



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for  
**Environmental Law & Policy**

April 2, 2008

Department of Ecology Central Regional Office

Attn: Tom Tebb

15 W. Yakima Avenue Suite 200

Yakima, WA 98902

sent via email: [kcwp@ecy.wa.gov](mailto:kcwp@ecy.wa.gov) and [gteb461@ecy.wa.gov](mailto:gteb461@ecy.wa.gov)

Re: Comments on the "March 4, 2008 Draft Memorandum of Agreement between Kittitas County and the State of Washington, Department of Ecology regarding management of exempt ground water wells in Kittitas County"

Mr. Tebb,

The Center for Environmental Law & Policy (CELP) is a public interest organization focused on protection of water resources in western Washington and the Columbia River watershed. Aqua Permanente (AP) is a non-profit organization dedicated to protecting senior water rights in Kittitas County. This letter and the comments that follow are filed jointly by CELP and AP.

CELP joined and supported AP's September 10, 2007, petition to Ecology to initiate rulemaking to close Kittitas County to further exempt groundwater withdrawals. CELP's initial letter asked Ecology to stop all exempt groundwater withdrawals in the County until such time that the Department had sufficient hydrogeologic information to determine whether such withdrawals will harm senior users or the public welfare. This request was made pursuant to RCW 90.54.050, which specifically requires Ecology to withdraw such waters when faced with a lack of sufficient information or data.

Unfortunately, the MOA proposed by Ecology and Kittitas County fails to consider CELP's request or relevant state law and therefore CELP cannot support it as drafted. The reasoning contained within RCW 90.54.050 is one of measured caution. It is wise resource management practice to proceed with care when making determinations that may be illegal or harm someone's right. This "precautionary principle" demands sufficient information before irrevocably committing the resource. It is only once sufficient information is obtained that decisions regarding applicable areas, development standards, mitigation, and other factors outlined in the MOA can be made. By making these determinations now, the MOA allows more exempt wells and does nothing to protect senior right holders or the public welfare. Furthermore, while CELP supports the groundwater study outlined in the MOA, it does very little to protect senior water rights or the public interest while the study is pending. CELP is also concerned that the money budgeted for the study may be insufficient to meet its goals. Ecology must make a commitment to secure any future funding necessary to complete the study.

CELP respectfully asks Ecology and Kittitas County to re-draft the MOA to reflect our concerns and applicable state law.

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Sincerely,

A handwritten signature in black ink that reads "Rachael Paschal Osborn". The signature is written in a cursive style with a large, prominent initial "R".

Rachael Paschal Osborn

cc. Kittitas County Commissioners

## I. Summary

The proposed MOA between the Department of Ecology and Kittitas County is deficient for a variety of reasons. It fails to address most of the issues raised by the Center for Environmental Law & Policy (CELP) and Aqua Permanente (AP) relating to impairment of senior water rights and the public interest. Major concerns include:

The MOA does not address issues raised by the CELP/AP petition for rulemaking, including that:

- Water is not available in the Kittitas Valley and Yakima basin due to over-appropriation leading to regulation of water rights.
- Unmitigated groundwater withdrawals are causing impairment to water users that are senior to recent developments relying on groundwater wells.
- Unmitigated groundwater withdrawals are harming instream flows, fisheries habitat (including endangered species habitat), and the public interest.

The MOA fails to require mitigation for past, present or future exempt groundwater withdrawals, even if those withdrawals are causing impairment to existing water rights and instream flows.

Most of the provisions of the proposed MOA apply only to upper Kittitas County, and do not require any response or action in the lower County, where groundwater impacts are more acute.

Panic well drilling continues to occur in Kittitas County and the MOA does nothing to halt this problem.

Water metering and reporting provisions of the MOA, where required, are a positive development. However, voluntary metering and reporting in the lower County is inadequate.

Placing warning language in plat documents, along with public education efforts, simply cannot substitute for affirmative action to protect senior water rights and instream flows or enforcement against illegal water use.

The draft MOA serves to delay effective enforcement to protect senior water rights and the public's interest in a healthy river system in the Yakima Valley.

The MOA contains a number of concepts regarding state-county relationships and duties that may be workable in water basins where water is available. In the Yakima Basin, water is no longer available. The MOA fails to address this problem.

The Hydrogeologic Investigation and Characterization Report (Attachment 3) suffers from as many flaws as the MOA. Generally speaking, the Report asks hydrogeologists hired by the applicant to produce a reliable determination of the impact of a proposed well. However, both Ecology and Kittitas County agree that insufficient data exists to make these determinations. Ecology often refers to the fact that the United States Geological Survey (USGS) is not studying

the upper county. The primary reason the USGS is not studying this part of the county is due to insufficient data necessary to create a reliable model. In fact, this lack of sufficient data is the very reason the MOA calls for \$683,000 to conduct a groundwater study. Ecology must explain how any reports produced by an applicant under the guidelines found in Attachment 3 can in any way be deemed credible in light of the common acceptance of the lack of hydrogeologic data for the area.

**II. Point-by-point Response to March 4, 2008 Draft MOA**

| <b>Section</b>                    | <b>CELP/AP Response</b>  |
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| II.A.1<br>(Applicable area)       | (1) Most provisions apply only to upper Kittitas County, although lower County well development is equally prolific and surface-groundwater connection is better understood and confirmed. The MOA should be expanded to include the entire Kittitas County.   |
| II.A.2<br>(SEPA review)           | (1) SEPA review is already required for land subdivisions. How does this provision differ?<br>(2) It is improper for Ecology or Kittitas County to rely on SEPA as a tool to prevent impairment of senior water rights and/or the public interest, as defined and protected under the state Water Code.<br>(3) SEPA exemptions for water rights may prevent the application of this provision. How does the state propose to avoid these exemptions?   |
| II.A.3<br>(Development standards) | (1) This section effectively guarantees water to new developments regardless of water availability, impacts to senior users, impacts on instream flows, etc. This provision of the MOA should not provide for new water use unless the new user can demonstrate no impairment to existing users or detriment to instream flows and other public interest issues, including water quality. Otherwise, mitigation must be required for all past, present and future groundwater withdrawals that are junior to existing water rights and otherwise harming public interest values. |
| II.A.3.a<br>(New parcels)         | (1) The language regarding “domestic purposes” versus “outdoor water use” is ambiguous.<br>(2) If the County is to “develop and apply” enforceable conditions, it should do so through promulgation and adoption of public policies that put all parties on notice and promote consistency in application.<br>(3) A mitigation fee should be required of all new exempt wells. This fee should be used to (a) offset impacts of new use on   |

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|  | <p>existing water right holders and instream flows and (b) fund a water master or similar position to enforce to protect water use.</p> <ul style="list-style-type: none"> <li>(4) Requiring water users to meter is good, but the County should not be in charge of determining “type and design” of meters. The state has an existing, robust metering and reporting program. The Kittitas County meters should be capable of fully integrating into state database.</li> <li>(5) If the County elects to allow “voluntary reading and reporting” of water meter data, it must include a mechanism to enforce against non-compliance.</li> <li>(6) Reporting periods are acceptable.</li> <li>(7) “Collaboration” before enforcement is vague and inadequate to protect against impairment.</li> <li>(8) Enforcement penalties should be dedicated to pay for a water master or similar position.</li> </ul>   |
| <p>II.A.3.b<br/>(Existing parcels)</p> | <ul style="list-style-type: none"> <li>(1) This provision is premised on the same false assumption as II.A.3.a (new parcels), i.e., that water is available to serve groundwater withdrawals that are junior to surface water rights.</li> <li>(2) The reliance on existing plat conditions is vague and will lead to inconsistencies among parcels and water use. It seems likely that County plat conditions do not provide for protection of senior users and instream flows, and are therefore an inadequate mechanism to serve those purposes.</li> <li>(3) Same comment as above regarding use of mitigation fee – it should be required of all users and used for the two purposes identified above.</li> <li>(4) Grandfathering existing uses effectively guarantees illegal water use.</li> <li>(5) Mandatory metering requirements are good.</li> <li>(6) Voluntary program for water conservation is inadequate and will not be effective. All water rights are subject to “reasonable efficiency” requirements. Ecology should enforce this law.</li> <li>(7) Applicants for development permits who intend to augment water for residential use via supplemental sources should be required to meter and report water used from the supplemental source.</li> </ul> |
| <p>II.A.4<br/>(Notice)</p>             | <ul style="list-style-type: none"> <li>(1) Plat warnings and public education do not substitute for affirmative protection of senior water rights and the public interest.</li> <li>(2) As a practical matter, it is difficult if not impossible to curtail water use once a home or business has been built.</li> <li>(3) Given the failure to date of Ecology and/or Kittitas County to protect senior water users and the public interest, we are</li> </ul>  |

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|  | <p>dubious about the ability of these two entities to “collaborate” in a manner that leads to effective public education materials. Mark these words.</p>  |
| <p>II.A.5<br/>(Data)</p>                 | <ol style="list-style-type: none"> <li>(1) Group A &amp; B water systems are already required to report source meter data to the Department of Health. If purpose of additional reporting is to “determine impacts of group domestic systems on water resources” then the data should be provided to Ecology, not Kittitas County or an SSMA. This is particularly so since it is Ecology that is proposing to provide existing data for the Hydrogeologic Report process (next section).</li> <li>(2) Voluntary reporting systems do not work and are unnecessary since this data is already being collected as part of the Water System Planning.</li> <li>(3) A provision that the County “consider” “encouraging” “voluntary” metering is, at a minimum, not enforceable. Voluntary reporting systems do not work.</li> <li>(4) This provision also points up the problem of the failure of the MOA to address lower Kittitas County areas.</li> <li>(5) Requiring public disclosure of meter data is good, however this provision is vague because of the term “agreed upon mechanisms.”</li> <li>(6) Fees to recover costs (i.e. that put the cost on the water consumer) are good. How will Ecology’s costs be recovered?</li> </ol>  |
| <p>II.A.6<br/>(Hydrogeologic report)</p> | <ol style="list-style-type: none"> <li>(1) The provision requiring the development of developer’s reports on hydrogeologic characterization will lead to confusion and inconsistent interpretations of data, particularly that the project proponent will be motivated to minimize findings of impacts.</li> <li>(2) This provision puts a large burden on impacted parties, including adjacent and geographically remote water users, the Yakama Nation, and the Water Resources Program hydrogeologists and other program staff of the Department of Ecology and Bureau of Reclamation to review and correct reports.</li> <li>(3) Since Ecology and Kittitas County representatives do not believe there is adequate data to close the area to new groundwater withdrawals, it is unclear how a requirement that only requires investigation of “existing, available information” will lead to accurate assessments of impacts to existing water users, instream flows, etc.</li> <li>(4) The term “convent” should be “covenant.”</li> <li>(5) Rather than require a “covenant,” developers who intend not to use exempt wells should be required to produce a water right document and/or guarantee of service by a water purveyor that references the purveyors water right document.</li> </ol> |

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|                                  | (6) What will it cost Ecology to provide information services to Kittitas County developers? How will this cost be covered?  |
| II.A.7<br>(Technical assistance) | <p>(1) SEPA review by Ecology does not substitute for affirmative protection of senior water users and the public interest.</p> <p>(2) Does Ecology intend to appeal SEPA determinations that are not protective of impacts to water resources? As organizations with extensive experience in our attempts to use SEPA for this purpose, this is a naïve and ineffective approach.</p> <p>(3) As noted above, the Hydrogeologic Report commenting process puts a burden on Ecology staff. How much? Who pays? Perhaps Ecology should request funding to provide technical support to itself.</p>   |
| II.B<br>(Groundwater study)      | <p>(1) Ecology should establish a technical advisory committee for review of scope of work and products of groundwater study. Subjecting these technical documents to policy or lay persons will undermine effectiveness of study. CELP/AP are prepared to offer to nominate an appropriate technical representative to this committee.</p> <p>(2) Long-term management planning is a big task. Please see and respond to our comments below.</p> <p>(3) How will CELP and AP be part of the advisory committee process?</p>   |
| II.C<br>(Long-term management)   | <p>(1) How does the proposal for a long-term management program fit with current watershed planning in the Yakima basin?</p> <p>(2) How does the proposal for a long-term management program integrate with the fact that Kittitas Valley water resources are connected to and managed as part of the larger Yakima Basin?</p> <p>(3) How are short-term impacts to senior water users protected? Kittitas Valley water users have been regulated several times in the last 10-15 years.</p> <p>(4) How are short-term impacts to instream flows and fish habitat protected? Federal and state agencies must contend now with endangered species recovery in the Yakima basin.</p> |
| II.D<br>(Mitigation program)     | <p>(1) Mitigation should be required of all groundwater users who are junior to the surface water users now subject to regulation during water-short years.</p> <p>(2) To date, Ecology’s efforts to “use the water market” have not been demonstrably successful. What does Ecology intend to do that is different and would lead to successful efforts? Given past failures, the vagueness of this section is troubling because many developments may be built on the assumption that mitigation water will become available in the future.</p>  |
| III<br>(Term of MOA)             |  |
| IV                               | (1) Substantive modifications to the MOA should be subject to  |

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| (Modification)  | public review (not just review by the advisory committee).  |
| V<br>(Mutual defense)   | <p>(1) It is possible that Ecology will find itself needing to bring legal challenges to Kittitas County SEPA determinations involving the Hydrogeologic Reports contemplated in the MOA. Does this provision effectively bar Ecology from such challenges?</p> <p>(2) The requirement that actions be “consistent with this agreement” would not seem to be a defense, since the MOA does not contain a substantive requirement that Kittitas County not approve water withdrawals that impair senior water users or the public interest.</p>  |
| IX.<br>(Existing wells)   | <p>(1) The grandfathering of existing wells that are causing impairment to senior water rights, the public interest, and potentially harming habitat necessary for recovery of endangered species violates a number of laws, both state and federal.</p> <p>(2) The statement "nothing in this section shall apply to the historical use of existing wells already in service for beneficial use..." seems to conflict with Section II.5 re: the intention to gather data from existing Group A &amp; B systems that utilize exempt wells. Ecology should not foreclose its authority to require metering and reporting of water use from any and all existing sources.</p> |
| <b>Attachment 3:<br/>Hydrogeologic<br/>Investigation<br/>and<br/>Characterization</b> | <b>CELP/AP Response</b>   |
| Att. 3 (General<br>Description)   | <p>(1) Use of available information is inadequate due to the paucity of data for this area of the county.</p> <p>(2) How will the information provided in this section be used, verified or evaluated?</p> <p>(3) “Local” is not defined and therefore has no meaning. Is it up to the applicant to determine what “local” means?</p>   |
| Att. 3 (Site<br>Specific<br>Description (a))  | (1) Should well depth also be required as well as location?   |
| Att. 3 (Site<br>Specific (b))   | <p>(1) What is the basis for the ¼ mile limit?</p> <p>(2) “Surface water sources” should be changed to “surface water.”</p> <p>(3) “Spring sources” should be changed to “springs.”</p> <p>(4) What does “water source boundaries” mean? Does it refer to the aquifer boundaries?</p>   |
| Att. 3 (Site<br>Specific (c))   | <p>(1) What does “available head” mean and how does it relate to “saturated thickness”?</p> <p>(2) The information asked for in this subsection is the very</p>   |

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|                               | <p>information that does not exist for this part of the county.</p> <p>(3) It strains credulity to ask an applicant to gather available information on the “orientation and inter-connectedness of fracture systems” or any “recharge-discharge relationships” of any unconsolidated aquifers.</p> <p>(4) This lack of reliable data makes any “site specific” determinations meaningless.</p>  |
| Att. 3 (Site Specific (d))    | <p>(1) The use of the 1 year and 5 year “area of pumping influence” is confusing. These standards are normally used to determine well head protection.</p> <p>(2) This confusion may suggest that wells located more distant from surface water are acceptable. This suggestion is incorrect.</p> <p>(3) What does “area of pumping influence” mean?</p> <p>(4) It is unclear what this relatively crude approximation will be used for. This must be explained in more detail.</p> <p>(5) Any model or analysis created using available information for this subsection will be of questionable use due to the lack of available relevant information.</p> |
| Att. 3 (Site Specific (e))    | <p>(1) This subsection suffers from the same flaws as subsection (d).</p>   |
| Att. 3 (Site Specific (f))    | <p>(1) What does “adversely affected” mean?</p> <p>(2) If this is defined in any way different than the impairment standard then it should not be used.</p>   |
| Att. 3 (Site Specific (g))    | <p>(1) This sentence suffers from very poor structure and grammar and should be rewritten.</p> <p>(2) What does “reasonably obtained” mean?</p> <p>(3) How will time and place capture effects be determined in such a data poor situation?</p>   |
| Att. 3 (Professional Opinion) | <p>(1) The question posed in this subsection must be answered ultimately by the Department of Ecology and not by a consultant hired by the applicant.</p> <p>(2) What does “special circumstances” refer to and what does it mean?</p> <p>(3) Would a “special circumstance” allow for unmitigated impairment of a senior water right?</p>  |

**III. Conclusion**

The proposed MOA does not address the fundamental and most pressing needs identified by CELP and AP. Therefore, if Ecology truly intends to protect senior water right holders and instream flows in the Yakima Basin it must take the preceding comments to heart. Ecology’s own Director, Jay Manning, has concerns that “the current pattern of subdivision approvals and

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drilling exempt wells is not sustainable.”<sup>1</sup> Unfortunately, the MOA fails to alleviate these concerns. The Yakima Basin is over appropriated and as a result has had to regulate junior water users twice in the past seven years alone. This is not a basin in which to continue to allow exempt wells without very stringent mitigation, metering, and enforcement standards. Yet, this MOA, as written, will do just this. CELP and AP urge Ecology to make the necessary changes to the MOA so that senior water users and instream values are protected.

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<sup>1</sup> Kittitas County Water Petition page on the Department of Ecology website, [http://www.ecy.wa.gov/programs/wr/cro/kittitas\\_wp.html](http://www.ecy.wa.gov/programs/wr/cro/kittitas_wp.html), last visited March 24, 2008.