

The Methow Valley Citizens Council



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May 16, 2017

The Honorable Chris Branch

The Honorable Jim DeTro

The Honorable Andy Hover

Board of Commissioners for Okanogan County

123 5th Ave N Ste. 150

Okanogan, Washington 98840

Subject: Comments regarding Okanogan County's procedures for determining water availability under Title 20

I am writing on behalf of the Methow Valley Citizens Council (MVCC), regarding Okanogan County's procedures for determining water availability in association with building permit and subdivision applications, as provided for in Okanogan County Code Title 20. MVCC's mission is to raise a strong community voice for the protection of the Methow Valley's natural environment and rural character.

Since early April, the County has issued many notices of determinations of legal and physical water availability under the new process, and conducted at least one hearing for subdivision water availability. Based on our observations and discussions with affected parties, we have several questions and concerns about how the County is implementing a transparent and predictable process that ensures water availability now and in the future.

It is also our understanding that under the terms of the March 20th, 2017 settlement agreement with the Yakama Nation, the county will review and adopt a new Title 20 ordinance. To that end, we also have some suggestions for

changes to Title 20 that would improve the process.

A. Information Baseline for Water Availability Decisions

1. Has the County prepared an analysis and conclusions or findings of fact regarding information received during the omnibus hearings for water adequacy? We would like to understand the criteria for making decisions about water availability in each subbasin for individual applications. We would also like to know whether the Department of Ecology (DOE) has been consulted in determining these criteria or in evaluating the evidence presented at the hearings. We have been unable to locate information on the Planning Department website providing analysis or conclusions regarding the information presented at the hearings.

We acknowledge that the County has made an effort to make available records of the two hearings on the website. However, when we attempted to connect with the information in any

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of the four links provided, we received an “error” message. A call to the Planning Department revealed that the files are too large for the Department’s own server and could be made available only through a Public Documents Request.

We understand that these files constitute a record of the voluminous information presented at the “omnibus” hearings. However, these records do not contain the weight to be afforded to studies or other evidence presented, or how conflicts among evidence have been resolved, or how determinations will be made in subbasins for which there is scant data available. As such, the public is unable to understand the basis for water availability decisions or how staff makes use of these documents in making decisions on or administering individual applications. We respectfully request that any findings of fact or protocols for decision-making that resulted from the omnibus hearings be made public.

2. What is the Planning Department’s basis for determining whether there is physical and legal availability of water for a requested building or development permit? Title 20 states that staff will use “information gathered during the omnibus hearings in January as well as the site specific information obtained from the applicant.” Given the voluminous omnibus submissions received, we would like to understand whether the county has made an attempt to review that information when issuing permits and determining water availability. If so, we respectfully suggest that any documents be made available on the Planning Department’s website at the time of public notice, not just upon request or at any subsequent hearing.

3. How is the determination made that a well drilled in a Closed Basin will not be in hydraulic continuity with surface water? We would like to understand the basis for the determinations and whether the determination is made by the DOE, or the County or as a consultation between the two agencies. We would appreciate receiving copies of those records for the decisions made since March 20, 2017 so we can understand the decision-making processes.

4. What system or process is being used to track and account for the accumulated usage represented by the approved withdrawals? Given the complexity of water-related issues, a transparent process that accounts for past, current, and anticipated water usage is warranted. To that end, we would like to understand how frequently the information is updated; how the county is documenting the final target for withdrawals in areas where ground or surface water is known to be limited; and how currently vested subdivisions and permits are accounted for when no well has yet been drilled.

B. Public Process for Notifying Potentially Affected Members of the Public

1. We respectfully request that the County provide more clear information about projects under consideration. As of May 5, 2017, there were 23 applications for water availability in WRIA 48, 23 for WRIA 49, and 4 in WRIA 52 listed on the Planning Department’s website, for a total of 50. No information about any application is available, other than the WRIA and the parcel number. The only information given in the public notice about an application is one

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conclusory sentence that the Planning Department “has made a determination that the proposed use of a permit exempt well . . . will provide a legal and physically adequate supply of potable water.”

Any member of the public who wants to know whether their interest may be affected by the grant of a permit must request all of the information in the record, while the clock is ticking on the deadline to comment, or appeal, or request a hearing. In the interest of transparency, we respectfully request that more information about the project be made available to the public, such as location and the records used to inform the determination. This information should be available well in advance of any deadlines for comment or objection and would also reduce the amount of staff time spent responding to public disclosure requests.

2. We respectfully request that the County provide more clear information on the process.

Currently, the Title 20 ordinance implementing the process is not available as part of the County Code on the website, nor are there any accompanying materials that outline how the water availability determination relates to the permitting process. As a result, the public must scroll through the Planning website to locate the most current version of the Ordinance.

3. Timing for Public Notice. The deadline for challenging a decision is based on the date the notice is published in the newspaper of record. The number of days allowed for a challenge to a water availability application appears to have varied among applications, and has not consistently met the 20 day appeal period.

C. Suggested Changes to Title 20

1. The Code Should Allow the Planning Department to “screen out” subdivision applications that do not demonstrate available water at the time of application. We recognize that the way the code is now written, determinations of water availability for all subdivisions require a hearing before the Hearing Examiner. We propose that this process be reserved for applicants who can demonstrate available water at the time of application, to save time and expense on all sides.

Examples of applications that should be screened out for failure to demonstrate available water include any application for a group water system in WRIA 48 without a water right (which are subject to interruption and therefore not adequate sources for domestic water), applications in closed basins where lack of hydraulic continuity with groundwater can't be proven, and applications that propose to use a water right that is contested or not approved by the Water Conservancy Board and DOE for the proposed use.

Under the current procedure, the public, neighbors and others who may be affected must do the job assigned to the Planning Department under Title 20. While Title 20 requires that water adequacy determinations for subdivisions be made by the Hearing Examiner, in a situation such as those outlined above, the Planning Department's initial determination should be that no

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water is available unless the applicant can establish at the hearing that water is legally and physically available. This places the burden of proof before the Hearing Examiner on the applicant, where it should be.

2. Standing: OCC 20.10.050 (4) (B) (i) attempts to allow only those with affected senior water rights to request a hearing. We understand that it is not always easy to determine who has a senior water right that may be affected by new well, which adds an extra administrative burden to the notice process, while depriving the public at large of the ability to protect its interest in assuring water availability in the future.

As we noted in our letter of December 15, 2016, we believe the narrow definition of those who have standing to appeal a determination unduly restricts the public's ability to challenge these decisions. It is not only those whose water right or availability will be directly affected by a permit who have a legal interest to protect.

We respectfully request that the BOCC consider amending Title 20 to delete the limitation of appeal rights to those with affected senior water rights. All members of the community have an interest in assuring that the County's watersheds are not over-allocated with respect to ecological function. This interest will become even more significant as the County's water supply is affected by climate change and population growth.

We understand the difficulties in implementing a new process. Some of the improvements we suggest can occur with how the process is being administered, while others will require revisions to the code. We ask that the Commissioners look at the experience to date with water adequacy determinations and work with the Planning Department to improve predictability and transparency to the process for applicants and the general public.

Thank you very much for your consideration. We hope these comments prove useful and would be happy to discuss them further.

Sincerely,

A handwritten signature in black ink that reads "Brian de Place". The signature is written in a cursive, slightly slanted style.

Brian de Place
Executive Director of the Methow Valley Citizens Council

Cc: Perry Huston, Planning Director, Okanogan County
Gary Graff, Department of Ecology