

1 **EXPEDITE**
2 No hearing set
3 Hearing is set:
4 Date: October 6, 2015
Time: 9:00 a.m.
5 Judge/Calendar: _____

6
7
8 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
9 **IN AND FOR OKANOGAN COUNTY**

10 METHOW VALLEY CITIZENS'
11 COUNCIL and FUTUREWISE,

12 Petitioners/Plaintiffs,

13 v.

14 OKANOGAN COUNTY,

15 Respondent/Defendant.

NO. 15-2-00005-7

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY'S
AMICUS CURIAE BRIEF

16 **I. INTRODUCTION**

17 This case involves a challenge to Okanogan County's recent update of its
18 comprehensive land use plan. The Methow Valley Citizens' Council and Futurewise
19 (collectively referred to as "MVCC") are contesting Okanogan County's adoption of its 2014
20 Comprehensive Plan and associated planning maps and documents, which include an Interim
21 Zone Code and Interim Zone Map (collectively referred to as the "Comprehensive Plan" or
22 "Plan"). The State of Washington, Department of Ecology (Ecology) offers this amicus curiae
23 brief to address issues in this case relating to the Comprehensive Plan's role in the regulation
24 of water resources.

25 Ecology concurs with MVCC's position that the Plan violates the Planning Enabling
26 Act, RCW 36.70, because it fails to adequately protect water resources and water quality. In

1 addition, Ecology concurs with MVCC's position that the County violated the State
2 Environmental Policy Act (SEPA), RCW 43.21C, by issuing a Determination of Non-
3 Significance (DNS) and not preparing an Environmental Impact Statement (EIS) that would,
4 among other things, fully consider impacts on water resources and quality that would be
5 caused by implementation of the Plan.

6 An aspect of the Plan that is of great concern to Ecology is its interim zoning that
7 establishes a "rural high density" zone throughout significant portions of the County which
8 allows the division of land into one-acre lots for the development of one home, or an apartment
9 building with up to four units, on each lot. The interrelationship between land use planning
10 and permitting laws and the laws governing water rights and the management of water
11 resources in Washington is becoming increasingly important as our state's population has
12 grown and competition for limited water resources has increased. There are legitimate
13 concerns that adequate water is not available to support development at this level of density in
14 rural Okanogan County, and that rural development at this density could cause adverse impacts
15 on water quality from, among other things, increased storm water runoff and septic discharge.
16 The Plan allows many more lots than can be supported by the County's water supply, without
17 including measures in the Plan that will ensure that water availability and quality will be
18 adequately protected.

19 Ecology supports MVCC's request for the Court to rule that the Comprehensive Plan
20 fails to comply with the Planning Enabling Act and to remand the matter back to the County
21 with a directive for it to re-write the Plan to bring it into compliance. Further, on remand, the
22 County should be required to comply with SEPA by preparing an EIS that adequately
23 considers impacts on water resources and quality that would be caused by implementation of
24 the Plan. The statement should include a range of alternative planning approaches, so that
25
26

1 adverse impacts on water resources and on fish populations that depend upon water for habitat
2 that would be caused by future development in rural Okanogan County can be minimized.¹

3 II. IDENTITY AND INTEREST OF AMICUS CURIAE

4 Ecology is the state agency that is the administrator of water resources in Washington.
5 See RCW 43.21A; RCW 90.03; RCW 90.14; RCW 90.44; RCW 90.54. Ecology is authorized
6 to adopt rules for water management in watersheds throughout the state. These water
7 management rules include minimum instream flow requirements, stream closures, and other
8 measures. See RCW 90.54.020, .040, .050. Ecology administers Washington's water
9 permitting system through the issuance of decisions on applications for water right permits
10 authorizing surface water diversions and groundwater withdrawals. RCW 90.03.290;
11 RCW 90.44.060. Further, Ecology has the authority to ensure that water resources are used
12 lawfully, including regulating permit-exempt groundwater wells² that are used inconsistently
13 with the statutory allowance in the Groundwater Code. See, e.g., RCW 90.03.600, .605.

14 Ecology has four important interests in this case. First, the issue involving the Planning
15 Enabling Act's requirement that comprehensive plans include adequate provisions for
16 protection of water resources, stated below, has statewide ramifications related to the overlap
17 between Ecology's water management authority and counties' land use regulation authority
18 under the Act when such authority addresses local water resources. Second, because
19 Okanogan County's Comprehensive Plan will govern the use of land and water in rural areas of
20 the County in the future, Ecology seeks to ensure that the County's specific Plan will include
21 provisions that will facilitate the proper management and protection of water resources. Third,

22 ¹ In this brief, Ecology is addressing only the County's adoption of the Comprehensive Plan as it relates
23 to the management of water use and the maintenance of instream flows, i.e., water "availability" or "quantity,"
24 and as it relates to water quality. Ecology is not addressing any other issues, such as the issue relating to
requirements to designate agricultural and forest lands in a comprehensive plan.

25 ² Under the Groundwater Code, certain uses of groundwater for domestic, stock watering, non-
26 commercial lawn and garden irrigation, and industrial purposes are exempt from the requirement to obtain a
permit from Ecology to establish a new water right. RCW 90.44.050. However, this is an exemption *only* from
the permitting requirement; and other aspects and requirements of water law apply to permit-exempt groundwater
uses. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

1 the water management rule for the Methow River Basin (Methow Rule), WAC 173-548, and
2 the water management rule for the Okanogan River Basin (Okanogan Rule), WAC 173-549,
3 are involved in the dispute over water in this case. As the agency which adopted these rules
4 and is charged with their implementation, Ecology has an interest in this Court's consideration
5 of the Methow Rule and the Okanogan Rule. Fourth, Ecology submitted comments on
6 Okanogan County's Draft Environmental Impact Statement (DEIS) and has an interest in
7 ensuring that the County complies with the requirements of SEPA so that its Comprehensive
8 Plan will be developed based on proper consideration of alternative courses of action and will
9 include adequate measures for the protection of water availability and quality.

10 **III. SPECIFIC ISSUES ADDRESSED BY AMICUS CURIAE**

11 1. In adopting its Comprehensive Plan, did Okanogan County violate
12 RCW 36.70.330(1), the provision in the Planning Enabling Act that requires land use elements
13 of comprehensive plans to protect groundwater resources?

14 2. Did Okanogan County violate the State Environmental Policy Act when it
15 withdrew its Draft Environmental Impact Statement relating to its Comprehensive Plan and
16 issued a Determination of Non-Significance finding that it was unnecessary to prepare an
17 Environmental Impact Statement?

18 **IV. FACTUAL BACKGROUND**

19 Ecology generally agrees with the statement of facts contained in Methow Valley
20 Citizens' Council's and Futurewise's Petitioners'/Plaintiffs' Opening Brief (MVCC Opening
21 Br.) at pages 7 through 10, and adds the following background related to Ecology's
22 involvement in this matter. Through letters dated June 5, 2009, and April 7, 2011, Ecology
23 submitted comments to the County on its draft Comprehensive Plan update documents. Letter
24 from Department of Ecology to Okanogan County, June 5 2009; RAP00000261-265 (Letter
25 from Department of Ecology to Okanogan County, April 7, 2011). A copy of the June 5, 2009,
26 letter is attached as Appendix 1, and a copy of the April 7, 2011, letter is attached as

1 Appendix 2. Subsequently, on June 21, 2013, Ecology sent a letter to the County that provided
2 comments on the draft Comprehensive Plan update and its accompanying DEIS. Letter from
3 Department of Ecology to Okanogan County, June 21, 2013.³ A copy of the June 21, 2013,
4 letter is attached as Appendix 3.

5 V. ARGUMENT⁴

6 A. Okanogan County Violated the Planning Enabling Act's Requirement That 7 Comprehensive Plans Must Protect Groundwater Resources

8 Ecology agrees with MVCC that the Comprehensive Plan fails to comply with
9 RCW 36.70.330(1), the provision of the Planning Enabling Act that requires protection of
10 groundwater resources. This provision requires comprehensive plans and zoning to be
11 consistent with Ecology's water management rules, and the County's Plan is inconsistent with
12 Ecology's rules for the Methow River Basin and the Okanogan River Basin. Implementation
13 of the Plan would cause adverse impacts to instream flows, and senior water right holders, in
14 both of these basins, where Ecology already issues orders during water-short periods that
15 require water right holders to shut off their use when required minimum flows are not met.

16 RCW 36.70.330, the subsection of the Planning Enabling Act setting forth required
17 elements for comprehensive land use plans, provides, in relevant part:

18 The comprehensive plan shall consist of a map or maps, and descriptive text
19 covering objectives, principles and standards used to develop it, and shall
include each of the following elements.

20 (1) A land use element which designates the proposed general
21 distribution and general location and extent of the uses of land for agriculture,
22 housing, commerce, industry, recreation, education, public buildings and lands,
and other categories of public and private use of land. . . . *The land use element
shall also provide for protection of the quality and quantity of groundwater*

23 ³ Ecology has not ascertained whether its June 5, 2009, and June 21, 2013, letters to the County are
24 included in the administrative record compiled by the County for this case. It is Ecology's understanding that the
record will be supplemented to include any records referred to in briefs that have not yet been included in the
record.

25 ⁴ Ecology agrees with MVCC that this Court has jurisdiction over this case under the Uniform
26 Declaratory Judgment Act or the Land Use Petition Act. *See* MVCC Opening Br. at 10–12, 14–18. It is
axiomatic that there must be some avenue available for judicial review of a county's decision to adopt a
comprehensive land use plan under the Planning Enabling Act.

1 *used for public water supplies* and shall review drainage, flooding, and storm
2 water run-off in the area and nearby jurisdictions

3 RCW 36.70.330(1) (emphasis added). Further, the Act requires that development regulations,
4 which include zoning codes and maps, “shall not be inconsistent with the county’s
5 comprehensive plan.” RCW 36.70.545.

6 In its landmark decision involving the interrelationship between regulation of land use
7 and water resources, *Kittitas County v. Eastern Washington Growth Management Hearings*
8 *Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011), the Supreme Court held that, under the Growth
9 Management Act (GMA), local governments must find that water supply is both legally and
10 physically available before they may approve subdivision and building permit applications. In
11 rejecting a county’s argument that it was preempted from adopting regulations related to the
12 protection of groundwater resources on the ground that such responsibility rests only on
13 Ecology, the Court pronounced in *Kittitas County* that:

14 In fact, several relevant statutes indicate that the County *must* regulate to some
15 extent to assure that land use is not inconsistent with available water resources.
16 The GMA directs that the rural and land use elements of a county’s
 [comprehensive] plan include measures that protect groundwater resources.

17 *Kittitas Cty.*, 172 Wn.2d at 178. More recently, in *Whatcom County v. Western Washington*
18 *Growth Management Hearing Board*, 186 Wn. App. 32, 46, 344 P.3d 1256 (2015), the Court
19 of Appeals held that, in adopting comprehensive plans under the GMA, counties are required
20 to include rural elements that include measures to protect water availability and water quality.

21 For the most part, as a consequence of its population, Okanogan County is not required
22 to adopt a comprehensive plan and certain development regulations under the GMA. *See*
23 RCW 36.70A.040. As a result, the County has opted to engage in planning under the
24 requirements of the Planning Enabling Act. But that does not mean that the same principles
25 related to groundwater resources under the GMA are inapplicable to Okanogan County merely
26 because it primarily plans under the Planning Enabling Act.

1 Ecology agrees with MVCC that the Planning Enabling Act, which contains identical
2 statutory language regarding protection of groundwater as in the GMA, requires protection of
3 groundwater resources in the same manner that is required under the GMA, and that the
4 principles stated in *Kittitas County* apply to Okanogan County's planning functions. See
5 MVCC Opening Br. at 50–51. The GMA requires that the land use element of a
6 comprehensive plan adopted under that act “shall provide for protection of the quality and
7 quantity of groundwater used for public water supplies.” RCW 36.70A.070(1). The Planning
8 Enabling Act includes the exact same language, except for the addition of the word “also.”
9 RCW 36.70.330(1). Since this language in both statutes is the same, the Planning Enabling
10 Act should be read to require protection of groundwater resources to the same extent as the
11 provisions in the GMA requiring the protection of groundwater in comprehensive plans and
12 zoning regulations. To comply with this provision, comprehensive plans and zoning must
13 ensure that water is legally available to support the development that would be permissible, or
14 require mitigation to offset impacts on senior water rights, including closed stream flows, or
15 minimum instream flows at times when they are not met. And they must also ensure adequate
16 protection of water quality, either through reducing the density of development that is allowed,
17 or by requiring mitigation or other measures to prevent or offset adverse impacts.

18 The interim zoning included in the County's Plan contains a “rural high density” zone
19 throughout significant portions of the County that allows the division of land into one-acre lots.
20 And virtually all that the Comprehensive Plan states about “water rights,” other than a policy to
21 attempt to keep water rights from being transferred outside the county, is that:

22 Okanogan County recognizes a water right as private property and affords it the
23 same protection. Recent court decisions concerning exempt wells have changed
24 the historic view of exempt wells and the County is required to follow state
25 guidelines with respect to uses and developments on exempt wells. State water
26 right permits are administered by the Washington Department of Ecology and it
is the policy of the County that promotion of the goals of this Comprehensive
Plan be a consideration in any permit decisions made by that agency.

1 RAP00001371–1422 (Comprehensive Plan of 2014, at 11–12). Similarly, the Plan appears to
2 attempt to justify high density zoning by stating that:

3 Historic land use divisions and segregations have created many more legal lots
4 in the County than the population growth suggests is needed. However . . .
5 requirements to prove available water supply to obtain building permits and
6 court-mandated limitations on exempt wells in specific projects under
7 RCW 90.44.050 severely limit the population and development potential of the
8 more rural areas where public water supplies are not available.

9 The County supports density rather than lot size limitations in low density rural
10 areas to minimize the amount of lands devoted to roads, fences and impervious
11 surfaces to limit development impact on the more remote rural areas and avoid
12 conflicts with recreation and resource issues.

13 *Id.* at 14.

14 These provisions fail to adequately protect the quality and quantity of groundwater, as
15 required by the Act. Specifically, the County’s failure to address the comments provided by
16 Ecology in its three letters by revising the draft Plan in order to prevent the potential impacts
17 on water availability and quality discussed by Ecology demonstrates the County’s failure to
18 comply with RCW 36.70.330(1). Despite explicit concerns regarding water availability raised
19 by Ecology in its letters, the County failed to make any changes to its draft Plan to address
20 Ecology’s concerns. MVCC has correctly characterized the water-related concerns that
21 Ecology expressed to the County through its comments. *See* MVCC Opening Br. at 27–29,
22 39–40; Methow Valley Citizens’ Council’s and Futurewise’s Petitioners’/Plaintiffs’ Reply
23 Brief and Answer to Motion to Dismiss (MVCC Reply) at 5–6, 20–21. Ecology expressed
24 concerns over potential impacts to instream flows, and senior water right holders, in the
25 Methow River and Okanogan River Basins, where Ecology already issues orders during water-
26 short periods that require water right holders to shut off their use when required minimum
flows in those basins are not met. The County failed to address Ecology’s comment that:

Demands of new water use reduce water legally available for existing, senior
water rights including instream flows. Where hydraulic continuity is shown
with surface water, new domestic uses established under RCW 90.44.050 are
subject to curtailment to meet the needs of more senior water rights in water
short years. If water supply becomes limited, water use could be curtailed by

1 those with senior water rights, which includes instream flows established in [the
2 Methow and Okanogan Rules].

3 App. 2, at 3.

4 Under the Methow Rule and the Okanogan Rule, adequate water is not legally available
5 in many parts of the County to support development under the interim zoning, unless a
6 mitigation system is established to ensure that new water uses are offset by the acquisition of
7 shares of senior water rights, or by other measures to mitigate the impacts of new water uses on
8 stream flows. New unmitigated water rights are not available because minimum instream
9 flows established under the Okanogan Rule and the Methow Rule are frequently not met,
10 which is causing the curtailment of preexisting irrigation water rights that have priority dates
11 senior to rights associated with new wells. Further, under provisions in the Methow Rule, and
12 the Supreme Court's decision in *Department of Ecology v. Campbell & Gwinn, L.L.C.*,
13 146 Wn.2d 1, 43 P.3d 4 (2002),⁵ reliance on the exemption from water right permitting for
14 group domestic water uses, without mitigation to offset effects on flows, is highly problematic.
15 Consequently, without a mitigation system, water is not available to support new development
16 in much of the County, especially in the rural high density zones. The Comprehensive Plan
17 and associated development regulations must include mitigation provisions to be adequately
18 protective of groundwater resources under RCW 36.70.330(1).

19 **1. Under the Okanogan Rule, the Comprehensive Plan is deficient because,
20 without mitigation, permit-exempt groundwater may not provide an
21 adequate source of water for new development**

22 The Okanogan Rule established stream management units and minimum instream flow
23 requirements for certain river reaches. WAC 173-549-020. Additionally, there are closures of
24 certain streams to new water uses on a seasonal basis. WAC 173-549-025. Groundwater use

25 ⁵ In *Campbell & Gwinn*, the Supreme Court held that each subdivision can qualify for only one
26 exemption from groundwater permitting requirements for group domestic water use not exceeding 5,000 gallons
per day of water use, and that a development cannot be sliced into multiple subdivisions that individually would
require no more than 5,000 gallons of water per day. *Campbell & Gwinn*, 146 Wn.2d at 12-15.

1 is subject to the instream flows and closures when there is hydraulic continuity between a
2 proposed groundwater source and regulated surface water body. WAC 173-549-060. Under
3 the Okanogan Rule's express language, permit-exempt groundwater use is not subject to the
4 instream flows and closures. However, permit-exempt groundwater use that would affect
5 instream flows may not provide an adequate source of water for new homes because holders of
6 water rights that are senior in priority to new permit-exempt wells are already being required to
7 shut off their water use at times when the flows are not met:

8 Ecology regularly sends out Administrative Orders under RCW 90.03 alerting
9 water right holders they will be curtailed in favor of instream flows for the
10 Methow and Okanogan Rivers. This has been a common occurrence in
11 Okanogan County where users were curtailed or shut off four out of the last five
years on the Methow and three out of the last five years on the Okanogan during
times of low flow.

12 App. 2, at 3. The water users who are shut off hold water rights for irrigation purposes that
13 were issued by Ecology after the date that the Okanogan Rule became effective in 1976 and
14 include conditions requiring that water use be curtailed at times when the rule's flow
15 requirements are not met. RAP00000078-83 (Department of Ecology, *Focus on Water*
16 *Availability for the Okanogan Watershed, WRIA 49*, at 2), ("Eighty-two irrigation rights based
17 on permits issued after adoption of WAC 173-549 are curtailed at some time during most years
18 when the adopted flows are not met."). As a result, users of new permit-exempt wells, who
19 would have rights that are junior in priority to the already-existing irrigation rights with the
20 curtailment conditions, could impair the holders of those rights by forcing them to shut off
21 their water use because of low flows earlier than would occur if the new, junior exempt wells
22 were not pumping water that is connected to the river. Thus, Ecology informed the County
23 that "water use could be curtailed by those with senior water rights," and further commented
24 that the:

25 Department of Health does not consider interruptible water rights an adequate
26 and reliable water source consistent with WAC 246-290-420. For these reasons,
future water source plans will likely not be a reliable supply for year round
residential use and may be subject to interruption due to conflict with instream

1 flows. As such, it will be questionable whether [the proposed comprehensive]
2 plan would provide an appropriate provision for potable water supply under
RCW 58.17.

3 App. 2, at 3.

4 **2. Under the Methow Rule, the Comprehensive Plan is deficient because,**
5 **without mitigation, permit-exempt groundwater may not provide an**
6 **adequate source of water for new development**

7 The County's failure to account for the availability of water in areas governed by the
8 Methow Rule is even more apparent because the Methow Rule expressly governs permit-
9 exempt groundwater use. Under WAC 173-548-050, several streams and lakes are closed to
10 new appropriations of water, including "groundwater hydraulically connected with these
11 surface waters," which includes "rights to use water consumptively established through permit
12 procedures and groundwater withdrawals otherwise exempted from permit under
13 RCW 90.44.050." WAC 173-548-020 establishes the Lower Methow, Middle Methow, Upper
14 Methow, Methow Headwaters, Early Winters Creek, Chewack River, and the Twisp River as
15 stream management units, sets forth base (i.e., minimum) flows for those reaches on a monthly
16 basis, and states that "[a]ll rights hereafter established shall be subject to the base flows . . .
17 except as provided under WAC 173-548-030 herein." WAC 173-548-020(4). In turn,
18 WAC 173-548-030 provides that "there are surface waters available for appropriation from the
19 stream management units" in certain amounts and at certain times, sets forth quantities of
20 water in cubic feet per second during each month of the year for each stream management unit,
21 and states that "[t]he appropriation limit is set forth to be an amount equal to the one in two
22 year natural reach discharge on a monthly basis for all management reaches except Early
23 Winters Creek. The appropriation limit for Early Winters Creek is set forth to be an amount
24 equal to the estimated natural mean monthly streamflow for that stream." Then, the second
25 subsection sets forth allocations of water by use categories for the period from April to
26 September, and the period from October to March. These include reserved allocations of
2 cubic feet per second in each management unit for "Single Domestic and Stock Use." For

1 “Public Water Supply, Irrigation, and Other Uses,” the reserved allocations are stated as
2 “[r]emaining waters up to the appropriation limit set forth in WAC 173-548-030(1)(c).”
3 WAC 173-548-030. And, under WAC 173-548-060, groundwater use is subject to the
4 instream flows. WAC 173-548-060 states that “[i]f it is determined that a future development
5 of groundwater measurably affects surface waters subject to the provisions of [this rule], then
6 rights to said groundwater shall be subject to the same conditions as affected surface waters.”
7 Groundwater use is subject to the instream flow requirements set forth in WAC 173-548-020 if
8 there is any indication of hydraulic continuity⁶ between the aquifer that would be pumped and
9 a regulated surface water body that would cause even a de minimis reduction in stream flows.
10 *Postema v. Dep’t of Ecology*, 142 Wn.2d 68, 85–93, 11 P.3d 726 (2000); *see also Hubbard v.*
11 *Dep’t of Ecology*, 86 Wn. App. 119, 125–127, 936 P.2d 27 (1997) (In a case involving
12 application of the Okanogan Rule, a “.004 percent reduction in the river’s flow during low
13 flow” was determined to demonstrate hydraulic continuity between the proposed well and the
14 Okanogan River.).

15 Ecology has determined that no water remains available under the reservations for
16 “Public Water Supply, Irrigation, and Other Uses,” which would include group domestic water
17 use. For the reservations for “Single Domestic and Stock Use” it has been estimated that some
18 water remains available for new appropriations. RAP00000222–235 (Letter from Methow
19 Watershed Council to Okanogan County, June 14, 2011). However, the quantities remaining
20 available are limited and Ecology may at some future time determine that reserved waters have
21 been fully allocated. Further, these reservations where some water remains available only
22 allow use of water for single domestic uses; in other words the reserved water could be used to
23 supply single homes, but cannot provide water for group domestic use to support subdivisions.
24 And even new, unmitigated permit-exempt use for single domestic purposes can be

25 _____
26 ⁶ “Hydraulic continuity” is a scientific term that describes the interconnection between groundwater (aquifers) and surface water bodies (such as rivers and lakes).

1 problematic because, just as with the Okanogan Rule, holders of water rights that are senior in
2 priority to new permit-exempt wells could be required to shut off their water use when the
3 minimum instream flows required under the Methow Rule are not met. Thus, a Plan must take
4 this Rule and the limited availability of water into account, which the County has failed to do.

5 **3. The Comprehensive Plan and interim zoning lack sufficient controls to**
6 **prevent proliferation of illegal permit-exempt wells**

7 MVCC also is correct that, in the recent past, Ecology has opposed the County's
8 approval of proposed developments that were divided into several applications for smaller
9 adjacent subdivisions in efforts to skirt the requirement that they must obtain a water right
10 permit if more than 5,000 gallons per day of water is required to serve the entire development.
11 MVCC Opening Br. at 53–54. For that reason, Ecology commented to the County that it
12 “fears the potential misuse of the groundwater exemption resulting from future developments
13 as a consequence” of the zoning. App. 2, at 4. Ecology is concerned that the allowance for
14 subdivision of large tracts of land into one-acre lots could promote larger developments
15 consisting of numerous one-acre lots where proponents could attempt to manipulate the permit
16 exemption statute through the daisy-chaining of permit-exempt wells.

17 With regard to the daisy-chaining of permit-exempt wells, as explained above, under
18 the Methow Rule, since the reservation for domestic use is only for single domestic use that
19 can support a single home, and not group domestic use that can provide a water supply for a
20 subdivision, the Plan and interim zoning should be revised to provide that *no* subdivisions in
21 the area covered by the Methow Rule can be approved that would rely on permit-exempt
22 groundwater, unless there is sufficient mitigation to offset impacts on stream flows.

23 With respect to the area covered by the Okanogan Rule, sufficient measures must be
24 included in the Plan to prevent the daisy-chaining of exempt wells. In *Whatcom County*, the
25 Court of Appeals upheld a comprehensive plan adopted by Whatcom County in part because
26 that county's development regulations include a provision stating that “[a]ll contiguous parcels

1 of land in the same ownership **shall** be included within the boundaries of any proposed long or
2 short subdivision of any of the properties” and that “lots so situated **shall** be considered as one
3 parcel...” *Whatcom Cty.*, 186 Wn. App. at 47–48 (emphasis in original) (citation omitted).
4 Okanogan County’s Plan should be re-written to include a similar measure that is geared to
5 prevent the unlawful daisy-chaining of permit-exempt wells.

6 To summarize in regard to water quantity, the County’s Plan fails to comply with
7 RCW 36.70.330(1). The Planning Enabling Act provision for protection of water resources
8 requires comprehensive plans and zoning to be consistent with Ecology’s water management
9 rules, and the County’s Plan is inconsistent with both the Methow Rule and the Okanogan
10 Rule. Implementation of the Plan would cause adverse impacts to instream flows, and senior
11 water right holders, in the Methow and Okanogan River Basins, where Ecology already issues
12 orders during water-short periods that require irrigation water right holders to shut off their use
13 when required minimum flows in those basins are not met. And the Plan is also inconsistent
14 with the Methow and Okanogan Rules because it does not specifically require that all new
15 subdivisions in the Methow Basin must provide mitigation for water resource impacts, and that
16 all new subdivisions in the Okanogan Subbasin must comply with *Campbell & Gwinn* and
17 include mitigation for water resources impacts if unmitigated water use would cause reductions
18 in instream flows that would result in earlier curtailment of senior irrigation water rights.

19 **4. The Comprehensive Plan and interim zoning lack sufficient controls to**
20 **prevent adverse impacts on water quality**

21 With respect to water quality, Ecology raised concerns over potential groundwater
22 contamination from septic systems, and contamination of surface water from development
23 activities, within the high density zones. App. 2, at 1–2; App. 3, at 2–3. High density rural
24 development could cause adverse impacts on water quality from, among other things, increased
25 storm water runoff and septic discharge. Increased rural development density, where homes
26 will have to rely on septic systems, will increase the potential for groundwater contamination

1 from septic systems. *See* MVCC Opening Br. at 33–34. Also, increased density will cause
2 increases in impervious surfaces and associated storm water runoff, which will increase the
3 potential for surface and groundwater contamination. The Plan fails to comply with the
4 Planning Enabling Act because the density allowed under the Plan would cause negative
5 impacts on the quality of water that the public in Okanogan County depends on for water
6 supplies.

7 **B. By Failing to Issue an Environmental Impact Statement, Okanogan County**
8 **Violated the State Environmental Policy Act**

9 Initially in its SEPA process, the County made a threshold determination that the
10 proposed Plan update may cause significant adverse impacts on the environment, issued a
11 Determination of Significance, and proceeded to prepare a DEIS that was released for public
12 comment. Later, the County back-tracked, withdrew its DEIS, and issued a DNS. Under
13 SEPA, an EIS must be prepared when a proposal may have a significant adverse impact on the
14 environment. Accordingly, a DNS can only be issued in a scenario where the agency
15 reasonably believes that a proposal will not have a significant adverse impact on the
16 environment. Ecology agrees with MVCC that the County’s second threshold determination,
17 that the Plan will not have a significant adverse impact on the environment, was unlawful and
18 should be reversed.

19 SEPA requires that “[a]n environmental impact statement . . . shall be prepared on
20 proposals for legislation and other major actions having a probable significant, adverse
21 environmental impact.” RCW 43.21C.031(1); *see also* RCW 43.21C.030(c). When a proposal
22 is an “action” that is not “categorically exempt” from SEPA review, an agency must make a
23 “threshold determination” as to whether preparation of an EIS is necessary. WAC 197-11-330.
24 To make such a determination, the agency must use an environmental checklist to assist its
25 analysis and must document its conclusion as to whether an environmental impact statement is
26 required by issuing a Determination of Significance or a DNS. WAC 197-11-315, -330.

1 The agency must base its threshold determination on “information reasonably sufficient
2 to evaluate the environmental impact of a proposal.” WAC 197-11-335. Consequently, a
3 checklist must adequately address a proposal and must fully disclose its potential
4 environmental impacts. *Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn.
5 App. 555, 580–581, 309 P.3d 673 (2013).

6 Through its letter dated June 21, 2013, attached as Appendix 3, Ecology provided
7 extensive comments on the DEIS that related to both water resources and water quality. The
8 County violated SEPA when it failed to revise the DEIS based on Ecology’s comments
9 pointing to potential significant environmental impacts, and, instead, jettisoned the draft and
10 issued a DNS. The County violated SEPA by issuing the DNS because it failed to disclose
11 adverse impacts that were reported by Ecology in its comments and, thus, failed to either
12 address them or explain why they are not significant.

13 The County’s failure to address Ecology’s comments by not including information on
14 environmental impacts discussed by Ecology in the SEPA Environmental Checklist (Checklist)
15 also demonstrates the County’s failure to comply with SEPA. The Checklist completed by the
16 County provides, at the very most, only bare-bones information on water availability in rural
17 Okanogan County. This scanty information is not reasonably sufficient to properly evaluate
18 potential impacts to the environment related to water availability in general and to groundwater
19 in particular and determine whether and what measures may need to be included in the
20 Comprehensive Plan and the interim zoning to prevent environmental impacts. *See Spokane*
21 *Cty.*, 176 Wn. App. at 580–81, (holding that to provide information reasonably sufficient to
22 evaluate a proposal’s impacts, a checklist must contain information with “particularity,” rather
23 than “broad generalizations”).

24 The section of the Checklist relating to surface water merely explains that there are
25 three major river systems in the County—the Columbia, Methow, and Okanogan Rivers—and
26 that “[r]ivers and lakes provide a major source of irrigation water for the County’s agriculture

1 industry and recreation opportunities tied to boating, swimming, fishing and, where
2 appropriate, recreational gold mining.” RAP00000030–67 (Checklist at 4). No information is
3 provided on how current factors related to the Methow and Okanogan Rivers may affect the
4 availability of water for future development, even under the interim zoning that was approved
5 along with the Comprehensive Plan. For instance, the Checklist fails to mention the limited
6 availability of water, despite information provided by Ecology to the County explaining that
7 Ecology regularly issues administrative orders alerting holders of water rights that have
8 priority dates junior to the minimum instream flows required under the Methow and Okanogan
9 Rules that they must shut off their water use when the flows are not met, and that “[b]ecause
10 users are already being shut off in the Methow and Okanogan River Basins, it is critical the
11 County carefully consider how to evaluate water availability and legal water sources to support
12 and sustain growth” in the County. App. 3, at 1.

13 The section of the Checklist relating to groundwater merely states that “[m]uch of the
14 new development in the unincorporated portions of the County will be served by existing water
15 systems and exempt wells,” and that “[t]he current Comprehensive Plan update recognizes
16 limitations imposed on exempt wells since the adoption of the prior Comprehensive Plan” that
17 have resulted from several Washington Supreme Court decisions. RAP00000030–67
18 (Checklist at 4–5). However, as discussed above, the Comprehensive Plan does not contain
19 any requirements that would facilitate implementation of and compliance with those Supreme
20 Court decisions despite the fact that RCW 36.70.330(1) requires that the comprehensive plan
21 “land use element shall also provide for protection of the quality and quantity of groundwater
22 used for public water supplies”

23 The Checklist then proceeds to state that “[n]ew development under the revised
24 Comprehensive Plan will be more restrictive than historically as a result of the legal precedents
25 set by those cases,” and that “[t]he availability of water for withdrawal and specific limitations,
26 if any, on the availability of water, including closed basins are set forth” in the water

1 management rules for the Methow and Okanogan Basins. RAP00000030-67 (Checklist at 5).
2 But the Checklist does not include any information on how, as also discussed above, daisy-
3 chaining permit-exempt wells to skirt the 5,000 gallon per day limit under RCW 90.44.050 has
4 been a problem in the County. If the Checklist had provided such information, it could have
5 prompted the inclusion of provisions in the Comprehensive Plan to prevent such problems,
6 such as the measure that the Court of Appeals found important in upholding the comprehensive
7 plan at issue in the *Whatcom County* case.

8 Further, the Checklist states that water for future development in the County under the
9 Comprehensive Plan would “be served by existing water systems and exempt wells,”
10 (Checklist at 4), but neglects to disclose that water may not be available in the future for new
11 permit-exempt wells unless there is mitigation to ensure there will be no impact on instream
12 flows. Inclusion of this information could have prompted the County to include an approach in
13 the Plan to facilitate development of a mitigation system through the transfer of existing water
14 rights into one or more water banks for mitigation for new permit-exempt uses when it is
15 determined that no water is available for new uses under the reservations of the Methow Rule
16 and to ensure that new permit-exempt wells will not injure holders of irrigation water rights
17 that are subject to curtailment when the instream flows under the Methow Rule and the
18 Okanogan Rule are not met.

19 The County erroneously contends that its withdrawal of the DEIS and issuance of the
20 DNS was justified because it adopted interim, rather than final, zoning in association with its
21 approval of the Comprehensive Plan. This argument fails for three reasons. First, an interim
22 zoning code is an “action” under SEPA. Second, the Comprehensive Plan constitutes a major
23 action subject to SEPA in its own right since it provides the framework for future zoning and
24 regulation of development in the County, which will undoubtedly cause environmental
25 impacts. And third, the interim zoning causes adverse environmental impacts by, among other
26 things, allowing 1-acre lots in rural areas, while not including any measures to prevent the

1 daisy-chaining of permit-exempt wells, and not ensuring that new development cannot be
2 approved in areas where water is not available for new permit-exempt wells, without
3 mitigation.

4 Ecology agrees with MVCC's position that the County erred in justifying its decision to
5 issue the DNS on the basis that the interim zoning associated with the Plan purportedly will not
6 result in any greater environmental impacts than would be caused by the former zoning code.
7 *See* MVCC Opening Br. at 40–41; MVCC Reply at 14–15. While the County asserts that the
8 interim zoning maintains the “status quo,” true maintenance of the status quo with respect to
9 environmental impacts would involve a moratorium on development or temporary down-
10 zoning to allow less density while the County produces a permanent zoning code, rather than
11 continued development without sufficient measures to ensure protection of water resources.

12 Moreover, the Hearings Examiner erred in affirming the County's DNS by justifying
13 the lack of information related to water resources on the false premise that such information is
14 not required because “[w]ater resources are not regulated by Okanogan County – they are the
15 purview of the Washington State Dept. of Ecology.” RAP00001423–1432 (*In re Appeal of*
16 *Okanogan Cty. SEPA, Threshold Determination, Issued May 9, 2014, Regarding the Okanogan*
17 *Cty. Comprehensive Plan*, Okanogan County Hearings Examiner at 4 (Nov. 23, 2014)). This is
18 erroneous because, in its land use regulatory role, the County is required to ensure that
19 groundwater resources are protected under RCW 36.70.330(1) and cannot avoid this
20 requirement based on the mistaken notion that Ecology has the sole responsibility to manage
21 water. *See Kittitas Cty.*, 172 Wn.2d at 178. This fundamental error of law is grounds for
22 reversal of the Hearings Examiner's decision.

23 In sum, the County violated SEPA by issuing a DNS when it should have prepared and
24 issued an EIS that evaluated the impacts on water resources and water quality that would be
25 caused by implementation of the Comprehensive Plan. This matter should be remanded to the
26 County with a requirement that an EIS be prepared that would fully consider impacts on

1 groundwater resources and consider alternative zoning approaches, and measures to prevent
2 the unlawful daisy-chaining of permit-exempt wells, and to require mitigation as a prerequisite
3 to the approval of new subdivisions, building permits, and other land use permits.⁷

4 VI. CONCLUSION

5 Ecology agrees with Methow Valley Citizens' Council and Futurewise that Okanagan
6 County's 2014 Comprehensive Plan is unlawful and should be invalidated by the Court. This
7 matter should be remanded to the County so that it can develop a comprehensive land use plan
8 that adequately protects groundwater resources in accordance with the Planning Enabling Act.
9 The County should also be required to prepare an EIS that will fully describe potential adverse
10 impacts on groundwater, and include alternative planning and zoning approaches that will
11 minimize such impacts.

12 DATED this 22nd day of September 2015.

13 ROBERT W. FERGUSON
14 Attorney General



15 ALAN M. REICHMAN, WSBA #23874
16 Senior Counsel
17 Attorneys for Amicus Curiae
State of Washington, Department of Ecology
(360) 586-6748

18 \\ATG\ATG\DIV\ECY\ACTIVE\CASES\REICHMAN\MVCC\PLEADINGS\WORD\ECY\AMICUSBR.DOCX

19
20
21
22
23
24
25 ⁷ One possible mitigation approach could be the development of one or more water banks to provide
26 mitigation to allow for development served by new permit-exempt wells based on purchasing shares of water
rights for mitigation where necessary to ensure that senior water rights, including instream flows, are not
impaired.



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

15 W Yakima Ave, Ste 200 • Yakima, WA 98902-3452 • (509) 575-2490

June 5, 2009

Perry Huston
Okanogan County Planning
123 Fifth Avenue North, Suite 130
Okanogan, WA 98840

Dear Mr. Huston:

Thank you for the opportunity to comment on the notice for the Okanogan County Comprehensive Plan Update. We have reviewed the documents and have the following comment.

Water Resources

Water must and can only be used in accordance with Washington State Water Laws as provided in RCW 90.03, RCW 90.14, RCW 90.42 and RCW 90.44.

The Draft Comprehensive Plan, Chapter One, Section Six B, Private Property and Water Rights, provides a list of programs that will be offered to encourage water right holders to keep their water within Okanogan County. One of the programs proposes to "Promote the re-issuance of water rights lost through relinquishment within Okanogan County." Relinquished water rights cannot be re-issued. If this is not the intended description for this proposed program, Ecology recommends the County contact the Department's Water Resources for assistance in providing a statement to better clarify the program proposed.

If you have any questions concerning the Water Resources comments, please contact Brean Zimmerman at (509) 454-7647.

Floodplain

Okanogan County has had restrictive language in its code since 1994 regarding the



Mr. Huston
June 5, 2009
Page 2 of 2

Methow Review District. The measure is at OCC 17.14.110D and states: "Construction in Flood Hazard Areas. No structures for human habitation or any sewage disposal facilities shall be constructed or placed in areas inundated by the 100-year flood." In the years since this was passed, Ecology has observed a somewhat uneven enforcement of this measure. It is hoped that the comprehensive plan will place added emphasis on strengthening this provision.

If you have any questions concerning the Floodplain comments, contact Chuck Steele at (425) 649-7139.

Sincerely,



Gwen Clear
Environmental Review Coordinator
Central Regional Office
(509) 575-2012



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

15 W Yakima Ave, Ste 200 • Yakima, WA 98902-3452 • (509) 575-2490

April 7, 2011

Perry Huston
Okanogan County Planning
123 Fifth Avenue North, Suite 130
Okanogan, WA 98840

RE: Addendum A – Okanogan County Comprehensive Plan Revisions

Dear Mr. Huston:

Thank you for the opportunity to comment on the revisions proposed in Addendum A – Okanogan County Comprehensive Plan, dated February 11, 2011. Ecology appreciates the opportunity and cooperative effort that Okanogan County is providing the public, government agencies, and interested stakeholders to review and comment on the Comprehensive Plan. The public review process is essential to assure quality environmental protection is considered and valued in the proposed revisions to the Comprehensive Plan.

Ecology recommends that clarification be provided concerning the association between the current review and the SEPA environmental review process. The use of the term Addendum may confuse reviewers on the method of review for the Comprehensive Plan revisions, Shorelines Master Program, Critical Areas Ordinance, Okanogan County Code 17 – Zone, and Okanogan County Code 16-Subdivisions. Ecology advises the use of the term Expanded Scoping be used for this process leading up to the issuance of the Draft EIS.

We have reviewed the document(s) and have the following comments:

A. WATER QUALITY

Ground Water

1. Minimum Requirement District that will be Rural-High Density (1 acre minimum), please describe how potential impacts to ground water from this density of on-site septic systems will be assessed to insure that groundwater quality will not be affected.
2. Within the high density zones, please describe how areas of higher risk to ground water contamination from on-site septic systems will be identified, based on geology, soil types, water table characteristics, proximity to water bodies, groundwater monitoring, etc., be

Appendix 2



identified. Please explain how local ordinances will be developed to mitigate the risk by specifying required system type, location, etc.

3. Please describe the need for mitigating (if any) affects of on-site septic systems on ground water quality will be identified. Please explain how appropriate requirements will be identified.

Surface Water

1. Within the high density zone designations, please describe how areas of higher risk to surface water contamination from development activities and/or installation of on-site septic systems will be identified, based on geology, soil types, water table characteristics, proximity to water bodies, etc. Please explain how ordinances will be developed to mitigate the risk by specifying stormwater construction requirements or best management practices, required septic system type or technology, location, etc.
2. Please describe how the need for mitigating the affects of on-site septic systems on surface water quality will be identified. Please explain how appropriate requirements will be identified.

If you have any questions or would like to respond to these Water Quality comments, please contact Charlie McKinney at (509) 457-7107.

B. WATER RESOURCES

Environmental review of zone designations should analyze the likely impacts of the development allowed within that zone. Water use is an environmental impact which varies based on water availability and is essential for development. The information contained in Addendum A – Okanogan County Comprehensive Plan does not provide sufficient information to evaluate water availability or the adequacy of water rights if necessary.

It must be noted this Comprehensive Plan Revision action involves areas that may be subject to the Instream Resources Protection Plan for the Methow River basin (WAC 173-548), Okanogan River basin (WAC 173-549) and Columbia River (WAC 173-563).

Addendum A to the Environmental Impact Statement (EIS) states the resulting Comprehensive Plan will provide an overall decrease in density. Based on the information provided, Ecology is unable to determine if the result intended will have more or less of an impact to water resources in areas subject to revision from this process. However, Ecology is concerned about impacts to senior water rights and instream flows resulting from any density.

Ecology regularly sends out Administrative Orders under RCW 90.03 alerting water right holders they will be curtailed in favor of instream flows for the Methow and Okanogan Rivers. This has been a common occurrence in Okanogan County where users were curtailed or shut off four out of the last five years on the Methow and three out of the last five years on the Okanogan during times of low flow.

Therefore, development projects resulting from this action will require new water use, being within the proximity of the Methow, Okanogan, and Columbia Rivers, and could be subject to instream flows (WAC 173-548 Methow River, WAC 173-548 Okanogan River, and WAC 173-563 Columbia River). In addition, if Ecology determines there is significant hydraulic continuity between surface water and the proposed ground water source, any permit exempt ground water use or ground water right shall be subject to the same instream flow conditions as affected surface waters.

Zone changes are proposed within the Methow Closed Basin. The Methow Rule (WAC 173-548-030) currently limits the reservation for exempt ground water use in the Methow Basin to single domestic use, and stock water. The reservation does not include new industrial uses nor group or multiple domestic uses that are required for subdivisions. In *Ecology v. Campbell & Gwinn*, 146 Wn2d 1 (2002), the Supreme Court held that lots of a subdivision that are jointly planned to use the exemption are group uses limited to a single group domestic exemption of 5,000 gallons per day (gpd). Because group domestic use is not covered under the reservation in the existing rule, WAC 173-548, group domestic uses begun after the rule would be subject to permitting requirements, instream flows and interruption. Once reserves provided under WAC 173-548 are exhausted, then all uses will be subject to permitting requirements.

Demands of new water use reduce water legally available for existing, senior water rights including instream flows. Where hydraulic continuity is shown with surface water, new domestic uses established under RCW 90.44.050 are subject to curtailment to meet the needs of more senior water rights in water short years. If water supply becomes limited, water use could be curtailed by those with senior water rights, which includes instream flows established in Chapters 173-548, 173-549 and 173-563 WAC.

Department of Health does not consider interruptible water rights an adequate and reliable water source consistent with WAC 246-290-420. For these reasons, future water source plans will likely not be a reliable supply for year round residential use and may be subject to interruption due to conflict with instream flows. As such, it will be questionable whether a plan would provide an appropriate provision for potable water supply under RCW 58.17.

Ecology understands the proposed Comprehensive Plan amendments will result in a large transformation of land through zone changes. The proposed plan will create a significant increase in development through, for example, creating a "Rural High Density" (RHD) zone.

Mr. Perry Huston
April 7, 2011
Page 4 of 5

Ecology has concerns with the immense expansion of one acre minimum zoning, such as the proposed RHD zone. The proposed RHD zone will result in a considerable increase of development in a localized area and therefore an increased need for water that may result in localized impacts to groundwater levels impacting existing users. Similar projects in areas of limited water supply across Ecology's Central Region have proposed to augment water supply by bringing senior water rights to the project to reduce or fully mitigate water resource impacts.

Addendum A does not address water use, water rights, and water availability. We respectfully request that the County address these environmental impacts as part of the Comprehensive Plan revisions. Ecology's Water Resources program is concerned for senior water right holders/users, which includes existing groundwater exempt uses. In addition to possible impairment to instream flows, senior water right holders and existing exempt uses, Ecology fears the potential misuse of the groundwater exemption resulting from future developments as a consequence of the zone changes. Ecology has cautioned the County a number of times through SEPA comments regarding the misuse of groundwater exemption.

Water is a finite resource. Particularly, with the effects of climate change resulting in more frequent droughts as we have experienced in north Central Washington. Without water, communities cannot grow and thrive. Because water users are already regularly being curtailed in the Methow and Okanogan River basins, it is critical the County carefully consider how to evaluate water availability and legal water supply sources to support and sustain growth in the Okanogan County.

If you have any questions or would like to respond to these Water Resources comments, please contact Brean Zimmerman at (509) 454-7647.

C. SHORELANDS & ENVIRONMENTAL ASSISTANCE

Addendum A frequently includes the statement "The proposed policies and land use designation in the Comprehensive Plan will result in a net decrease in overall density from the existing comprehensive plan". No Documentation was given or cited to support this statement.

Rural Resource High and Rural Resource Low Density should be assigned with the draft Shoreline Master Program and the available Channel Migration Zones (CMZs) in mind. Allowing smaller subdivisions without the consideration of the existence of the CMZs could give a false impression of safe developable land, especially concerning areas surrounding dynamic river systems such as the Methow, Twisp, Chewuch and Stimilkimeen. Flooding considerations should be applied when assigning these High/Low designations on the Okanogan River.

Mr. Perry Huston
April 7, 2011
Page 5 of 5

If you have any questions or would be to respond to the Shorelands & Environmental Assistance comments, please contact Clynda Case at (509) 457-7125.

D. AIR QUALITY

We encourage Okanogan County to evaluate the long term impacts to breathing air quality of the plan that is being proposed, and to assure that the development will not place the County in a non-attainment status with respect to federal air quality standards. Non-attainment status places a heavy financial burden on affected communities, and makes it more difficult for business and industry to locate in the area. Okanogan County airsheds are particularly susceptible to PM2.5 air pollution (fine particles) buildup, especially during times of air stagnation in the fall and winter. The primary sources of PM2.5 are outdoor burning, indoor burning, and other combustion sources such as diesel generators and industrial processes. With the known health effects of PM2.5 and the upcoming tightening of the PM2.5 standard by the federal government, this is an excellent time for Okanogan County to review its future trajectory and map a course that preserves healthy breathing air for future generations.

If you have any questions about the Air Quality comments please contact Sue Billings at (509)575-2486.

Thank you for the opportunity to provide comments on the Addendum A-Revisions to the Okanogan County Comprehensive Plan.

Sincerely,



Gwen Clear
Environmental Review Coordinator
Central Region Office
(509) 575-2012

GC:TT (110401 / 236)



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

15 W Yakima Ave, Ste 200 • Yakima, WA 98902-3452 • (509) 575-2490

June 21, 2013

Perry Huston, Director
Okanogan County Planning
123 Fifth Avenue North, Suite 130
Okanogan, WA 98840

Re: Draft Environmental Impact Statement Revisions

Dear Mr. Huston:

Thank you for the opportunity to comment on the Draft Environmental Impact Statement for revisions to the Okanogan County Comprehensive Plan. We have reviewed the documents and have the following comments.

WATER RESOURCES

Environmental review of zone designations should analyze the likely impacts of the development allowed within that zone. Water use is an environmental impact which varies based on water availability and is essential for development. Ecology's Water Resources program provided comments on the Draft Okanogan County Comprehensive Plan on June 5, 2009 and again on April 7, 2011 (see attached). It does not appear that Ecology's comments have been addressed in the Draft Environmental Impact Statement dated May 16, 2013 or in the Draft Okanogan County Comprehensive Plan dated May 16, 2013.

Ecology's Water Resources program is concerned for senior water right holders/users, which includes existing groundwater exempt uses. In addition to possible impairment to instream flows, other senior water right holders and existing exempt uses, Ecology fears the potential abuse of the groundwater exemption resulting from future developments as a consequence of the zone changes. Ecology has cautioned the County a number of times through SEPA comments regarding the abuse of groundwater exemption.

This action involves areas that may be subject to the Instream Resources Protection Plan for the Methow River basin (WAC 173-548), Okanogan River basin (WAC 173-549) and Columbia River (WAC 173-563)., Ecology regularly sends out Orders alerting water right holders they will be shut off in favor of instream flows for the Methow and Okanogan Rivers. Because users are already being shut off in the Methow and Okanogan River basins, it is critical the County carefully consider how to evaluate water availability and legal water sources to support and sustain growth in the Okanogan County.

Appendix 3



It is relevant to this plan that on July 28, 2011, the Washington Supreme Court issued its decision in Kittitas County v. Eastern Washington Growth Management Hearings Board, 172 Wn.2d 144, 256 P.3d 1193 (2011); a case which included as a major issue the respective roles of Ecology and local governments in the management of water resources.

The Court concluded that in implementing RCW 19.27.097 and RCW 58.17.110, counties must ascertain that water is legally available, as well as physically or factually available, before they can approve applications for subdivisions and building permits. Under this holding of the Court, counties are not only required to ascertain that water is physically available, for instance, through hydrogeological data showing that a well can successfully yield water, but must determine that there is an "appropriate provision for potable water supply" to approve a subdivision under RCW 58.17.110.

Ecology requests Okanogan County consider our comments prior to adopting the May 16th Draft Comprehensive Plan.

If you have any questions or would like to respond to these Water Resources comments, please contact Sage Park at (509) 454-7647.

WATER QUALITY

Ground Water

1. Minimum Requirement District that will be Rural-High Density (1 acre minimum), please describe how potential impacts to ground water from this density of on-site septic systems will be assessed to insure that groundwater quality will not be affected.
2. Within the high density zones, please describe how areas of higher risk to ground water contamination from on-site septic systems will be identified, based on geology, soil types, water table characteristics, proximity to water bodies, groundwater monitoring, etc., be identified. Please explain how local ordinances will be developed to mitigate the risk by specifying required system type, location, etc.
3. Please describe the need for mitigating (if any) affects of on-site septic systems on ground water quality will be identified. Please explain how appropriate requirements will be identified.

Surface Water

1. Within the high density zone designations, please describe how areas of higher risk to surface water contamination from development activities and/or installation of on-site septic systems will be identified, based on geology, soil types, water table characteristics, proximity to water bodies, etc. Please explain how ordinances will be developed to mitigate the risk by

Mr. Huston
June 21, 2013
Page 3

specifying stormwater construction requirements or best management practices, required septic system type or technology, location, etc.

2. Please describe how the need for mitigating the affects of on-site septic systems on surface water quality will be identified. Please explain how appropriate requirements will be identified.

If you have any questions or would like to respond to these Water Quality comments, please contact Charlie McKinney at (509) 457-7107.

SHORELANDS/ENVIRONMENTAL ASSISTANCE

Section 8.1 Goals and Policies: POLICY: Views of the Methow River corridor, especially at road crossings and trailheads where views of the river are most accessible should be maintained. Projects reviewed and permitted under the Okanogan County Shoreline Master Program should be conditioned to provide and protect views.

1. Ecology recommends protected view corridors be aligned to avoid removal of existing native vegetation and minimize disturbance to riparian functions and processes. Ecology also recommends mitigation of vegetation removed in accordance with the Okanogan County Shoreline Master Program.

Section 9.5.1 Suggested Goals and Policies: GOAL: Ranching, hobby farming and other agricultural activities that use and maintain the open fields should be encouraged.

2. Ecology recommends review of new proposed uses in accordance with the Okanogan County Critical Areas Ordinance.

If you have any questions or would like to respond to these Shorelands/Environmental Assistance comments, please contact Andrea Jedel at (509) 454-4260.

Sincerely,



Gwen Clear
Environmental Review Coordinator
Central Regional Office
(509) 575-2012

Attachments
1830