

Washington State Ground Water Association Position Paper regarding private / exempt well use in Washington State and the Department of Ecology's questionable actions taken over rural water issues in Kittitas County since September 2007

On July 16, 2009 the Department of Ecology imposed an emergency rule in Upper Kittitas County banning the drilling of any unpermitted water wells. According to the Department of Ecology, the “uncontrolled proliferation” of these so-called “exempt groundwater wells” is causing “significant concern” about the amount of water senior water right holders may lose, including the ongoing maintenance of healthy stream flows. The reason this emergency exists, according to, Jay Manning, Director of the Department of Ecology, is that Ecology could not reach any kind of agreement with the Kittitas County Commissioners on limiting well use throughout the Upper Kittitas County region.

Interestingly, Ecology has recently used terminology relative to exempt wells that is very revealing. To begin, they've added the term “**uncontrolled proliferation.**” Our State Legislature, in 1945, specifically made exempt wells uncontrolled from the permitting process under Washington State's exempt well law – as stipulated in RCW 90.44.050. Subsequently, exempt wells would not require any permission from the state to be constructed. Furthermore, exempt wells have not been used indiscriminately. They have limits of use and purpose. These limits are clearly enumerated in existing law. Ecology's reference toward the use of exempt wells as “uncontrolled proliferation” is either a dramatic statement of the obvious or a subtle way of suggesting that the use of private / exempt wells should become tightly controlled and severely curtailed. It appears that the Department of Ecology is using every trick-in-their-book to place controls on well drilling activity – not just in Kittitas County – but wherever they see fit.

In Ecology's news releases, they also refer to the private well as “**so-called**” exempt groundwater wells. This represents more new verbiage by the Department of Ecology. Why would Ecology add the adjective so-called? Are they suggesting that these wells are **not** exempt from the permitting process? Are they suggesting they are **not** groundwater wells? Are they attempting to **minimize** the significant value afforded to nearly a million exempt well owners, statewide, who utilize this highly efficient water consumption method? Indeed, by adding the word “so-called,” Ecology is calling into question the very nature of the, long standing, exempt well provision as contained in RCW 90.44.050. For nearly 65 years, rural property owners throughout our state have relied upon the exempt well to provide water to their homes, farms, ranches, and places of business, **without permitting controls**. The only state body that can take away or otherwise modify the existing groundwater exemption, currently guaranteed to every citizen of Washington State, is the Washington State Legislature.

The Department of Ecology may be able to disparage the exempt well with their carefully placed adjectives and not so subtle verbiage but they cannot change the law and they cannot deny the rights of citizens with impunity.

Ecology's Director, Jay Manning, in a commentary submitted to the Ellensburg Daily Record and the Yakima Herald-Republic newspapers stated:

"The exempt well provision was intended to allow homesteaders to have access to water without requiring a permit, but it does not exempt those withdrawals from regulation to protect senior water rights under the legally required principle of 'first in time first in right'."

The above statement represents an oversimplification of a very complicated set of laws. The Department of Ecology has the authority and the responsibility to enforce the water laws. Included in those laws is RCW 90.44.050. In this provision, exempt wells are not allowed to pump more than 5,000 gallons per day. They cannot irrigate more than one half acre of noncommercial lawn or garden. They cannot impair a senior water right. It is the Department of Ecology's responsibility to enforce the well exemption, as they are currently attempting to do by emergency rule. The question here is, has Ecology been diligent in the enforcement of the laws that limit the consumptive use of exempt wells? The answer to that question is a resounding **no**. Director, Manning, refers to the City of Roslyn as an example of what is wrong with our water laws. The City of Roslyn has a **junior** water right to other water right holders in the Upper Basin – even though it is about 100 years old. During drought years, Roslyn is required to stop diverting water so as not to impair **senior** water right holders. At the same time the Department of Ecology allows exempt wells to continue their respective water use unabated in any way. Most of the wells drilled in the Upper Kittitas Basin are junior to the City of Roslyn and yet Ecology did not take any enforcement action against those water right holders.

In reviewing the Department of Ecology's enforcement actions during the past 10 years it is interesting to note that there is not one enforcement action listed for exceeding the legal consumptive limits of an exempt well. Ecology typically issues a couple of dozen fines that total from \$200,000 to \$500,000 for a given calendar quarter, but not one of them has been issued to an exempt well owner. In March of 2009, a man in Ritzville was fined \$3,000 for burning railroad ties. During that same month another man from Black Diamond was fined \$1,000 for inadvertently spilling two gallons of diesel fuel into a lake. Additionally, during that same period, a man in Tonasket was fined \$4,500 for burning a carpet cleaner and other illegal materials in burn barrels. It seems that the Department of Ecology has plenty of time to enforce the laws they deem as important and clearly enforceable and to ignore the laws that do not interest them. Their enforcement actions are at best arbitrary and capricious.

Moreover, how does the use of exempt wells cause "significant concern" on the part of the Department of Ecology and others? Almost all exempt wells are used in rural settings. In these settings, public water is not available – or the cost of bringing public water to the property is economically prohibitive. Exempt wells are almost always used in conjunction with an onsite septic system. The amount of consumptive use in these homes is **considerably less** than the same home on a **public water system** that is connected to a sewer. In most cases, the use of exempt wells with onsite septic systems **enhances** instream flows. Therefore, the amount of consumptive water use by exempt wells becomes very small. A senior water right holder would be very hard pressed to prove that the collective use of

exempt wells is impairing their water right. Speaking of proof, does Ecology have **any proof** that the use of exempt wells is creating a negative impact on instream flows and is impairing senior water right holders in the Upper Kittitas Basin? None whatsoever. The emergency resides in their minds. To summarize, it reminds one of the famed “Chicken Little” story. One is left to wonder...what agenda is really at play here with Ecology?

In summary to the above comments, Washington State Ground Water Association (WSGWA) has carefully observed and has remained involved in Kittitas County’s exempt well water use dilemma since it’s origination in September 2007. Additionally, during a 2008 Public Hearing Session before our Washington State Senate’s (then named) “Water, Energy & Telecommunications Committee”...WSGWA was asked by the Senate Committee to provide viable **source information** and **study data** that dealt with ground water / surface water issues throughout the state which could, in turn, become helpful to the Senate Committee and Ecology. On January 30, 2008, WSGWA supplied the Senate Committee with their requested information and re-emphasized our earlier, January 25th, verbal testimony as follows:

“As stated during Glen Smith’s – Washington State Ground Water Association testimony before the ‘Senate Water, Energy & Telecommunications’ Committee Hearing last Friday, our association embraces sound science and unbiased study data. It’s vital to the ongoing success of our ‘generations-old trade’ here in Washington. With (then) 61 years of significant statewide knowledge and expertise, our association is eager to provide assistance and valued input wherever and whenever it is requested. We would be most **pleased to interface more closely with the DOE** relative to water issues and concerns. We believe we represent a very important ingredient when it comes to the overall process of truly understanding Washington State’s unique water dynamics and concerns.

Washington State Ground Water Association’s membership exceeds 350. Our members are comprised of very skillful, licensed, bonded, certified and insured Drilling Contractor Firms, Pump Installers, Manufacturers & Suppliers, Hydrologists, Hydrogeologists, Engineering and Consulting Firms and personnel.”

Note: To date, WSGWA has not been asked to provide input or to otherwise interface with Ecology over Kittitas County’s water concerns – thereby bypassing an important information resource. **WHY !!**

WSGWA also acknowledges and concurs with each of the recently shared comments expressed by the following county and state lawmakers following Ecology’s moratorium action taken on 7/16/09:

Commissioner, Paul Jewell, 7/16... “Certainly, to me, makes me question what the DOE’s motivations really are.”

Commissioner, Mark McClain, 7/16... “The moratorium was not based on science, nor an impasse with the county but was based ‘on back room, bureaucratic politics’.”

Commissioner, Alan Crankovich, 7/16... “There will be consequences, including economic ones, that will go well beyond what anyone realizes at this point.”

State Rep., Bill Hinkle, 7/17... “Though technically Ecology has the authority to regulate ground water, this is a clear overstepping of the facts and an abuse of their power based on a political agenda that can’t get enough support to pass legislation in Olympia.”

State Rep., Judy Warnick, 7/17... “I have heard from many constituents who want everyone involved to work for a common sense solution. Without an agreement, we cannot move forward with the study to get factual information about our groundwater resources.”

State Senator, Janea’ Holmquist, 7/17... “The state Department of Ecology is ‘effectively bankrupting the building industry’ in Upper Kittitas County, issuing pink slips to its workers, and sending economic shockwaves through a county that is already suffering from economic hardship.”

State Rep., Bill Hinkle, 7/30... “It’s amazing to me that DOE would make such a harmful economic decision without any scientific data to back up its claim of a problem. The agency’s actions push past the will of the people, even the authority of the legislature, to promote their agenda and bow to special environmental interests. DOE doesn’t have any justification for this rash decision that will ultimately hurt economic growth.”

WSGWA is in full support and agreement with each of the above quoted statements.

Furthermore, WSGWA wants to emphasize, again, “The only state body that can take away or otherwise modify the existing ground water exemption, currently guaranteed to every citizen of Washington State, is the Washington State Legislature.” Ecology’s recent use of the terms “so-called”... “uncontrolled proliferation”...and “significant concern” when referring to private, exempt wells utilized by more than a **million** Washington resident / users could be construed as a threat toward needed water consumption that impacts the rights of nearly 20% of **all** Washington residents.

WSGWA **supports** the tireless effort that’s been placed forth by the Kittitas County Commissioners, since September 2007, to bring its rural water concerns to an efficient and sensible resolve.

Today...the fact remains:

*Every citizen of Washington State has an absolute right to water for their own personal use. That right will be secured and defended by Washington State and will not be denied, nor will the cost of supplying such water be made exorbitant. The exercise of this right **will not** be dependent upon permission from Washington State, and as such, no permitted water right user may deny any citizen their respective right to water based upon “first in time first in right principals.” The peoples right to water, though absolute, is not without controls.*

No citizen may use water in a wasteful or irresponsible manner. During droughts or times of emergency, water use may be restricted to a reasonable minimum by Washington State until the drought or state of emergency has passed. It will be incumbent upon all water purveyors, both public and private, to design, operate, and maintain their infrastructure in a manner that will conserve water with a goal of zero unaccounted for water. It is also incumbent upon all state and local governments to enact laws and regulations that will preserve and restore, to the greatest extent possible, the natural flow of both surface and ground water, with the goal of reducing the overall consumptive use of water.

All future infrastructure, as well as the replacement of existing failing infrastructure, will be designed and constructed to keep storm water in a selected basin and to return as much of the used water to that basin as is practical. It is incumbent upon the people who are exercising their right to water; both those obtaining their water from a purveyor and those who are private well owners, to maintain their personal water conveyance infrastructure in good working order and to use their water in a responsible manner, thereby complying with all state and local laws and regulations.

*Washington State **shall not deny** any citizen of their right to drill a water well on their property provided the water well can be constructed without posing a tangible threat to the resource or to public health. No well can be constructed within the service area of a public water system unless the well will be used only for outside water use, an emergency potable water source, or an open loop ground source for a heat pump.*

The foregoing private / exempt well use Position Paper has been submitted for clarification and consideration this 11th day of August, 2009 by – Washington State Ground Water Association – P.O. Box 813, Burlington, Washington 98233.