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The Center for  
**Environmental Law & Policy**

## **SKAGIT WATERSHED RULE & EXEMPT WELLS CASE STUDY** **May 2008**

Prior to 1996 many stakeholders in Skagit County, including tribes, the county, Ecology and local water purveyors, signed a Memorandum of Agreement whereby the tribes agreed to not challenge a local water permitting decision in exchange for an IFIM study and the establishment of instream flows. The studies were completed and the instream flows were set and established by rule in 2001. The rule did not contain a reservation of water for exempt wells.

After adoption of the rule, Skagit County sued Ecology. All parties to the original MOA began negotiations to settle the lawsuit, but were unsuccessful. In October 2005 Ecology issued a proposed new rule that included water reservations for permit-exempt wells. The amended rule was adopted in May 2006.

### **I. WRIA Rules**

The Skagit rules incorporate both the Upper and Lower Skagit watershed inventory resource areas (WRIAs). The basin was subdivided into 25 management units each with its own reservation. The quantities for the reservations range from 5,170 GPD in the Salmon/Stevens creek management unit to 5,254,103 GPD for the Lower Skagit management unit. The total reservation for both WRIAs is 9,370,208.<sup>1</sup>

Unlike the rule for the Methow WRIA, the Skagit rules allows for ground water withdrawals and surface water appropriations only under certain conditions.<sup>2</sup> However, similar to the Methow the Skagit rule does not require metering of exempt single domestic wells.<sup>3</sup> Instead, the rule states that estimates of water use for exempt single domestic wells will be calculated by assuming each household uses 350 gallons per day. Moreover, water users on an individual or community septic system receive a credit of fifty percent of the individual's water use, which is credited back into the reservation.

Ecology's septic recharge and water use estimates have been criticized. During the comment period of the rulemaking process the Swinomish Tribe submitted a report analyzing the flaws in the rule's assumptions.<sup>4</sup> The report notes that domestic water use falls into two general categories: indoor and outdoor. The amount of water "returned" to the system is almost entirely dependent on whether it is indoor or outdoor water use. Indoor water use for cooking and sanitation that is discharged to a septic system actually

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<sup>1</sup> WAC 173-503-070 (2007)

<sup>2</sup> WAC 173-503-073(3)(b) (2007)

<sup>3</sup> WAC 173-503-073(3)(d) (2007)

<sup>4</sup> *An Evaluation of the Proposed Amendment to the Instream Resource Protection Program in the Skagit River Water Resource Inventory Areas: Estimates of Aquifer Recharge from Septic Systems* (Jan. 26, 2006) Massmann, Joel

consumes approximately 15% of the water. The rest slowly recharges the groundwater in the area. For outdoor water use, such as lawn and garden watering, the amount of water consumptively used and not returned to the system is approximately 90%. The report observes that Ecology's approach to credit a flat 50% of the maximum daily average used back to the reserve will over-estimate consumptive use for individuals who use little water outdoor and will under-estimate consumptive use for individuals with average or above average outdoor use.<sup>5</sup>

Ecology's assumption of 350 gallons per day per residence does not consider the spike in outdoor water use during the summer months. Between July and September outdoor water tends to increase dramatically. The Swinomish report cites an estimated outdoor water use of 25,185 gallons per person per year. If this total is averaged for just the summer months (July 15<sup>th</sup> to September 15<sup>th</sup>) it results in a daily average of 274 gallons per day per person. Household size in Skagit County is 2.6 people on average. Therefore, if average outdoor and indoor water use are combined, the daily average per household during the summer is 860 gallons per day.<sup>6</sup>

The Skagit rules do not fully consider the extent of exempt well water consumption or its seasonal impacts. The question then becomes: why has Ecology created a rule that fails to properly account for exempt well use in a basin that has consistently failed to achieve its instream flow targets. The answer is OCPI.

## **II. Public Interest Considerations**

The "overriding considerations of the public interest," or OCPI, is a policy used by Ecology to allow for water appropriations that conflict with the state's goal of retaining "perennial rivers and streams of the state ...with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." Any water withdrawals that conflict with this goal can only be allowed "in those situations where it is clear that overriding considerations of the public interest will be served."<sup>7</sup>

The Skagit rule chapter creating the water reservation cites OCPI as the mechanism that allows for future water withdrawals even if they negatively impact stream values. The rule states, "critical to the department's finding that the public interest overrides the negative impacts is the limited nature of the reservations."<sup>8</sup>

### **a. Purpose of OCPI**

Historically, the use of an OCPI determination occurred was during extreme conditions, such as a drought or to provide water for public use, such as fire protection. In the very dry year of 2001, Ecology made an OCPI determination to allow for negative impacts to instream flows on the Columbia River. This was a temporary and one-time "hit" to the instream flows. However, OCPI has recently become a method for allowing sustained long-term impacts to instream flows and values.

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<sup>5</sup> Id. at 5.

<sup>6</sup> Id. at 4

<sup>7</sup> RCW 90.54.020(3)(a) (2007)

<sup>8</sup> WAC 173-503-073(1) (2007)

In 2004, Ecology issued a guidance document regarding the setting of instream flows and allocating out of stream uses.<sup>9</sup> The document notes that in basins where water is not available because additional appropriations would be harmful to the protection and preservation of fish and wildlife, an OCPI determination can be utilized to take more water out of the stream. Further, there must be a “clear showing” of OCPI, which is done through weighing the public interests to determine if they will “clearly override the harm” to the environment. The principle issues to consider when weighing the public interest versus harm are “the limitation of uses to those of maximum public benefit and the extent to which the harm is avoided, minimized and mitigated.”<sup>10</sup>

### **b. Determining OCPI**

When making the Skagit OCPI determination, Ecology noted that the “critical” factor in determining that the public interest overrides the harm to the environment is the “limited nature of the reservations.”<sup>11</sup> However, the “limitation” referred to is not the total extent of the reservation, 10,480 acre-feet per year, but instead that the reservations are finite. Ecology claims once the reservations are exhausted it will not have the ability to create new reservations as “further reservations would be expected to exceed “potential” negative impacts and create actual negative impacts.”<sup>12</sup> Unfortunately, for the fish and wildlife that are dependent on sufficient flows, it may be impossible to protect or preserve them once the reservations have been exhausted.

Notably absent from the Skagit rule is any language regarding “avoiding, minimizing or mitigating” the harm caused by water allocated under the OCPI determination. The rule does not mandate any mitigation for water used from the reserve. It also does not restrict water use to indoor water use nor does it require implementation of water use efficiency programs. Considering that the “avoid, minimize and mitigate” factor is one to be weighed during an OCPI determination, it is alarming that the Skagit rule is silent on this issue. Finally, as discussed above, it is likely the rule under-estimates outdoor water consumptive use and over-estimates septic recharge thereby creating an actual greater impact than assumed in the rule.

OCPI determinations create a slippery slope from which increasing pressure and harm to instream flows will result. As water resources become more constrained throughout the state, Ecology may increase its use of OCPI as a method to take additional water for out of stream uses.

## **III. Population and Water Demand**

Between 1990 and 2007, the population of Skagit County increased by more than 35,000 people.<sup>13</sup> Since the Skagit rule was implemented in 2004 the population has increased by 6,500 people. In 2000 there were 15,252 one unit housing structures in unincorporated Skagit County. By 2007 there is an estimated 16,729, an increase of 1,477 one unit houses.<sup>14</sup>

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<sup>9</sup> *Setting Instream Flows and Allocating Water for Future Out of Stream Uses*, Washington Department of Ecology (2004).

<sup>10</sup> *Id.* at 8

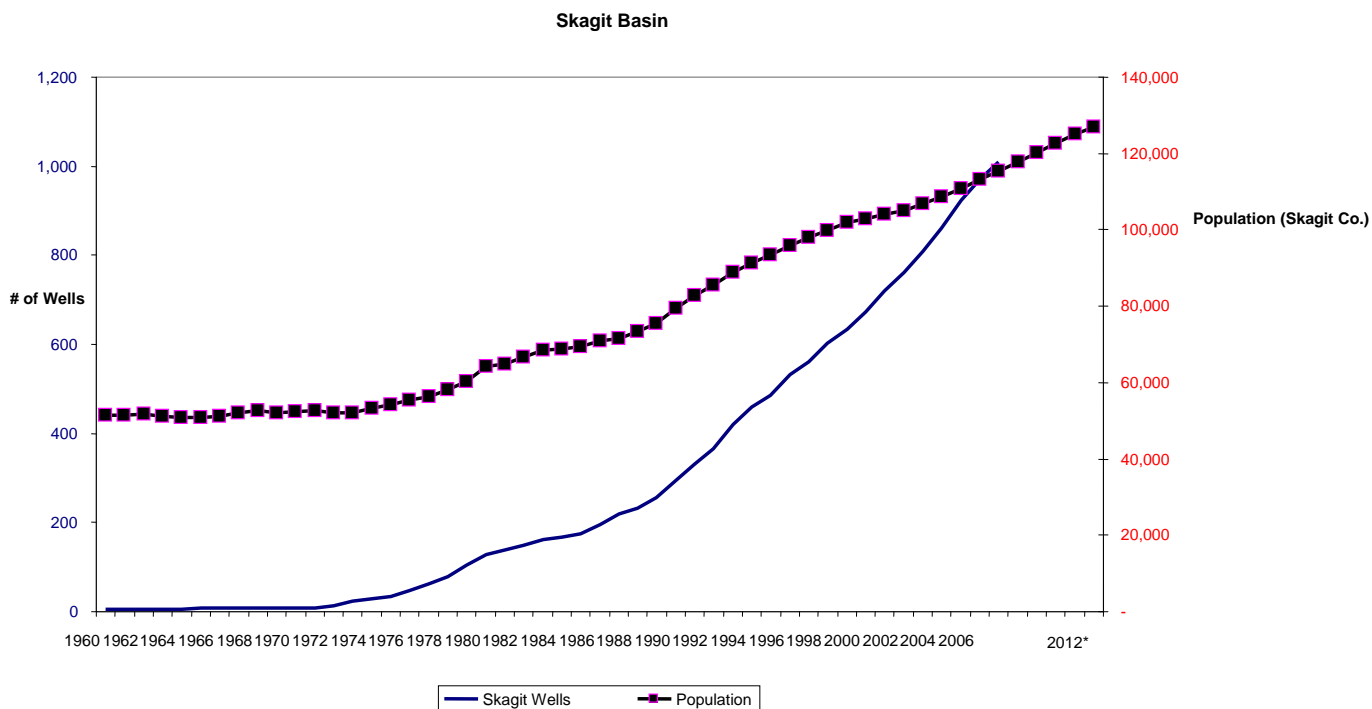
<sup>11</sup> RCW 173-503-073(1) (2007).

<sup>12</sup> *Id.*

<sup>13</sup> Washington Office of Financial Management.

<sup>14</sup> State of Washington Office of Financial Management: 2007 Population Trends, p. 37, available at [http://www.ofm.wa.gov/pop/poptrends/poptrends\\_07.pdf](http://www.ofm.wa.gov/pop/poptrends/poptrends_07.pdf) (last visited May 27, 2008).

As the graph below shows, since 2000 there has been a rapid acceleration of wells drilled in Skagit County.



In 2007 Ecology and Skagit County released the “Skagit Reservation Accounting Report.” As may be expected by the numbers represented in the graph, some management units have experienced significant growth pressure. This is particularly true for the Nookachamps Mainstem. According to the reservation accounting report the quantity of water used from the Nookachamps Mainstem management unit was 15,750 gallons per day. The total reservation for this part of the Nookachamps is only 12,279 gallons per day.<sup>15</sup> Therefore, it would appear that this particular reserve is exhausted and the basin should be closed to new permit-exempt wells. But that is not the end of the story.

As noted above, the rule allows for a 50% septic recharge credit back into the reservation. In the Nookachamps Mainstem management unit this idea has been stretched to a new level. Skagit PUD has placed many homes in this management unit on its public water system, but did not connect the homes to the public sewer line. Therefore, Ecology and Skagit County are considering this “imported” water as a net gain for the Nookachamps Mainstem.<sup>16</sup> Instead of running up against the limit of the reservation there is now “new” water in the basin above and beyond the reservation. The result is that no water was

<sup>15</sup> Available at <http://www.ecy.wa.gov/programs/wr/instream-flows/Images/pdfs/skagit/SkagitReservationReport.pdf>

<sup>16</sup> Id.

debited from the reservation. If this accounting is allowed to continue it will lead to an ever-increasing number of new homes utilizing permit exempt wells under the belief that water is not only available, but increasing in quantities.

#### **IV. County Regulation and Water Quantity**

Skagit County regulations concerning water supply and building permits require builders applying for a building permit to provide evidence of adequate water supply.<sup>17</sup> A person seeking a land division must also show evidence of an adequate water supply.<sup>18</sup> Yet the determination of adequate water supply is done not by a water resources agency, but instead by the Skagit County Public Health Department (SCPHD), whose focus is on sanitation and health as it relates to that particular application.

There is no consideration given to the legal availability of water. County regulations do not compel analysis or action beyond that required under RCW 19.27.097(1) and RCW 58.17.100, which require a showing of adequate water supply prior to new construction or subdivision of land. These requirements were established prior to implementation of the Skagit rule and do not reflect the changes brought by the rule.

In 2007 Skagit County and Ecology entered into an Interlocal Agreement regarding implementation of the rule. The agreement states that the County, with cooperation from Ecology, will create and maintain a database to track applications and approvals for "all subdivisions, short subdivisions and building permits," as well as "water availability determinations." Each February Ecology will post a preliminary report showing water use estimates for the previous year as well as an estimate of the remaining reserve.<sup>19</sup> Skagit County is responsible for tracking water usage for permit exempt wells and reporting the estimated usage to Ecology. Through this coordinated effort Skagit County and Ecology will attempt to track permit exempt wells and water usage from the various reservations.

#### **V. Conclusion**

The Skagit rule is an example of Ecology's policy to allow continued depletion of instream flows rather than provide for the water demands associated with growth via water conservation and efficiency requirements, transfers, fees or other non-consumptive approaches. The Skagit rule does establish a framework and standard to properly account for withdrawals from the reservation. Unfortunately, the assumed quantities, particularly for 350 gallons per day per residence using an exempt well, probably underestimates the total consumptive use. Similarly, the assumption of 50% return rate for septic recharge is an overestimate and fails to account for water quality problems and timing of return flow. The harm to instream flows may be greater than predicted.

Ecology's reliance on OCPI in order to make water legally available for the Skagit is poor policy and precedent. OCPI should only be used in temporary acute situations and should not be used to make long-term water resource allocation decisions. The latter will inevitably result in a reduction of instream flows.

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<sup>17</sup> Skagit County Code 12.48.230(1)

<sup>18</sup> Skagit County Code 12.48.240(1)

<sup>19</sup> Skagit River Basin Instream Flow Implementation Agreement between Skagit County and the State of Washington Department of Ecology, (Jan. 22, 2007).

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