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IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

WHATCOM COUNTY,
Appellant/Cross-Respondent,

v.

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and DAVID STALHEIM, FUTUREWISE, AND WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,
Respondents/Cross-Appellants,

And

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
Amicus Curiae.

BRIEF OF RESPONDENTS ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and DAVID STALHEIM, AND FUTUREWISE ANSWERING AMICUS CURIAE DEPARTMENT OF ECOLOGY

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TABLE OF CONTENTS

Topic — Page Number

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. ARGUMENT 3

A. WCC 21.01.040, the Provision Relating to Subdivision Applications, is Not Sufficient to Ensure that Water Resources Will be Adequately Protected. 5

B. The Requirement That Development Cannot Occur In Areas That Ecology Has Closed to New Water Uses Does Not Ensure that Waters Will Be Protected As Required by the GMA 8

C. The Board Did Not "Misinterpret" the Nooksack Rule by Implementing the GMA. 15

III. CONCLUSION 20

DECLARATION OF SERVICE 21

TABLE OF AUTHORITIES

Cases

Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 615 P.2d 1279 (1980). 11
Dep't of Ecology v. Campbell & Gwinn, 146 Wn.2d 1, 43 P.3d 4 (2002) . 5
Kittitas County v. Eastern Washington Growth Mgmt. Hearings Bd., 172 Wn.2d 144, 256 P.3d 1193 (2011) ..... passim
Port of Seattle v. Pollution Control Hearings Board, 151 Wn.2d 568, 90 P.3d 659 (2004) 18
Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 111 P.3d 726 (2000) ..... passim
Steensma v. *Ecology,* PCHB No. 1 1-053, Order Granting Summary Judgment to Ecology (Sept. 8, 2011) 12
Veit v. Burlington Northern Santa Fe Corp., 171 Wn.2d 88, 249 P.3d 607 (2011). 15

Statutes

RCW 19.27.097 ..... 4, 6, 12, 17
RCW 36.70A.020(10) 4, 15
RCW 36.70A.030(15)(d) 4, 15
RCW 36.70A.030(15)(g) 4, 15
RCW 36.70A.040(4)(d) 4
RCW 36.70A.070(1) 4
RCW 36.70A.070(5)(c)(iv) 4, 15
RCW 36.70A.130(1)(d) 4
RCW 58.17.110 ..... 4, 6, 17
RCW 90.54 8

Other Authorities

Dept. of Ecology, *Instream Flow Rule Status* (2013) 13
Merriam Webster Dictionary Online 10, 11

Regulations

Chapter 173-501 WAC 1
WAC 173-501-020 ..... 8, 19
WAC 173-501-030 15
WAC 173-501-040 15
WAC 173-501-080 16

I. INTRODUCTION

The State of Washington, Department of Ecology ("Ecology") filed a Motion for Leave to File Amicus Curiae Brief ("Brief") dated August 29, 2014 with the Court of Appeals, Division I. Commissioner Mary Neel of the Court entered a notation ruling granting the motion and providing for an answer to the amicus brief to be filed by October 17, 2014. This brief constitutes the response to the Ecology Brief on behalf of Respondents/Cross-Appellants Eric Hirst, Laura Leigh Brakke, Wendy Harris, and David Stalheim ("Hirst") and Futurewise.

Ecology did not participate in Whatcom County's ("County's) process leading to the adoption of the Comprehensive Plan ("Plan") that is at issue in this case. For the first time in this proceeding, Ecology asserts that the County's Growth Management Act ("GMA") obligations to protect water availability, surface and groundwater resources, and fish and wildlife habitat are limited by and precisely coterminous with Ecology's pre-GMA 1985 water management rule for the Nooksack Basin ("Nooksack Rule").[1] Ecology cites no case, statute, or regulation to support this claim, which conflicts with the Washington Supreme Court's recent holding in *Kittitas County v. Eastern Washington Growth*

[1] Chapter 173-501 WAC, sometimes referred to as the Water Resources Inventory Area ("WRIA") 1 Rule.

Management Hearings Board,[2] that state water law does not preempt counties' GMA obligation to protect groundwater from detrimental land uses. *Kittitas* determined that the County "*must* regulate" to protect water resources as required by the GMA.[3]

Ecology further argues that its particular "interpretation" of its Rule governs the County's GMA obligations. Ecology asserts that the Growth Management Hearings Board ("Board") erred by considering the substance of state water law as it has developed since 1985, rather than limiting its analysis to Ecology's "intent" when Ecology adopted the Nooksack Rule in 1985. Much has changed in the past thirty years, however, as the Washington Supreme Court recognized in *Postema v. Pollution Control Hearings Bd.*[4] decided at the midpoint of the thirty-year span since the adoption of the Nooksack Rule. In 2000, *Postema* found that "there is no dispute that Ecology has revised its view of the interconnection of groundwater and surface water in hydraulic continuity as new information has become available."[5] *Postema* and other cases discussed in this brief emphasize the obligation of both the County and Ecology to protect water resources, including instream flows. The Board

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[2] *Kittitas County v. Eastern Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 178, 256 P.3d 1193 (2011).
[3] *Id.* at 178 (emphasis in original).
[4] 142 Wn.2d 68, 111 P.3d 726 (2000).
[5] *Postema,* 142 Wn.2d at 91.

did not err by considering the GMA, *Kittitas*, *Postema*, and changes in state water law since 1985 in determining that the County had not complied with its GMA obligations to protect water resources.

II. ARGUMENT

Ecology contends that the Board was required to find that the County's Comprehensive Plan complies with the GMA's requirements for protection of water resources because the Plan includes two provisions that accord with Ecology's interpretation of its 1985 Rule.[6] The first such provision "serves to prevent violation of the requirement that each residential development can only qualify for one group domestic exemption from permitting requirements," while the second provision "require[s] that the County will not approve a subdivision or building permit application that relies on a permit-exempt well for water supply when the well is located in an area where water is unavailable for new uses under an Ecology rule."[7]

If the Legislature wanted counties to implement these provisions, and nothing more, it would have said so in the GMA. It did not. As the Board recognized, "[t]he GMA is replete with requirements to protect

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[6] State of Washington, Department of Ecology's Motion for Leave to File Amicus Curiae Brief ("Ecology Brief") at 8.
[7] *Id.*

ground and surface water and ensure land uses are compatible for fish and wildlife."[8] These goals and requirements include:

- "Protect the environment and enhance the state's high quality of life, including . . . the availability of water"[9];
- Establish patterns of land use and development in rural areas compatible with fish habitat;[10]
- Establish patterns of land use and development in rural areas compatible with protection of natural surface water flows and groundwater recharge; [11]
- Adopt a Land use Element which "shall provide for protection of the quality and quantity of groundwater used for public water supplies;"[12]
- Adopt a Rural Element that "shall include measures that apply to rural development and protect" rural character by "[p]rotecting . . . surface water and groundwater resources;"[13]
- Assure legal availability of potable water prior to building permit or subdivision approval;[14] and
- Ensure that development regulations are consistent with and implement the requirements of an internally-consistent Plan.[15]

This list of requirements is far more extensive than mere conformance with Ecology's "interpretation" of its water management

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[8] AR 1348-1399 (*Hirst v. Whatcom County*, Growth Mgmt. Hearings Bd., Western Wash. Region, Case No. 12-2-0013 (June 7, 2013) ("FDO") at 22). "AR" refers to the Certified Administrative Record with sequential page numbers prepared by the Growth Management Hearings Board. We omit the preceding zeroes.
[9] RCW 36.70A.020(10), AR 1367 (FDO at 20).
[10] RCW 36.70A.030(15)(d), AR 1367-68 (FDO at 20-21).
[11] RCW 36.70A.030(15)(g), AR 1367-68 (FDO at 20-21).
[12] RCW 36.70A.070(1), AR 1368 (FDO at 21).
[13] RCW 36.70A.070(5)(c)(iv), AR 1368 (FDO at 21).
[14] RCW 58.17.110 and RCW 19.27.097, AR 1369 (FDO at 22).
[15] RCW 36.70A.040(4)(d) and RCW 36.70A.130(1)(d), AR 1368 (FDO at 21).

regulations. For all the reasons set forth below, the Board's application of the GMA, rather than Ecology's cramped interpretation, should prevail.

A. WCC 21.01.040, the Provision Relating to Subdivision Applications, is Not Sufficient to Ensure that Water Resources Will be Adequately Protected.

Ecology contends that the fact that the County does not allow the "slicing of a larger residential development project . . . into multiple smaller subdivisions" for water permitting purposes[16] is sufficient to satisfy the Supreme Court's *Kittitas* decision.

The Board explicitly recognized that the County had avoided the precise GMA violation identified under the specific facts of *Kittitas.*[17] Contrary to Ecology's argument, however, *Kittitas* did not hold that GMA water resource protection provisions are limited to ensuring that a county does not permit the "daisy-chaining" of subdivisions that the Supreme Court had already found to be illegal in *Dep't of Ecology v. Campbell & Gwinn.*[18] *Kittitas* held, more broadly, that the County "is required to plan for the protection of water resources in its land use planning."[19]

The remainder of the Board's decision explains why the County's

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[16] Ecology Brief at 9.

[17] The Board stated that "[t]he County points out, and the Board agrees, that its subdivision regulations do not allow the "daisy-chaining" of plat applications that was the specific target of the Supreme Court's finding of noncompliance in the *Kittitas* case." AR 1387 (FDO at 40).

[18] 146 Wn.2d 1, 43 P.3d 4 (2002).

[19] 172 Wn.2d at 179, emphasis added.

land use planning does not adequately protect water resources. As the Board explained, Comprehensive Plan policy 2DD-2.C.6 and the water regulations referenced therein "do not require the County to make a determination of the legal availability of groundwater in a basin where instream flows are not being met."[20] Under provisions of the GMA codified at RCW 19.27.097 and RCW 58.17.110, it is the applicant's burden to "provide evidence" that water is available for a new building or subdivision.[21] The Board found that the County's Plan and referenced development regulations do not comply with these provisions of the GMA because "a building permit for a private single-residential well does not require the applicant to demonstrate that groundwater withdrawal will not impair surface flows."[22]

The Board correctly found that the failure to determine the legal availability of groundwater results in numerous adverse consequences, based on "evidence in the record about the . . . lack of water availability in Whatcom County, and the need to integrate land use and water resource planning."[23] The long list of evidence supporting the Board's conclusion includes the fact that "Ecology's *Focus on Water Availability* report states

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[20] AR 1387 (FDO at 40).
[21] AR 1389 and 1389, fn. 155 (FDO at 42). *See also* AR 1369, fn. 71 (FDO at 22, fn. 71).
[22] AR 1389 (FDO at 42).
[23] AR 1382 (FDO at 35).

. . . '**average minimum instream flows in the mainstem and middle fork Nooksack River are not met an average of 100 days a year**.'"[24] In short, the Board relied on evidence establishing that despite of – or, more accurately, because of – the fact that the County has adhered to Ecology's "interpretation" of the Nooksack Rule, its water resources are not protected as the GMA requires.

Ecology made no claim that the substantial evidence supporting the Board's conclusions is wrong or insufficient, or that in fact there is no problem with water availability in the County. It merely made the unsupported assumption that the Board is not authorized to consider evidence that the County's land use planning does not meet GMA requirements. Wearing blinders forged by its limited focus on its own "interpretation" of its pre-GMA Rule, Ecology utterly failed to address the evidence showing that Whatcom County's water resources are not, in fact, sufficiently protected.

The Board enlisted strong support for its conclusion that the County's regulations fail to comply with the GMA. Rather than relying on any "interpretation" of a pre-GMA rule,[25] the Board took counsel from

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[24] AR 1370-71 (FDO at 23-24). Instream flows protect fish habitat. They also constitute a senior water right that the County's regulations allow to be violated in contravention of the GMA, as described further below.

[25] Ecology, of course, never provided the Board with any "interpretation" during the Board's consideration of the County's Plan. Nor did Whatcom County.

the Washington Supreme Court. As described further below, *Postema* and other cases interpreting state water law, as well as cases interpreting the GMA, support the board's conclusion.

B. The Requirement That Development Cannot Occur In Areas That Ecology Has Closed to New Water Uses Does Not Ensure that Waters Will Be Protected As Required by the GMA.

Contrary to Ecology's claim, the Board did not "fail to recognize that the Comprehensive Plan is harmonious with the Nooksack Rule."[26] In fact, the Board specifically referenced the provisions that the Ecology views as "harmonious,"[27] stating:

> Whatcom County's regulations only allow approval of a subdivision or building permit that relies on a private well when the proposed well site "does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist." <u>This restriction falls short of the *Postema* standard, as it does not protect instream flows from impairment by groundwater withdrawals</u>.[28]

The Supreme Court's *Postema* decision interprets RCW 90.54, the Water Resources Act of 1971. It is important to note a fact about the Nooksack Rule that Ecology failed to disclose to the Court in its Brief: the Rule itself states that Ecology's administration and enforcement of the Rule "<u>shall</u> be consistent with the provisions of chapter 90.54 RCW."[29] As

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[26] Ecology Brief at 9.
[27] WCC 24.11.090(B)(3), WCC 24.11.160(D)(3), and WCC 24.11.170(E)(3).
[28] AR 1387 (FDO at 40).
[29] WAC 173-501-020, emphasis added.

Postema observes, the statute provides that "'[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)."[30]

The Board recognized (although Ecology failed to address this issue in its Brief) that *Postema*, decided fifteen years after the Nooksack Rule was adopted, addresses water availability issues that are directly relevant to the protection of groundwater and surface water in Whatcom County:

> In *Postema v. Pollution Control Hearings Board*, the Supreme Court made clear that where 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.[31]

While the Board's decision appropriately addresses state water law, Ecology's Brief insists that its 1985 Rule, like Brigadoon, is immune from the passage of time. Ecology states that Hirst and Futurewise's observation in our opening brief that the 1985 rule is subject to changes in

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[30] *Postema*, 142 Wn.2d at 80.
[31] AR 1387 (FDO at 40), citing *Postema*, 142 Wn.2d at 90, 96.

science and the law is "erroneous."[32] Ecology provides no support for its assertion that its Rule is not subject to changes in governing law, despite the fact that the Rule itself states that it must be consistent with governing law.

Ecology merely asserts, incorrectly, that *Kittitas* establishes a blanket standard for GMA compliance requiring nothing more than "consisten[cy] with Ecology's water resources regulations and the agency's interpretations of them."[33] Ecology provides no citation to the *Kittitas* decision to support this contention, for the simple reason that *Kittitas* does not support Ecology's assertion. While *Kittitas* observes that Ecology "ought to assist counties in their land use planning to adequately protect water resources,"[34] *Kittitas* makes it clear that counties bear the burden of GMA compliance. Ecology may "assist," which means "to give support or help,"[35] but "the County is responsible for land use decisions that affect groundwater resources."[36] "Responsible" means "having the job or duty of dealing with or taking care of something; able to be trusted

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[32] Ecology Brief at 11 and 11, fn. 13, *quoting* Appellants' Brief and Brief of Respondents ("Even if the County were correct that Ecology intended the 1985 Rule to allow exempt wells without any inquiry into their effect on instream flows, this original intent must change with changes in science and the law.")
[33] Ecology Brief at 11-12.
[34] *Kittitas*, 172 Wn. 2d at 180, emphasis added.
[35] *Merriam Webster Dictionary Online*, http://www.merriam-webster.com/dictionary/assist (accessed Oct. 16, 2014).
[36] *Kittitas*, 172 Wn. 2d at 180, emphasis added.

to do what is right or to do the things that are expected or required."[37] Whatcom County has the duty of dealing with land use decisions affecting water resources. Ecology may give support or help, but it is the County's job to do what is required.

The remainder of Ecology's discussion in this section is a citation-free soliloquy. Ecology clearly would rather rewrite the GMA than address the GMA as it actually exists, and as it governs the County's Plan. Remarkably, Ecology asserts that compliance with GMA water availability and protection provisions is an optional activity that Counties may or may not engage in at their own discretion. Ecology muses that a County "is *authorized* to take actions that are more restrictive of water use than Ecology's regulations"[38] when conditions violate the GMA, such as "the dewatering of streams that provide fish habitat . . . "[39] but that "the GMA does not *require* the County to do so."[40]

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[37] *Merriam-Webster Dictionary Online*,, http://www.merriam-webster.com/dictionary/responsible (accessed Oct. 16, 2014).
[38] Ecology Brief at 12, emphasis eliminated from original with the exception of the word "authorized."
[39] Ecology Brief at 12. The Board made a finding of fact that there is "substantial evidence in the record about water availability limits . . . in rural Whatcom County," including a finding that "a proliferation of rural residential exempt wells. . .draw[] down underlying aquifers and reduc[e] groundwater recharge of streams." AR 1370-71 (FDO at 23-24). Based on the County's own Plan, the Board found that impacts include "'fisheries depletion . . . and other instream problems.'" AR 1373 (FDO at 26). The County did not challenge this finding, which is a verity on appeal. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279, 1282 (1980).
[40] Ecology Brief at 12, emphasis added.

Not a single citation supports this statement, because Ecology's claim that the GMA is merely precatory is wrong. The Supreme Court stated in *Kittitas* that "[t]he GMA requires counties to protect water resources"[41] and that counties "*must* regulate" to implement GMA requirements to protect water resources. As the Board stated, and Ecology conceded, "patterns of land use and development in rural areas must be consistent with protection of instream flows, groundwater recharge, and fish and wildlife habitat. A County's Comprehensive Plan rural lands provision must include measures governing rural development to protect water resources."[42] Furthermore, as noted above, GMA provisions, "require counties to assure adequate potable water is available when issuing building permits and approving subdivision applications."[43] "[I]t is the local government – and not Ecology – that is responsible" to make these determinations.[44] The Board based its decision on these substantial GMA obligations.

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[41] *Kittitas*, 172 Wn.2d at 181. *See also id.* at 175 ("The GMA includes requirements that counties consider and address water resource issues in land use planning") and 176 ("[T]he the GMA includes requirements to protect water").
[42] AR 1368 (FDO at 21); *see* Ecology Brief at 7. *See also* Ecology Brief at 6, emphasis added ("Ecology—and, indeed, all parties, including the County—agree with the Board's general statements that GMA planning actions are required to protect water resources.")
[43] 172 Wn.2d at 179, emphasis added, citing RCW 19.27.097 and 58.17.110.
[44] AR 1370 (FDO at 23), *citing Kittitas,* 172 Wn. 2d at 180. *See also Steensma* v. *Ecology,* PCHB No. 1 1-053, Order Granting Summary Judgment to Ecology (Sept. 8, 2011) at 7-9.

Ecology's rewriting of the GMA further proclaims that:

> Under the GMA, counties are *not required to be more restrictive of water use* under their land use regulatory authority than Ecology is in exercising its water management regulatory authority in the basin where the county is located. As such, the GMA does not require counties to adopt land use plans and regulations that are more restrictive with respect to water use than Ecology's water management rules.[45]

Again, no citation to authority (statute or case) supports this claim, and this Court should not revise the GMA to incorporate Ecology's interpretation for a number of reasons. First, Ecology's version of the GMA would exempt any county from GMA compliance with water protection measures if Ecology has not adopted a water management rule applicable to the County. If Ecology's argument became governing law, it would mean that, where Ecology has adopted no rule, the GMA requires no planning to protect water availability.[46] Nowhere did the Legislature carve out such an exception to the GMA. Furthermore, the Supreme Court rejected the argument that the GMA is merely a "second-class statute," subordinate to Ecology's water planning authority, when it held in *Kittitas* that state water management law does not preempt the GMA.

Second, Ecology's argument conflates GMA requirements with the

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[45] Ecology Brief at 12, emphasis in original.

[46] Approximately half of the counties in Washington are not covered by a water management rule. *See* Dept. of Ecology, *Instream Flow Rule Status* (2013), at http://www.ecy.wa.gov/programs/wr/instream-flows/Images/pdfs/wsisf-0213.pdf

substance of Ecology rules, where such rules exist, and state law does not support this conflation. Ecology's "water management regulatory authority" is not based on the GMA, and Ecology made no effort to establish that its water management rules must meet GMA requirements. Indeed, it could not make such a claim with respect to the Nooksack Rule because Ecology adopted the Nooksack Rule in 1985[47] – five years before the Legislature adopted the GMA. The Legislature knew about Ecology's water management authority when it adopted the GMA, and it still decided to require counties to protect water availability and water resources.

The Legislature's subsequent adoption of the GMA, after the passage of the 1985 Rule, indicates that the Legislature recognized that Ecology's water rules alone were not sufficient to protect rural water resources. Consequently, the Legislature imposed additional obligations for the County to meet in its Comprehensive Plans. As the Supreme Court described this division of authorities, "[w]hile Ecology is responsible for appropriation of groundwater by permit under RCW 90.44.050, the County is responsible for land use decisions that affect groundwater resources."[48] Under the GMA, Ecology "ought to assist counties in their land use planning,"[49] but counties must satisfy GMA obligations, which

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[47] See WAC Ch. 173-501, reference to WSR 85-24-073 (Order 85-19), filed 12/4/85.
[48] *Kittitas*, 172 Wn.2d at 180.
[49] *Id.*

are not limited to compliance with any plan that Ecology may (or may not) have adopted in their area.

Finally, Ecology's argument violates "the rule against surplusage, which requires this court to avoid interpretations of a statute that would render superfluous a provision of the statute".[50] As Ecology concedes, the GMA requires the County to "[p]rotect . . . the availability of water,"[51] to protect "surface and groundwater resources" in its rural area,[52] and to ensure that rural development is compatible with fish habitat[53] and "consistent with the protection of natural surface water flows."[54] This Court should not render these provisions superfluous by interpreting them as coterminous with Ecology's water regulatory authority.

C. The Board Did Not "Misinterpret" the Nooksack Rule by Implementing the GMA.

Ecology's remaining argument, comprising a close and convoluted reading of the language of its 1985 Rule, ignores one key fact: Ecology established instream flows and closed stream basins in the 1985 Rule.[55] The Rule itself states: "Consistent with the provisions of chapter 90.54

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[50] *Veit v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 114, 249 P.3d 607 (2011).
[51] RCW 36.70A.020(10), cited in Ecology Brief at 6.
[52] RCW 36.70A.070(5)(c)(iv), cited in Ecology Brief at 6-7.
[53] RCW 36.70A.030(15)(d), cited in Ecology Brief at 7, fn. 9.
[54] RCW 36.70A.030(15)(g), cited in Ecology Brief at 7, fn. 9.
[55] WAC 173-501-030, WAC 173-501-040.

RCW, it is the policy of the department to preserve an appropriate minimum instream flow . . ."[56] Consequently, state law governing instream flows and basin closures applies to the Rule. If Ecology wants to change its rule, it should amend its rule. If the County believes that instream flows and basin closures are unwarranted, the County may petition Ecology to change the rule. Under the 1985 Rule's establishment of instream flows, however, the GMA requires the County to determine legal water availability and to protect its water resources. The Board's decision correctly recognized this obligation.

Ecology first, incorrectly, claims that the Board concluded that the County's Plan fails to protect water availability because the Board "erroneously" interpreted the 1985 Rule.[57] Again, Ecology entirely overlooks the substance of the Board's decision, which was based on "substantial evidence in the record about water availability limits,"[58] including instream flows and basin closures.[59] In fact, it is Ecology that has "erroneously interpreted" the Board's authority and obligation under the GMA.

Based on undisputed evidence in the record, the Board found that

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[56] WAC 173-501-080.
[57] Ecology Brief at 13.
[58] AR 1370 (FDO at 23).
[59] AR 1370-71 (FDO at 23-24).

"instream flows were established in 1985 for WRIA 1, but minimum flows in the mainstem and middle fork Nooksack River are not met an average of 100 days a year. Rural development continues to draw groundwater from the shallow aquifers that are responsible for 70% of base flows."[60] The Board addressed whether the County's Plan adequately protected the insufficient water resources in areas subject to instream flows. Citing *Postema*, the Board addressed the following facts:

> Where a development intends to utilize an exempt well, its right to water is junior to other ground and surface water withdrawals in the basin, and junior to instream flows. Where the proposed groundwater withdrawal is located within a basin that has been closed to new surface water appropriations, or where Ecology has set instream flows that are not consistently met, <u>there is a presumption that no additional water is legally available</u>.[61]

Under provisions of the GMA codified at RCW 19.27.097 and RCW 58.17.110, it is the applicant's burden to "provide evidence" that water is available for a new building or subdivision. The Board found that the County's Plan and referenced development regulations do not comply with these provisions of the GMA because "a building permit for a private single-residential well does not require the applicant to demonstrate that groundwater withdrawal will not impair surface flows."[62]

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[60] AR 1376 (FDO at 29).
[61] AR 1371 (FDO at 24), fn. 81, citing *Postema,* 142 Wn.2d at 81, 90, 95.
[62] AR 1389 (FDO at 42).

Ecology complains that the Board referred to an Ecology letter agreeing with this analysis.[63] Ecology's Brief argues that the state law requirements discussed in the letter apply elsewhere, but do not apply in Whatcom County because the 1985 Rule provisions must be interpreted as prevailing over subsequent GMA and state water law requirements.[64] For example, Ecology argues that the "express language of the Rule . . . indicates that Ecology did not intend this Rule to govern permit-exempt groundwater use under RCW 90.44.050." Ecology's "interpretation" of its 1985 "intent" makes no effort to demonstrate that this 1985 "intent" is consistent with 2014 governing law. It does not address *Postema*'s requirements. It does not even address the Board's substantive analysis of the relationship between state water law and the GMA. It merely asserts that its interpretation of its own rule is entitled to "great weight," citing *Port of Seattle v. Pollution Control Hearings Board*.[65]

In the context of this case, Ecology's "entitlement" to deference is inapplicable. First, *Port of Seattle* cited *Postema* as authority for the proposition that "deference to an agency's interpretation of its own

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[63] Ecology staff had provided this letter to the County during the pendency of the County's consideration of its Plan, and the letter was the only information in the record providing Ecology's views, so the Board's reference to the letter is hardly surprising.
[64] Ecology Brief at 19.
[65] 151 Wn.2d 568, 593, 90 P.3d 659 (2004), *cited in* Ecology Brief at 13.

regulations is also appropriate."[66] *Postema* also states, however, that "regulations must be consistent with statutes under which they are promulgated . . . [an] agency exceeds its rule-making authority to the extent it modifies or amends precise requirements of [the authorizing] statute."[67]

Postema emphasized that, under chapter 90.54 RCW, "Ecology's intent [in adopting instream flow rules] was and is to prevent interference with instream flows."[68] Ecology's "interpretation" not only fails to protect instream flows as required by *Postema*, but it goes so far as to insist that the Board must also fail to protect instream flows under the GMA. According to Ecology, the Board must ignore the substantial evidence establishing the adverse effects of permit-exempt wells on water resources in the County, because state water law prohibits the Board from protecting these resources under the GMA. This contention is contrary to the statute and is entitled to no deference.

Second, Ecology is not entitled to deference in the interpretation of the GMA. In *Kittitas*, the Supreme Court stated that courts must give

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[66] 151 Wn.2d 568, 593, citing *Postema*, 142 Wn.2d at 86, 11 P.3d 726.
[67] *Postema,* 142 Wn.2d at 83 (citations omitted). Additionally, as previously noted, the Rule itself states that Ecology's administration and enforcement "shall be consistent with the provisions of chapter 90.54 RCW." WAC 173-501-020.
[68] *Postema,* 142 Wn.2d at 89, emphasis added.

"'substantial weight' to the Board's interpretation of the GMA,[69] not to Ecology's interpretation.

The Board's conclusion that the County has not protected rural character "by ensuring land use and development patterns are consistent with protection of surface water and groundwater resources throughout its Rural Area"[70] appropriately reflects guidance from state water law as interpreted by the Washington Supreme Court since 1985. More important, it implements the GMA as required by the Supreme Court in *Kittitas*. The Board's interpretation of the GMA's water resource requirements should be upheld.

III. CONCLUSION

Respondents respectfully request that the Court of Appeals uphold the decision of the Growth Management Hearings Board.

Respectfully submitted on this 17th day of October, 2014.

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[69] *Kittitas*, 172 Wn 2d at 154.
[70] AR 1390 (FDO at 43).