

James Smith

I am a Whatcom county resident living on a rural property I own with my partner. I support the policy of water conservation in the Nooksack Basin.

I support the concept of adjudication, but have grave concerns about the process so far based on my review of the draft claim form.

These claim forms will be the first contact between Ecology and many affected property owners and residents. The claim forms are defective in important ways, especially in how they essentially omit permit exempt status. (see below)

As I am sure Ecology is aware, the context here is property owners' long settled expectations with regard to their property rights. In this context, Ecology has the obligation to do more to educate the public about adjudication prior to the claim process and make the forms clear, appropriate and understandable.

Ecology's failure to give widespread notice of the draft claim forms and foster widespread public participation is a form of unhelpful provocation in an era in which many people (not myself) have feelings of anger and hostility toward government agencies. It will have the effect of magnifying bad feelings and interfere with the smoothness of the adjudication process, and may increase divisiveness in our County.

Ecology has missed an opportunity to use the draft comment period as a way of educating the affected public about the following:

What is the historical background to the current adjudication;
What is the need for adjudication?
How does adjudication work?
How will it be fair?

Problems with the forms

1. Lack of a form for Permit Exempt Well Claims.

Ecology should revise the forms to include a third claim form to permit property owners to make a simple claim of permit exempt status as specified by RCW 90.44.050 for a groundwater well source in continuous use prior to the 2020 cutoff date. This will account for a substantial number of users and will simplify the process of adjudication.

The claim forms appear to be channeling 5000 GPD permit exempt well users into making a vastly reduced 500 GPD claim. "The Small Use Court Claim Form is intended to simplify the procedure for water users who have a single home on a well." Claim forms draft at Pg 4. And at Page 1: "There are two claim forms: The Small Use Court Claim Form for single homes on wells and the full length claim form for all other water uses. The current draft forms and instructions could be seen as deceptive and may catch folks out who are not careful readers and thinkers. It may anger

people. It is not a good, open, honest way to achieve water conservation.

I am not aware of any legal authority that allows Ecology or the Court to take a property that meets the permit exempt well requirements of beneficial use of a well prior to the cutoff date and reduce its allowance for residential use from 5000 GPD to 500 GPD. If the agenda is to restrict usage rights on properties with permit exempt wells, Ecology needs to say so clearly.

2. Creating forms that ask for water usage quantity, when metering is the exception rather than the rule.

Compounding the problem set forth above (lack of a form for permit-exempt wells) is the problem of the long form, which calls on claimants to testify under oath about specific amounts of water use when very few property owners meter their use or can make any accurate factual statement about their use. The draft forms demand quantification even there is no legal requirement to meter usage. Does Ecology expect people to guesstimate under penalty of perjury? Without a simple permit exempt form, forcing permit exempt claimants to use this form is confusing and unnecessarily burdensome. If a claimant is careful, and refuses to state usages because there is no usage data, will that claimant lose water rights?

At minimum, the long form should be revised to state that submitting the usage data is not necessary for preservation of a permit exempt well claim under RCW 90.44.050.

Summary

--Ecology should revise the draft forms as set forth above.

--Ecology should create a larger hard copy mailing to all affected property owners, in which Ecology explains the background to the current adjudication, why it is needed, and how it will work. What evidence the court will consider for each type of claim: short form, permit exempt, and long form.

--Ecology should re-circulate to all affected property owners the revised draft forms for comment. Ecology should give a new 60-day period in which people can read and digest this information and provide the department with comments that will produce the best final forms and minimize future controversy in the adjudication process. Online postings and webinars are no substitute for a hard copy mailing to affected property owners. Many Whatcom County residents are not computer literate and do not regularly get information from the internet.

--read the comments and make changes that are supported by good policy. Recirculate for comment if the changes are substantial.

There is no need for a rush to judgment in water adjudication. Better to lay really effective groundwork for a smooth process. And try to increase confidence in government agencies rather than enrage folks further.