Available Resources, Including Ecology’s Water Resource Management Regulations, to Comply with GMA Obligations

As discussed above, reliance on Ecology’s water resource management rules is perfectly appropriate under relevant law. Moreover, planning and regulating in a manner consistent with Ecology’s water resource management regulations and the water code can assist counties in providing a clear, coordinated, and predictable regulatory framework.¹³ Counties may seek and rely on Ecology’s input regarding water availability and whether a specific development proposal may utilize a permit-exempt well within an area subject to an applicable instream flow

¹¹ RCW 90.54.040(1).

¹² RCW 90.54.090 (emphasis added).

¹³ See RCW 36.70A.020(7) (Goal 7 of the GMA provides: “Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.”).

rule in Title 173 WAC.¹⁴ *Kittitas County* expressly recognizes this partnership between local governments and Ecology.¹⁵ Given the wide range of land use issues that counties must address under the GMA – from transportation planning to designation of agricultural lands to providing for the siting of essential public facilities – counties must be afforded the ability to rely on state agency expertise in formulating their comprehensive plans and development regulations.

This is not to say, however, that local jurisdictions must be lock-step with Ecology, or any other agency with expertise, in all circumstances and at all times in complying with those myriad responsibilities placed on local jurisdictions under the GMA. Such a blanket holding is not necessary to the resolution of this case, nor is it consistent with controlling precedent.

There are several examples in which courts have recognized that local government can choose a different course than that recommended by a state agency when the record supports it. For example, in *Kittitas County*, the Court held that Kittitas County did not violate the GMA provisions in RCW 36.70A.547 and RCW 36.70A.510 regarding general

¹⁴ See, e.g., *Steensma v. Ecology*, PCHB No. 11-053, Order Granting Summary Judgment to Ecology (September 8, 2011), 2011 WL 4301319. At issue was a comment letter that Ecology provided to the Whatcom County Health Department concerning the availability of certain water rights and whether and to what extent permit-exempt wells could be used in a proposed subdivision project application filed with Whatcom County.

¹⁵ *Kittitas County*, 172 Wn.2d at 180.

aviation airports by adopting regulations that “diverge[d] from [Washington State Department of Transportation] recommendations for land use near airports.”¹⁶ Similarly, in *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005), the Court noted that while counties and cities may use information prepared by the Washington Department of Wildlife to classify and designate habitats and species of local importance, consistent with WAC 365-190-080(5)(c)(ii), such reliance was not required so long as Ferry County considered best available science in reaching its own determinations, consistent with RCW 36.70A.172.¹⁷

While, as demonstrated above, local governments are afforded flexibility in determining how best to comply with GMA obligations, penalizing a local government for aligning its regulatory approach with that of an agency with expertise and rule making authority, as was done here, is improper and inconsistent with the cooperative approach contemplated under the GMA.¹⁸ Accordingly, WSAC asks this Court to reverse the Board’s determination of noncompliance with RCW

¹⁶ *Kittitas County*, 172 Wn.2d at 174-175 (“The County clearly did not follow all of WSDOT’s recommendations. While this may be imprudent, the statutory scheme does not suggest that counties must follow the advice of WSDOT. Considering the loose statutory language and the requirement of boards to defer to counties’ planning choices, the record before the Board does not establish firmly and definitely that the County erred” (emphasis in original)).

¹⁷ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 836, 123 P.3d 102 (2005).

¹⁸ See, e.g., WAC 365-196-825(3).

36.70A.070(5)(c)(iv), because counties should be able to rely on Ecology's water resource management regulations as was done here, without foreclosing the possibility of counties incorporating new or different approaches and standards, as determined necessary by local conditions, so long as they are consistent with law.

D. Counties May Lack the Resources and Expertise to Comply With the Board's Ruling

In most circumstances, counties will not have the local resources and expertise necessary to make the determinations required by the Board. This is not particularly surprising given that the overarching regulatory framework, as discussed above, has been one of consistency and, in many circumstances, cooperation.¹⁹ Yet the Board appears to require here that counties' planning departments step into Ecology's shoes and second-guess Ecology's interpretation and implementation of water laws and Ecology's regulations. Many counties simply do not have Ecology's expertise concerning surface flow impairment analysis, existing water rights, and hydraulic connectivity. It is worth noting that impairment analysis is only one part of the four part test that Ecology must employ in determining whether to issue a water right permit appropriating surface

¹⁹ See, e.g., WAC 365-196-825(3); RCW 90.54.090.

water or groundwater of the state²⁰ and even Ecology is not required to engage in that analysis in the context of permit-exempt wells.²¹ Requiring counties to do so here is inappropriate where local expertise likely does not exist.

E. Counties Will Be Exposed to Liability for Water Availability Determinations Inconsistent with Ecology’s Interpretation of Applicable Instream Flow Rules

Compelling counties to disregard Ecology’s water resource management regulations and make a separate, independent, and conflicting determination of surface flow impairment and water rights exposes counties to potential liability. For example, in this case the Board’s ruling would have Whatcom County denying development applications due to the unavailability of water where Ecology’s applicable regulation, the Nooksack Rule, otherwise provides that water is available. On the other hand, in a basin that has been closed to new permit-exempt groundwater withdrawals by Ecology, such as the Carpenter-Fisher in Skagit and Snohomish counties, the Board’s ruling could be interpreted as authorizing or compelling local jurisdictions to disregard Ecology’s

²⁰ See *Postema*, 142 Wn.2d at 79 (“Ecology must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare”); see also RCW 90.03.290 and RCW 90.44.060).

²¹ See *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 16, 43 P.3d 4 (2002) (“where the exemption in RCW 90.44.050 applies, Ecology does not engage in the usual review of a permit application under RCW 90.03.290, including review addressing impairment of existing rights...”).

determination and independently assess water availability, perhaps in a manner inconsistent with Ecology's regulations.

The GMA's requirement of consistency provides something of a safe harbor. But the Board's order forces counties to independently make such determinations without regard to Ecology's interpretation of its regulations and the applicable statutory scheme, which undoubtedly sets up counties for damages claims for denial of a permit due to agency action that is "arbitrary, capricious, unlawful, or exceed[s] lawful authority."²²

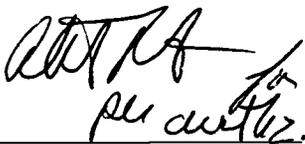
VI. CONCLUSION

For the foregoing reasons, amicus WSAC respectfully requests that the Court set aside the Board's Final Decision and Order dated June 7, 2013, and hold that Whatcom County's rural element complies with RCW 36.70A.070(5)(c)(iv) by requiring water supply for rural development to be consistent with the Nooksack Rule, chapter 173-501 WAC.

Respectfully submitted this 1st day of December, 2014.

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²² RCW 64.40.020.

DECLARATION OF SERVICE

I, Regina McManus, hereby declare that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on this 1st day of December, 2014, the original and one copy of **Washington State Association of Counties Motion for Leave to File Amicus Curiae Brief and attached Brief** was filed with the Division I of the Court of Appeals and served on the following parties and in the manners indicated:

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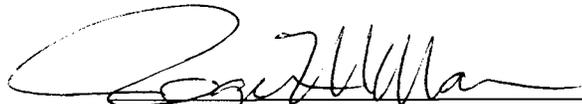
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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 1st day of December, 2014.


Regina McManus