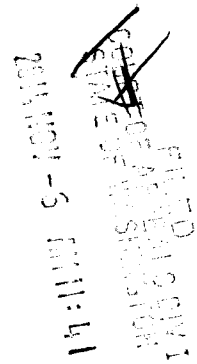
No. 91475-3

WASHINGTON STATE COURT OF APPEALS
DIVISION I



No. 70796-5-1

WHATCOM COUNTY,

Appellants/Cross-Respondent,

vs.

ERIC HIRST, et al,

Respondents/Cross-Appellants

AMICUS CURIAE BRIEF OF THE CENTER FOR ENVIRONMNETAL LAW & POLICY

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I. Introduction

The Center for Environmental Law & Policy respectfully offers the following arguments regarding Washington's water resources statutes, cases, and regulations, for the benefit of the Court in determining how such laws intersect with the Growth Management Act (GMA) laws at issue in this appeal.

II. Identity and Interests of Amicus Curiae

Amicus curiae Center for Environmental Law & Policy is a membership-based, non-profit corporation with a mission to protect and restore the quantity of water flowing in Washington's freshwater resources, i.e. its rivers and aquifers, to ensure protection of public values in those waters, including drinking water supply, fish and wildlife habitat, water quality, recreational use, and aesthetic enjoyment.

The Center accomplishes its mission by advocating for responsible allocation of water rights, either by permit or permit-exempt processes, and promoting adoption and protection of instream flow rules. The Nooksack River rule for Water Resource Inventory Area (WRIA) 1 is an instream rule in which the Center has an interest. *See* Ch. 173-501 WAC. In particular, the Nooksack rule expressly incorporates provisions of the Water Resources Act of 1971, Ch. 90.54 RCW, and the Minimum Flows Act, Ch. 90.22 RCW, which authorize the Department of Ecology to

establish "minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same." RCW 90.22.010. The values called out in these statutes are the same values the Center seeks to promote, including through the filing of an amicus brief in this matter that directs the Court to specific statutes and court decisions that must be used to interpret the Nooksack rule.

III. Statement of the Case

The Center concurs with and adopts the statement of the case set forth in the Hirst Opening/Response Brief, dated May 16, 2014, at 5-11.

IV. Argument

Whatcom County (County) and the Department of Ecology (Ecology) ask the Court to accept the proposition that, because the Nooksack rule was adopted in 1985, (1) the County is free to ignore this state's Supreme Court decisions over the past 30 years regarding water law, and (2) Ecology's "interpretations" of relevant law, which have not been adopted as formal policies required by state law if they are to have any legal effect, preclude the Growth Management Hearings Board (GMHB) from reaching any contrary conclusions. This brief is intended to assist the Court in concluding that both propositions are erroneous.

A. Multiple water resources laws and policies apply to Whatcom County's GMA policies and practices.

Ecology posits that, because the County has adopted regulations to prevent daisy-chaining exempt wells to serve subdivisions, therefore the Whatcom County regulations at issue are adequate to meet GMA requirements to protect rural water resources. Dept. of Ecology Amicus Curiae Brief (ECY Br.) at 8-9. This view fails to capture the full scope of the water resource laws applicable to land use decision making. The daisy-chain problem (i.e., use of more than one well, or more than 5,000 gallon per day from multiple wells, per subdivision project) is but one legal issue relating to exempt wells and their impacts on water resources.[1] The following outlines some of the particular requirements of the law that Ecology has not discussed in its brief.

The fundamental rules pertaining to proposed new water uses provide that (1) water must be available for the new water use, (2) the new use may not impair pre-existing uses, including instream flows established by regulation, treaty, or otherwise, (3) the new use must not pose a detriment to the public interest, and (4) the use must be for a beneficial purpose. RCW 90.03.290, 90.44.100; *Hillis v. State,* 131 Wn.2d 373, 383-

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[1] See *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 4-8, 43 P.3d 4 (2002).

85, 932 P.2d 139 (2002). In addition, new groundwater uses in particular must support a safe, sustaining yield of groundwater. RCW 90.44.130.

These laws guide issuance of water permits, but are applicable to permit-exempt wells. This is because, as explained by the Supreme Court, permit-exempt wells, although not required to obtain a state permit at the time of creation, are a form of water right just like other, permitted rights.

> While the exemption in RCW 90.44.050 allows appropriation of groundwater and acquisition of a groundwater right without going through the permit or certification procedures of chapter 90.44 RCW, once the appropriator perfects the right by actual application of the water to beneficial use, the right is otherwise treated in the same way as other perfected water rights. RCW 90.44.050. Thus, it is subject to the basic principle of water rights acquired by prior appropriation that the first in time is the first in right. " '[T]he first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants....' " *Postema,* 142 Wn.2d at 79, 11 P.3d 726 (quoting *Longmire v. Smith,* 26 Wash. 439, 447, 67 P. 246 (1901)); *see* RCW 90.03.010 (codifying first in time, first in right principle).

Campbell & Gwinn, 146 Wn.2d at 9 (emphasis added). Thus, when considering whether Whatcom County land use laws are consistent with water resource laws, the Court must examine whether the County's regulations allowing use of permit-exempt wells properly assess water availability, including maintenance of safe and sustaining yields of groundwater, and whether such wells would cause impairment. *See* Section C, *infra.*

Another important principle of water law that informs the analysis of the County's rural character regulations relates to "interruptibility." Specifically, it is state practice to not issue water rights for public water supply if those rights are subject to interruption or curtailment, because an unreliable water supply directly implicates public health. This rule should be considered in evaluating Whatcom County's regulations pertaining to water adequacy determinations. *See* Section D *infra*. Finally, the burden always remains on the applicant, in both water right permit and land use permit contexts, to demonstrate that water is available for a new water use, permitted or permit-exempt.

In *Kittitas County*, the Court held that local governments' land use policies and codes must be not inconsistent with water resource statutes. 172 Wn.2d 144, 178-79, 256 P.3d 1193 (2011). Whatcom County's GMA regulations relating to water supply and resource protection are not consistent with water resource statutes.

B. Permit-exempt wells are not *de minimis* uses.

Ecology's brief focuses on permit-exempt wells, i.e., domestic wells that do not require Ecology to issue a water right permit. RCW 90.44.050. Although permit-exempt wells were once considered small, even *de minimis*, in terms of the quantity of water withdrawn and consumed, for several reasons that assumption no longer holds true. First,

there has been a tremendous proliferation of exempt wells throughout Washington. Second, there has been abuse of the use of permit exemption, as illustrated in *Campbell & Gwinn*, where developers proposed to "daisy-chain" multiple exempt wells to supply water to a subdivision. *Campbell & Gwinn*, 146 Wn.2d at 4-8; *Kittitas County*, 172 Wn.2d at 177 (describing evasion of *Campbell & Gwinn* rule); Six Packs for Subdivisions, 28 Envtl. Law 1099 (1998).

Exempt wells also impair instream flows. *Swinomish Indian Tribal Comm'ty v. Dept. of Ecology*, 178 Wn.2d 571, 583, 311 P.3d 6 (2013); *Squaxin Island Tribe v. Dept. of Ecology*, 177 Wn.App. 734, 737-38, 312 P.3d 766 (2013).

Finally, the Washington Supreme Court ruled recently that the use of permit-exempt wells for stock-watering, including for commercial feedlots and dairies, is unlimited in quantity.[2] *Five Corners Family Farmers v. State of Washington*, 173 Wn.2d 296, 268 P.3d 892 (2011). Indeed, *Five Corners* involved use of a permit-exempt well to pump 600,000 gallons of water per day. *Id.* at 300-301.

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[2] A 2009 AGO reached the same conclusion regarding use of permit-exempt wells for the statutory purpose of "non-commercial irrigation of half-acre of lawn or garden." RCW 90.44.050. That is, water used for household irrigation is not encompassed within the 5,000 gallon per day limit on permit-exempt wells, and landowners may instead use unlimited quantities for this purpose. AGO 2009 No. 6 at 6-9.

The point is that permit-exempt wells can and do physically impact groundwater quantities and water tables and, where hydraulically connected, surface water flows. Impacts to water resources and pre-existing water users are not simply theoretical concerns. See FDO at 25-26. County land use codes designed to preserve rural character must take account of the impacts of exempt wells on water resources and other water rights.

In sum, permit-exempt wells represent an important element of water supply and may involve pumping large quantities of water either individually or cumulatively. Whatcom County's land use codes must properly address their use as a source of supply for rural development.

C. The Nooksack rule is binding on permit-exempt wells under well-established principles of water law as enunciated by Washington courts.

(1) Introduction

Ecology's fundamental argument is that the "Board mistakenly assumed that the Nooksack rule's closures of certain water bodies to new uses include a bar on permit-exempt groundwater use."[3] ECY Br. at 13.

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[3] Ecology asserts that counties are authorized, but not required, to be more restrictive of water use than is Ecology. ECY Br. at 12-13. Ecology cites no authority for this interesting assertion. *See* Hirst Answer to Ecology Amicus at 11-15.

Ecology's lengthy argument as to why the Nooksack rule does not apply to groundwater misses the boat for two reasons. First, the purpose of the Nooksack rule is not solely to control water permitting, but also to establish and protect instream flows. Second, the instream flow protections established under the rule are applicable to all new uses, including permit-exempt wells, *not* because of any language in the Nooksack rule per se, but because of the rule of priority and its application to groundwater in hydraulic continuity with surface waters.

(2) A primary purpose of the Nooksack rule is to protect instream flows and values.

The purposes of the Nooksack rule help define the scope of Whatcom County's duties to protect water resources under the GMA. Washington's instream flow rulemaking program has several purposes as identified in RCW 90.54.020 and WAC 173-500-020. One set of purposes is to determine how much water is available for future water rights, set reserves and limits, and support other allocation oriented decisions. WAC 173-500-020(5)-(8).

Another equally important purpose is to establish instream flows and closures in order to preserve wildlife, fish, scenic, aesthetic, and other environmental values. WAC 173-500-020(3), (4). These latter purposes represent a function of the Nooksack rule that is independent of Ecology's

water allocation duties.[4] This purpose of the rule, to retain water in rivers, streams, and lakes, and to protect instream flows, is fully described in the rule. WAC 173-501-010, -020.

Ecology claims, without citation to authority, that the "county complies with GMA requirements to protect water resources in its land use planning function when its comprehensive plans and development regulations are consistent with Ecology's water resources regulations and the agency's interpretations of them." ECY Br. 11-12. But, Ecology's interpretation fails to acknowledge the independent purpose of the Nooksack rule to protect instream flows. By ignoring this primary purpose of the rule, Ecology fails even to acknowledge, much less analyze, the substantial body of case law that has developed around instream flow protection. This approach presents an odd dynamic, under which Ecology's unofficial interpretation would trump post-rule adoption decisional law.[5]

Ecology parses the language of several subsections of the Nooksack rule to conclude that it applies only to Ecology water right

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[4] As discussed below, once adopted into rule, instream flows are water right appropriations that are protected from impairment by subsequent users, including permit-exempt wells. *Swinomish*, 178 Wn.2d at 584-86.

[5] See the next section for discussion of the impact of specific appellate court decisions on interpretation of the Nooksack rule.

permit decisions.[6] ECY Br. at 14-18. The rule subsections referenced by Ecology do not speak to the County's land use duties.[7] But as discussed above, the rule as a whole provides a water resource policy framework which informs County land use plans and codes. A primary goal of managing water in the Nooksack watershed is to preserve instream flows and the values they protect, i.e., fish and wildlife, water quality, recreation, navigation and aesthetics. County land use rules must follow suit.

Based on the substantial, and essentially uncontradicted evidentiary materials submitted by Hirst, it is clear that removing water from the Nooksack basin groundwater systems is causing and will continue to cause damage to instream flows established in the Nooksack rule and its tributaries. See FDO at 21, 24-25. These flows represent values that water resources laws, as expressed through the Nooksack rule, requires Whatcom County to protect.

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[6] Ecology argues that the PCHB decision in *Steensma v. Dept of Ecology* (2011) supports its interpretation of the Nooksack rule. ECY Br. at 18, n.15. In *Steensma*, the PCHB held that it lacked jurisdiction over a letter sent by Ecology to Whatcom County regarding groundwater availability, because the letter was not a final order. The substance of Ecology's positions in that letter, whatever it may have been, was not before the PCHB and is not before this Court. If anything, the Steensma decision stands for the proposition that informal views of the Department of Ecology—as in this case—carry no legal weight.

[7] Adopted in 1985, the Nooksack rule preceded enactment of the GMA, and its extensive requirements regarding land use and water management.

(3) Permit-exempt wells are subject to the Water Code's priority and hydraulic continuity laws, which protect instream flows.

Permit-exempt wells, as a form of water right, may not impair previously established uses. *Campbell & Gwinn, supra.* Such previously established uses include instream flows adopted by rule, which Washington law explicitly recognizes as a form of water right.

> The establishment of . . . minimum flows or levels under RCW 90.22.010 or 90.54.040 shall constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment. . . .

RCW 90.03.345 (emphasis added); *Swinomish*, 178 Wn.2d at 584-86. Hence, the instream flows established in the Nooksack rule, WAC 173-501-030(1)-(3), are water rights with a priority date of December 4, 1985. The rule protects specified flows in Whatcom county rivers and streams from impairment by subsequent appropriations.

If not outright denied, any water right created or issued after the date of adoption of an instream flow rule is subject to curtailment if the previously-established instream flow is not being met. *Hubbard v. Ecology,* 86 Wn.App. 119, 936 P.2d 27 (1997); WAC 173-500-060(5)(a) (general rule on conditioning new water permits on instream flow rules). This general rule is recognized and applied in the Nooksack rule. WAC 173-501-030(4) (new water rights to be conditioned on instream flows).

Moreover, the closure of any stream either by rule or "low flow limitation"[8] prohibits establishment of new uses that would in any way impact that stream. Such a closure represents a finding that water is not available to establish a new use, a prerequisite to issuance of new water permits. *Postema*, 142 Wn.2d at 94-95; *see* WAC 173-501-040 (Nooksack rule stream closures).

The priority system that protects instream flows from subsequent impairment applies to new groundwater uses through the state's robust hydraulic continuity laws and policies. Pursuant to the Water Resources Act of 1971, "[f]ull recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and groundwaters." RCW 90.54.020(9). Notably, this law is <u>not</u> directed solely to the Department of Ecology. Rather, this is a general water policy directive that is applicable to all programs that involve water allocation and management. After *Kittitas*, we now understand that local government administration of GMA water adequacy requirements must be consistent with this law. 172 Wn.2d at 178-79.

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[8] "Low flow limitations" pre-dated the instream flow rules. These are stream-specific directives, usually placed into individual water right permits, establishing low-flow conditions or closures. They are grandfathered into the instream flow rulemaking system. WAC 173-500-050(8) (defining low flow limitations) and -060(4) (grandfathering low flow limitations into the instream flow rules).

New groundwater uses may not impair senior, pre-existing surface water rights. RCW 90.44.030; *Postema v. PCHB,* 142 Wn.2d at 80-81, *citing Rettkowski v. Dept. of Ecology*, 122 Wn.2d 219, 226, n.1, 858 P.2d 232 (1993). This protection extends to rule-based instream flows, which are water right appropriations. "[A] minimum flow set by rule is an existing right which may not be impaired by subsequent groundwater withdrawals." *Postema,* 142 Wn.2d at 81, 82. "[W]here there is hydraulic continuity and withdrawal of groundwater would impair existing surface water rights, including minimum flow rights, then denial [of application for a new water right] is required." *Id.* at 93; *Swinomish*, 178 Wn.2d at 590-91.

With respect to outright closures of surface water bodies, "a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if it is established factually that the withdrawal will have any effect on the flow or level of the surface water." *Postema*, 142 Wn.2d at 95.

Finally, these rules apply to permit-exempt withdrawals of groundwater. The Groundwater Code defines the term "groundwater" to mean "<u>all waters</u> that exist beneath the land surface or beneath the bed of any stream, lake or reservoir, or other body of surface water within the boundaries of this state." RCW 90.44.035(3) (emphasis added). Thus the

rules of priority apply to limit permit-exempt groundwater uses that deplete flow in surface waters that are protected by instream flow rules. *Swinomish*, 178 Wn.2d at 584-86; AGO 2009 No. 6 at 11.

The Nooksack rule codifies these requirements. The rule explicitly requires that subsequently issued surface water permits may not impair instream flows and may not be issued at all in closed basins. WAC 173-501-030(4). Similarly, the rule prohibits issuance of new groundwater permits that would significantly interfere with stream closures and/or instream flows. WAC 173-501-060.[9] Ecology asserts that because the Nooksack rule does not mention permit-exempt wells, and the rule does not close groundwater basins, therefore permit-exempt groundwater uses are not prohibited by the rule. ECY Br. at 13-20. This reading misstates hornbook priority rules and completely fails to account for court decisions

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[9] The Nooksack rule's hydraulic continuity provision, WAC 173-501-060, is identical to that contained the Okanogan WRIA rule, WAC 173-549-060, which was interpreted in *Hubbard v. Ecology, supra*. In *Hubbard,* Ecology conditioned a new groundwater permit for agricultural use on the Okanogan instream flow rule, WAC 173-549-020. On appeal, the permittee presented evidence that the groundwater withdrawal would reduce flow in the river by only .004 percent, and argued this was not "significant." The Court held that any groundwater withdrawal that impacts an instream flow right is "significant." 86 Wn.App. at 126-27. This illustrates that Washington's rule-based instream flows are no different than out-of-stream rights, and enjoy 100% protection from impairment. *Swinomish*, 178 Wn.2d at 590-91.

decided since adoption of the Nooksack rule. That the agency responsible for managing the state's water resources would assert this is disturbing.

In sum, both permit-exempt wells and instream flows set by rules are forms of water right appropriation recognized in Washington's water priority system. Permit-exempt withdrawals established after the instream rule adoption date that would take water from a stream when flows are not meeting their rule-based targets, or that would take water from a closed stream, are prohibited. To protect water resources as required by the GMA, Whatcom County's rural character policies and regulations must recognize and implement these rules.

D. It is state policy to not authorize new domestic water rights that are subject to curtailment or interruption.

Another water resource rule relevant to local government GMA water adequacy duties is the Department of Ecology's practice to not issue interruptible water permits for domestic, municipal or other essential uses. The basis for this rule is grounded in public health policy: shutting off water to households causes sanitation and drinking water problems.

It is axiomatic that a water supply proposed for a building requiring potable water must be reliable. This fundamental principle was enacted as part of the GMA, which requires proof of an adequate supply of potable water for all buildings required to have a building permit. RCW

19.27.097. In analyzing and providing guidance for the term "adequate supply," the Attorney General published a formal opinion in 1992. AGO 1992, No. 17 (July 28, 1992). In that opinion, the Attorney General concluded that potable supply must meet both health standards (adopted by the State Board of Health or a local health authority) and water resource laws, including the Groundwater Code, Ch. 90.44 RCW. With regard to the use of exempt wells, the AGO explicitly states that:

> ...any applicant for a building permit who claims that the building's water will come from surface or ground waters of the state, other than from a public water system, must prove that he has a right to take such water.

AGO 1992 No. 17 (emphasis added).[10] Even a permitted water right does not provide secure supply if it is subject to curtailment under the state's water priority system:

> Even a person with a water right under RCW 90.03 or 90.44 may be unable to take water at certain times. This is because the Department of Ecology regulates the

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[10] The burden of proving that water is available falls to the applicant, not the agency. In the water right permitting statutes, the applicant must "promptly furnish sufficient information on which to base" the Department's statutory findings. RCW 90.03.290(2)(a). In the subdivision statute, "[a] proposed subdivision and dedication shall not be approved unless the . . . legislative body makes written findings that: (a) Appropriate provisions [in the application] are made for . . . potable water supplies . . ." RCW 58.17.110(2). For building permits, "[e]ach applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building." RCW 19.27.097.

> appropriation of water under a priority system commonly described as the "first in time shall be the first in right." See RCW 90.03.010, 90.44.020. Under this doctrine, more recently developed water rights can be curtailed when necessary to protect more senior water rights. This doctrine applies to all water rights, including those for which a permit is not required. Although RCW 19.27.097 states that a water right permit from the Department of Ecology may be evidence of an adequate water supply, we believe that, because of the first-in-time doctrine, it may not be sufficient evidence in cases where water is not actually available for withdrawal. In areas experiencing drought severe enough to deprive those holding junior water rights of water, for example, a local building department could require evidence in addition to the water right that a sufficient quantity of water actually would be available for the building to be constructed.

Id. at n.5.

With regard to the use of groundwater sources for small water systems that may serve multiple rural properties, the State Board of Health has adopted standards for approvals that require analysis of physical production capacity of the well source along with inclusion of any water resource limitations or known seasonal groundwater fluctuations. WAC 246-291-125(3)(i). Determination of whether a well provides adequate potable water requires analysis of water resource limitations, which would include curtailment for instream flows.

In other words, Whatcom County's GMA regulations must recognize that the proffer of a permit-exempt well as evidence of adequate water supply to support a land use permit may not be sufficient if there is

risk that the well will withdraw water that affects a regulatory stream flow or closure. In that case, the water supply is subject to curtailment and is not sufficiently reliable to use for potable water. Whatcom County's rural area regulations do not contain such a proviso.

E. Amendment of the Nooksack rule is not a remedy for the GMA violations here.

Ecology posits that if the parties believe the Nooksack rule should directly address permit-exempt wells, they can petition for amendment. ECY Br. at 11, n.12. This is a hollow remedy, however, given the recent decision in *Squaxin Island Tribe, supra*. There, the Squaxin Tribe did petition for amendment of the Kennedy-Goldsboro rule, Ch. 173-514, in an effort to limit exempt well proliferation that was uncontrolled by Mason County. The Court upheld Ecology's vigorous refusal to amend the rule solely because it was not a priority item for their program. 177 Wn.App. at 740-41. There is no reason to believe that Ecology would approve a rule amendment here, particularly in view of its argument that the Whatcom County plan complies with the law. More importantly, an amendment to the Nooksack rule is not required to implement the application of priority and curtailment to permit-exempt wells.

F. Ecology's interpretation of the Nooksack rule is not entitled to "great weight."

Ecology and Whatcom County argue that letters sent by Ecology to Whatcom County that accept the dearth of water resource protection content in the County's Comprehensive Plan are entitled to deference. ECY Br. at 13, County Br. at 11-12. The argument is not persuasive. First, under the Administrative Procedures Act, general expressions of agency interpretations of a statute, and its practice in implementing it, are to be written in either a "policy statement" or an "interpretive statement" that are to be filed with the Code Reviser. RCW 34.05.010. Ecology routinely prepares and files such statements (often called "policy/interpretive statements"), and their website is replete with them.[11] Ecology has yet to adopt any such policy with regard to County compliance with water resource requirements under the GMA.

At issue is the adoption of a Comprehensive Plan by Whatcom County under the GMA, and whether it contains sufficient policies to meet the objectives of the GMA for protection of water resources in addressing how to provide water supplies to meet forecasted growth. The requirements of the GMA are not the purview of the Department of Ecology, and the County's obligation to meet GMA requirements is

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[11] *See* http://www.ecy.wa.gov/programs/wr/rules/pol_pro.html.

separate and apart from Ecology's responsibilities to enforce the Water Code. The argument advanced by Ecology and the County ignores the body of scientific evidence that was entered into the record at both the County level, and with the GMHB. Lacking even a policy or interpretive statement, Ecology is not entitled to deference. The Court should not afford "great weight" to Ecology's interpretation of the Nooksack rule.

VI. Conclusion

For the foregoing reasons, the Center for Environmental Law & Policy respectfully urges the Court to uphold the Growth Management Hearings Board decisions under appeal.

Respectfully submitted this 4th day of November, 2014.

Center for Environmental Law & Policy

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