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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS, DAVID
STALHEIM, and FUTUREWISE,

Petitioners,

vs.

WHATCOM COUNTY and WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,

Respondents.

**BRIEF OF AMICI CURIAE WASHINGTON
REALTORS®, BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON, AND WASHINGTON STATE FARM BUREAU**

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I. INTRODUCTION

In this brief, amici curiae Washington REALTORS®, Building Industry Association of Washington, and Washington State Farm Bureau address Issue No. 1, urging the Court to affirm the Court of Appeals' decision in *Whatcom Co. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 186 Wn. App. 32, 344 P.3d 1256 (2015), that the Growth Management Act's "rural element" provisions do not require a county to impose exempt well restrictions that are inconsistent with the Water Code and applicable regulations promulgated by the Department of Ecology ("Ecology").

The Growth Management Hearings Board ("Board") erroneously concluded that the GMA mandate to protect water resources requires Whatcom County (the "County") to restrict rural development relying on permit-exempt groundwater withdrawals—specifically, by requiring an applicant for a subdivision or building permit to demonstrate that an exempt well will not impair minimum instream flows set in Ecology's Nooksack Instream Resources Protection Program regulation ("Nooksack Rule").

The Nooksack Rule determines where and under what circumstances water is legally available in rural Whatcom County. In the Nooksack Rule, Ecology has determined that in most areas of the basin water is legally available for new single domestic uses. The Nooksack Rule's provisions – including minimum instream flows and stream closures – do not apply to permit-exempt groundwater withdrawals. The Board misinterpreted the

Nooksack Rule, misapplied *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000), misunderstood references to “public” and “private” water systems in the County’s policies, disregarded applicable GMA regulations, and ignored the GMA’s legislative history.

The Board has neither the authority nor the expertise to decide how legal availability of water should be determined under the Water Code. The Legislature did not intend the GMA to be used to override state water resource management regulations adopted by Ecology, the only agency with statutory authority to allocate the state’s water resources. Amici urge the Court to affirm the Court of Appeals by holding that a county complies with GMA requirements to protect water resources by adopting policies and regulations consistent with the Water Code and applicable Ecology rules.

II. IDENTITY AND INTEREST OF AMICI CURIAE

Washington REALTORS®, Building Industry Association of Washington, and Washington State Farm Bureau (collectively, the “Associations”) are described in the Associations’ Motion for Leave to File Amicus Curiae Brief. The Associations and their members have an interest in ensuring a fair, coherent, and predictable regulatory system in which local land use regulations are consistent with state law and regulations governing water supply for residential development and agriculture.

III. STATEMENT OF THE CASE

The Court of Appeals’ decision sets forth the relevant facts.

IV. ARGUMENT

- A. Under the Nooksack Rule, water is legally available for new single domestic uses and uses relying on permit-exempt groundwater wells.**
- 1. Ecology has exclusive authority over water right permitting and rulemaking.**

Under Washington's Water Code,¹ the Legislature has granted Ecology the exclusive authority to adopt regulations governing water allocation and management, including the authority to set minimum instream flows. RCW 90.22.010; RCW 90.54.040; *see also* RCW 43.21A.020 (establishing Ecology in 1970 as the single state agency with authority "to undertake, in an integrated manner, the various water regulation, management, planning and development programs" previously administered by different agencies). The Legislature has expressly affirmed Ecology's exclusive authority to establish minimum instream flows. RCW 90.03.247 provides in pertinent part:

No agency may establish minimum flows and levels or similar water flow or level restrictions for any stream or lake of the state other than the department of ecology whose authority to establish is exclusive, as provided in chapter 90.03 RCW and RCW 90.22.010 and 90.54.040.

¹ The term "Water Code" is used generally to refer to various statutes within RCW Title 90 that address water resource management. Chapter 90.03 RCW, enacted in 1917, established a permit system for surface water appropriation. Chapter 90.44 RCW, enacted in 1945, extended the permit system to groundwater. Chapter 90.14 RCW, enacted in 1967, established a claims registration system for rights that pre-dated the permit system and established procedures and standards for statutory relinquishment of water rights. Chapter 90.22 RCW, enacted in 1969, authorized Ecology's predecessor agency to set minimum water flows or levels for lakes and streams. Chapter 90.54 RCW, the Water Resources Act of 1971, set forth a comprehensive list of state policy "fundamentals" and authorized Ecology to adopt rules for utilization and management of water.

The provisions of other statutes, including but not limited to RCW 77.55.100 and chapter 43.21C RCW, may not be interpreted in a manner that is inconsistent with this section.

RCW 90.03.247 (emphasis added).

Under this exclusive authority, Ecology has divided the state into 62 watersheds, known as “Water Resource Inventory Areas” or “WRIAs” (WAC Chapter 173-500), and has promulgated distinct water resource management regulations for approximately 30 WRIAs (WAC Chapters 173-501 through 591). Different WRIAs have different rules. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 83-87, 11 P.3d 726 (2000).

Ecology also has exclusive responsibility for water right permitting. Ecology is the only governmental entity—state or local—authorized to make decisions on applications for water right permits. RCW 90.03.290; RCW 90.44.040; RCW 90.44.060; *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 178, 256 P.3d 1193 (2011) (RCW 90.44.040 “preempts the County from separately appropriating groundwaters”); *id.* at 180 (“Ecology is responsible for appropriation of groundwater by permit”).

When a person seeks a permit to appropriate groundwater, Ecology must investigate the application and, before issuing a permit, “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.” *Postema*, 142 Wn.2d at 79; *see also* RCW 90.03.290.

This is known as the “four-part test” for new water rights. *See Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 383-84, 932 P.2d 139 (1997).

The Water Code includes an exemption from the permit requirement for certain groundwater uses: single or group domestic uses not exceeding 5,000 gallons per day; noncommercial lawn or garden use under one-half acre; industrial uses not exceeding 5,000 gallons per day; and stockwatering. RCW 90.44.050; *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 268 P.3d 892 (2011). “Of course, 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 and public interest review.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 16, 43 P.3d 4 (2002).

Ecology’s WRIA regulations take various approaches to exempt wells. In some WRIAs, Ecology prohibits new exempt wells except under an express reservation of water for future uses. *E.g.*, WAC 173-505-090 (Stillaguamish); WAC 173-527-080 (Lewis). In some WRIAs, Ecology requires new exempt well users to purchase mitigation credits to offset their consumptive use. *E.g.*, WAC 173-518-070 (Dungeness); WAC 173-539A-050 (Upper Kittitas). In some WRIAs, Ecology has adopted basin regulations applicable only to water right permits, but not to permit-exempt uses. *E.g.*, WAC 173-507-010, -040 (Snohomish). Regardless of the differences in approach, the specific provisions of Ecology’s regulations

determine the extent of legal permitted and permit-exempt water use within each basin. No other state or local agency has the authority or legal duty to allocate water resources.

2. In the Nooksack Rule, Ecology has established minimum instream flows that do not apply to permit-exempt groundwater withdrawals.

Ecology has adopted an instream resources protection program for the Nooksack River WRIA, which covers most of rural Whatcom County, in WAC Chapter 173-501 (the “Nooksack Rule”).² WAC 173-501-030 is the minimum instream flow provision. Subsection (1) identifies “stream management units” consisting of the Nooksack River and numerous tributaries. Subsection (2) lists numeric minimum instream flows for each stream at specific times of the year. Subsection (4) explicitly makes those minimum instream flows applicable to “*consumptive water right permits* issued hereafter for diversion of surface water in the Nooksack WRIA and perennial tributaries” only. WAC 173-501-030(4) (emphasis added).

The Nooksack Rule contains a separate groundwater provision, which extends the Rule’s provisions only to groundwater permits or certificates:

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. If

² See Washington Department of Ecology, Nooksack Instream Resources Protection Program, Ecology Publication No. 85-11-001 (November 11, 1985) (available at <https://fortress.wa.gov/ecy/publications/publications/8511001.pdf>).

department investigations determine that withdrawal of groundwater from the source aquifers would not interfere with stream flow during the period of stream closure or with maintenance of minimum instream flows, then *applications to appropriate public groundwaters* may be approved.

WAC 173-501-060 (emphasis added). Thus, the Nooksack Rule's minimum flows and stream closures do not apply to permit-exempt wells. This is consistent with RCW 90.03.247, in which the Legislature has expressly required that water right *permits* be conditioned to protect minimum flows.³

3. In the Nooksack Rule, Ecology has determined that water is legally available for new single domestic uses in most areas of the basin.

The Nooksack Rule explicitly exempts from its minimum instream flows and stream closures new single domestic uses of surface water or groundwater, as follows:

Single domestic, (including up to 1/2 acre lawn and garden irrigation and associated noncommercial stockwatering) shall be exempt from the provisions established in this chapter, except that Whatcom Creek is closed to any further appropriation, including otherwise exempted single domestic use. For all other streams, when the cumulative impact of single domestic diversions begins to significantly affect the quantity of water available for instream uses, then any water rights issued after that time shall be issued for in-house use only, if no alternative source is available.

WAC 173-501-070(2). This exemption—which includes uses that would also qualify for the groundwater permit exemption in RCW 90.44.050—

³ RCW 90.03.247 provides in pertinent part: “Whenever an application for a permit to make beneficial use of public waters is approved relating to a stream or other water body for which minimum flows or levels have been adopted and are in effect at the time of approval, the permit shall be conditioned to protect the levels or flows.” The statute says nothing about permit-exempt groundwater withdrawals being conditioned to protect minimum flows.

applies to use of surface water or groundwater in all areas except for Whatcom Creek. Exempt single domestic uses are not affected by the closures in the Nooksack Rule (except for Whatcom Creek), and are not subject to curtailment in the event that minimum instream flows are not met. This feature of the Nooksack Rule is an expression of one of the policy “fundamentals” in the Water Resources Act: “Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs.” RCW 90.54.020(5).

The exemption in WAC 173-501-070(2) means that, except in the area of Whatcom Creek, water is legally available for single domestic use. As this Court has stated, “[s]tream closures by rule embody Ecology’s determination that water is not available for further appropriations.” *Postema*, 142 Wn.2d at 95. If a stream closure embodies a determination that water is *not* available for new appropriations, then it follows logically that an explicit exemption from that closure for specific uses embodies a determination that water *is* legally available for those specific uses.⁴

Thus, in the Nooksack Rule Ecology has already determined that, except in the area of Whatcom Creek, water is legally available for a permit-exempt groundwater well serving a new single-family house – i.e., for a use

⁴ This does not mean that water will always be “factually” available. The distinction between water that is “factually available underground” and water that is “legally available”

which is already statutorily exempt from the four-part test applicable to new groundwater rights. Such an exempt well is not subject to the minimum instream flows or stream closures established in the Nooksack Rule.

Pursuant to the groundwater permit exemption in RCW 90.44.050, such an exempt well is also not subject to the four-part test for a permit to appropriate water. Under state law, a building permit applicant proposing to rely on a single domestic exempt well consistent with WAC 173-501-070 is not required to demonstrate that the exempt well will not impair instream flows.

B. The Board erred in fashioning a GMA mandate inconsistent with the requirements of applicable state water resource regulations.

The Board concluded that the policies and development regulations incorporated in the County's rural element do not satisfy the GMA mandate to protect water resources, even though the County does not allow exempt wells for subdivisions or single-family building permits in an area "where DOE has determined by rule that water for development does not exist."⁵ According to the Board, "this is not the standard to determining [sic] legal availability of water."⁶ The Board concluded that the County's restriction on exempt wells "falls short of the *Postema* standard, as it does not protect instream flows from impairment by groundwater withdrawals."⁷ The Board's

because its use is consistent with applicable state water law is addressed in *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 179-80, 256 P.3d 1193 (2011).

⁵ CP 1554-57.

⁶ CP 1556.

⁷ CP 1555.

ruling rests on the fundamental premise that the County's policies and regulations, even though consistent with Ecology's Nooksack Rule, are insufficient to protect instream flows. But under the Water Code, only Ecology has the authority to adopt rules allocating water to protect instream flows; under the GMA, the County's duty is to be consistent with those rules.

1. Under *Kittitas*, counties must address water availability in a way that is consistent with state water law.

In *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 256 P.3d 1193 (2011), the issue was whether Kittitas County's subdivision regulations—which allowed applicants to circumvent the groundwater permit exemption in RCW 90.44.050 and this Court's decision in *Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002), by artificially dividing a larger project into a series of smaller plats, each relying on a permit-exempt well—could be reconciled with the GMA's mandate to protect water resources. *Kittitas*, 172 Wn.2d at 154, 175-76. *Kittitas* stands for the proposition that the GMA requires protection of water resources through *consistent* local regulations, i.e., local policies and regulations that ensure compliance with—rather than evasion of—state water law. *Kittitas*, 172 Wn.2d at 181. The operative concept is *consistency* with state law—a requirement underscored in the Water Resources Act, Chapter 90.54 RCW, which provides that counties “shall, whenever possible, carry out powers

vested in them in manners which are *consistent with the provisions of this chapter.*” RCW 90.54.090 (emphasis added).

The Board turned *Kittitas* on its head by ruling that the GMA requires the County to adopt water use regulations that are inconsistent with RCW 90.44.050 and the Nooksack Rule. If the County were to enact a development regulation requiring a single-family building permit applicant to demonstrate that a permit-exempt well would not impair minimum instream flows, such an ordinance would nullify the permit exemption in RCW 90.44.050 and the explicit exemption for single domestic uses in the Nooksack Rule—a conflict with state law that would violate Article XI, §11 of the Washington Constitution. An ordinance conflicts with state law and is unconstitutional if it prohibits what the state law permits. *Dep’t of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 377-78, 337 P.3d 364 (2014), *review denied*, 182 Wn.2d 1023 (2015) (holding unconstitutional a local ordinance prohibiting land application of class B biosolids, in conflict with state statute and Ecology regulations); *see Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998). The Legislature did not intend such a result when it added the “rural element” provisions to the GMA.

2. In the GMA, the Legislature specifically considered and rejected the Board’s approach to water availability.

Had the Legislature intended to require impairment review for exempt wells, it would have done so expressly in the GMA. In 1990, the Legislature

considered but ultimately did not adopt changes to the groundwater permit exemption in RCW 90.44.050 that would have made new exempt wells subject to the same impairment review as water right permit applications. Courts will consider sequential drafts of legislation in order to determine legislative intent. *See Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 470, 139 P.3d 1078 (2006).

Under the version of the GMA legislation passed by the House of Representatives, all new groundwater uses, including uses exempt under RCW 90.44.050, would have been subject to an Ecology permit review process similar to the four-part test in RCW 90.03.290. The House Bill Report for ESHB 2929, as passed by the House on February 15, 1990, states “the existing water right exemption that allows users of less than 5,000 gallons per day of well water to use water without obtaining a water right is eliminated . . . a permit may be required in areas that have groundwater problems.” Section 58 of the bill would have created a new well notification and permitting requirement:

The department may require the person making the notification in subsection (2) of this section to apply for a water right permit if the area within which the withdrawal would occur is known or believed to have problems related to water availability, water quality, interference with existing rights, or other related problems which could be adversely affected by additional withdrawals of ground water. The department may deny an application required under this subsection or condition a permit if water is not available, if the use is not a beneficial use, if the use would adversely affect existing water rights, if the use would threaten water quality or if the use would be inconsistent with a local comprehensive plan.

ESHB 2929 (1990), Sec. 58(3).

However, the Legislature did not adopt these requirements. Instead, the GMA legislation passed by the Legislature and signed into law required local governments to review the availability of potable water for a proposed building permit. Laws of 1990, 1st Ex. Sess., ch. 17, §63 (codified as RCW 19.27.097). When it added the rural element provisions to the GMA in 1997 (Laws of 1997, ch. 429, §7), the Legislature did not intend RCW 36.70A.070(5)(c)(iv) to accomplish indirectly the result it had explicitly considered and rejected in 1990. The legislative history of the GMA does not support the Board's conclusion that Whatcom County must deny a permit for a new building or subdivision unless the applicant can demonstrate that an exempt well will not cause adverse impact on minimum instream flows. The Board's quasi-judicial imposition of new requirements for permit-exempt domestic use ignores this legislative history and disregards legislative intent.

3. The Board's decision conflicts with GMA regulations.

The Legislature required the Washington Department of Commerce "to adopt criteria to assist counties and cities in adopting comprehensive plans and development regulations that meet the goals and requirements of the [GMA]." WAC 365-196-020(2); *see* RCW 36.70A.190(4). As explained in Part IV.A above, Whatcom County's approach to exempt wells is consistent with applicable state law and specifically with Ecology's

Nooksack Rule. This approach complies with the GMA regulations on “potable water” promulgated by the Department of Commerce:

If 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.

WAC 365-196-825(3) (emphasis added). *See also* WAC 365-196-700(1) (requiring local GMA plans and regulations to be integrated with existing laws relating to resource management); WAC 365-196-735 (listing state agency permits and regulations that local governments should take into account in their GMA planning, including water right permits and instream resource protection regulations).

Ecology has, by rule, determined that water for single domestic uses is available without regard to the minimum instream flows in the Nooksack Rule. WAC 173-501-070(2). Local governments are responsible for finding that potable water is legally available prior to approving subdivisions, short plats, or building permits,⁸ but under *Kittitas* and the GMA regulations, “legal availability” must be determined consistently with state law and Ecology rules. RCW 36.70A.070(5)(c) does not empower—let alone obligate—a county to disregard Ecology’s determination of availability under the guise of protecting rural character.

⁸ RCW 58.17.110; RCW 19.27.097; WAC 365-196-745(1)(a), (l), (m).

4. The Board misapplied *Postema* and the Nooksack Rule.

The Board's reliance on *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000), is misplaced. *Postema* addressed issues of water availability and impairment in the context of water right *permit applications*, not exempt wells.⁹ When the Court explained that "a minimum flow set by rule is an existing right which may not be impaired by subsequent groundwater withdrawals," citing RCW 90.03.345 and RCW 90.44.030,¹⁰ it was referring to subsequent *permitted* groundwater withdrawals and not exempt wells. *Postema*, 142 Wn.2d at 80 n.2 ("where minimum flow or levels have been adopted and are in effect when a permit to appropriate is granted, the permit must be conditioned to protect the flows or levels"), 82 (the "minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights, and RCW 90.03.290 mandates denial of an application where existing rights would be impaired").

⁹ *Postema*, 142 Wn.2d at 73 (issues arise from Ecology's "denial of *applications for groundwater appropriation permits*"); 78 (parties disagree on "whether hydraulic continuity requires denial of a *groundwater application*"; *Postema* "contends that there must be a significant measurable effect on surface waters before a *groundwater application* may be denied"; PCHB held that "*permit applications* must be denied"); 78-79 (superior courts ruled that "water *applicants* must have the opportunity to present their factual cases on the question of impairment or any of the other criteria justifying denial of a water *application*"); 79-80 ("before a *permit to appropriate* may be issued,..."; the "decision whether to grant a *permit to appropriate* water is within Ecology's exercise of discretion"; "whether to issue a *permit for appropriation of public groundwater*..."); 81 (appellants contend that "before a *groundwater application* may be denied. . ."); 82 (appellants "cite no statute . . . requiring that economic considerations influence *permitting decisions* once minimum flows are set"); 83-84 ("If the statute's requirements are not satisfied, a *permit* cannot be issued"). (Emphasis added.)

¹⁰ *Postema*, 142 Wn.2d at 81.

The Board incorrectly read *Postema* to mean that a minimum instream flow or stream closure in a basin rule must be treated as absolute, independent of any specific conditions, limitations, or exemptions accompanying it.¹¹ Nothing in *Postema* suggests that a minimum flow or stream closure in a basin rule overrides express exemptions for single family domestic use established in the same regulation. *Id.* at 89 (discussing single domestic exemption established in WAC 173-508-080(2)).

Mr. Postema pointed to the statutory groundwater permit exemption and an exemption for single domestic use in Ecology's applicable basin regulation in an attempt to establish a "de minimis" exception to the no-impairment standard for a water right permit. *Postema*, 142 Wn.2d at 89-90. The Court categorically rejected that argument because the four-part test—including the no-impairment standard—simply does not apply to exempt wells: "As to RCW 90.44.050, legislative exemptions from the permitting system do not determine what impairment means." *Id.*

5. The Board misunderstood what constitutes a public water system under Washington law, discerning a "large ambiguity" in the County's policy where none exists.

The Board misinterpreted the County's Policy 2DD-2.D.7, which requires "purveyors of public water systems and private water system

¹¹ CP 1555 (citing *Postema* for the proposition that "where Ecology has set minimum instream flow [sic] by rule, as in Nooksack WRIA 1, subsequent groundwater withdrawals may not contribute to the impairment of the flows").

applicants” to comply with Ecology’s groundwater requirements. The Board concluded that the County’s policy and regulations “address only water withdrawals by ‘water system’ applicants, leaving a large ambiguity for a building permit applicant seeking to rely on an exempt well.”¹² There is no ambiguity; a building permit applicant seeking to rely on an exempt well for a single-family residence is a “private water system applicant.”

Under the Washington State Safe Drinking Water Act, the term “public water system” includes *all* water systems providing water for human consumption, *except* “a system serving only one single-family residence” or “a system with four or fewer connections all of which serve residences on the same farm.” RCW 70.119A.020(12); *see also* WAC 246-290-020(1); WAC 246-291-010(51). The Board apparently assumed – incorrectly – that ownership distinguishes a “public” water system from a “private” water system. Ownership is not determinative; a water system shared by two neighboring single-family homeowners is a “public water system” under state law. By necessary implication, a “private” (i.e., non-public) water system is either (1) an on-farm system serving up to four residences; or (2) a system serving one single-family residence. The County’s policy unambiguously covers all building permits.¹³

¹² CP 1556.

¹³ Petitioners Hirst, et al. assert incorrectly that the County’s policy “applies only to ‘purveyors of public water systems and private water system applicants’ and not building

6. The Board erred in relying on an Ecology letter about the 2006 amended Skagit Basin Rule.

The Board erred in relying on an Ecology letter to Snohomish County regarding Ecology's 2006 amended Skagit Basin Rule (which applies to parts of Snohomish County) to interpret the legal effect of the stream closures and instream flows in the Nooksack Rule.¹⁴ On its face, that Ecology letter had nothing to do with the Nooksack Rule or Whatcom County's compliance with the Water Code. Contrary to the Board's statement,¹⁵ the "applicable legal principles" are certainly not the same between the Nooksack Rule and the 2006 amended Skagit Basin Rule. *Compare* WAC 173-501-070 with former WAC Chapter 173-503.¹⁶

Unlike the Nooksack Rule, the 2006 amended Skagit Basin Rule did not include any exemption for single domestic uses, and explicitly prohibited new permit-exempt wells except pursuant to specific "reservations" based on "overriding considerations of the public interest." The 2006 amended Skagit Basin Rule was subsequently invalidated in *Swinomish Indian Tribal Community v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013). *Swinomish* did not address GMA requirements for protection of water resources, and does

permit applicants seeking to rely on exempt wells." Hirst, et al. Petition for Review at 5 (footnote omitted).

¹⁴ CP 1556-1557.

¹⁵ CP 1556 n.154.

¹⁶ See <http://www.leg.wa.gov/CodeReviser/WACArchive/Documents/2013/WAC-173-503-CHAPTER.pdf>.

not require Whatcom County to override the state's groundwater permit exemption or the Nooksack Rule in its GMA planning.

C. The Hirst Petitioners' "water availability" challenge is an improper collateral attack on Ecology's Nooksack Rule.

The County's consistency with state water law gave rise to this GMA appeal in the first place. The Hirst Petitioners do not like the Nooksack Rule because it does not prohibit exempt wells and because it explicitly determines that, except in the area of Whatcom Creek, water is legally available for new single domestic uses. The Hirst Petitioners argued to the Board that the County's regulations incorporating Ecology's Nooksack Rule "do not solve the problem of proliferation of individual exempt wells . . ." ¹⁷ Their appeal amounts to a collateral attack on the Nooksack Rule—an improper subject for a GMA appeal. *See* RCW 34.05.510; RCW 36.70A.280(1).

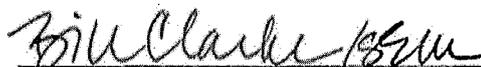
The GMA is not a vehicle for nullifying state water resource rules or the groundwater permit exemption. Allowing the GMA to be misused to achieve that end will result in a legal morass of overlapping and contradictory requirements for counties seeking to exercise GMA planning authority while complying with state agency rules, and for people trying to build homes in Whatcom County and elsewhere in Washington.

¹⁷ CP 1531. In urging this Court to accept review of the Court of Appeals' decision in this case, amicus curiae Squaxin Island Tribe offered similar criticisms of Ecology water resource management regulations that do not prohibit exempt wells. *See* Amicus Curiae Brief of the Squaxin Island Tribe at 6-7.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeals decision 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.

Respectfully submitted this 4th day of September, 2015.



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CERTIFICATE OF SERVICE

I certify that on September 4, 2015, I caused a copy of the foregoing Brief of Amici Curiae Washington REALTORS®, Building Industry Association of Washington, and Washington State Farm Bureau to be served on all parties and amici by U.S. Mail or email, as indicated, at the addresses below:

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Good afternoon –

Attached for filing are the following documents:

1. Motion for Leave to File Amicus Curiae Brief of Washington Realtors, Building Industry Association of Washington, and Washington State Farm Bureau
2. Brief of Amici Curiae Washington Realtors, Building Industry Association of Washington, and Washington State Farm Bureau

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Thank you.

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