

Recent Clarifications of State Rainwater Law

*For Washington Stormwater Center
& Contech Urban Green Rainwater
Harvesting Technical Seminar*

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Water Law 101 Background: Prior Appropriation Doctrine: Origins

- Riparian doctrine did not fit California miners well
 - Water scarcity
 - Mines often far from the river
- Miners needed to be able to establish rights to water
- Requirements for ownership of minerals were adapted for rights to water
- Later adopted by farmers



Prior Appropriation

- First in time is first in right
- Water right holders entitled to streamflow conditions as they existed at the time of water right issuance (within reason)
- What about rainwater?



Common law: Diffuse Surface Waters vs. Watercourses

- Diffused waters are spread over the surface
 - Rainwater
 - Stormwater
 - Flood drainage
 - Typically not regulated
- A watercourse has a definite natural channel and a bed with banks



Elements of a Water Right

- An appropriation requires a diversion and beneficial use
 - Appropriation: the act of taking something for one's own use
 - Diversion:
 - Act of removing water from its natural course, or
 - Controlling water that remains in its natural course
 - *What's natural? What does remove mean?*

What's the Natural Course?



Is this Removal?



Removal – the act of removing water from its natural course

Does This Require a Water Right?



Washington State Rainwater Law

- Water right ambiguity issue debated every legislative session from 2002 - 2009
 - 10 separate bills with dozens of different amended versions
 - Proposed water right permit exemptions ranged from 3,000 gallons of storage capacity to categorical
 - Exempt from a call on the river (inherent right) vs. exempt from permit process only (permit exempt)

Why the Fear & Opposition?

- Ecology already over allocated water in many places
 - Streams regularly go dry in summer
 - Junior water right holders regularly not served
 - Rainwater harvesters would have “super-priority”
- Permit exempt well loophole is impairing streamflows and injuring senior water right holders
 - Some fear that rainwater “loophole” could create another similar exempt well problem (it can’t)

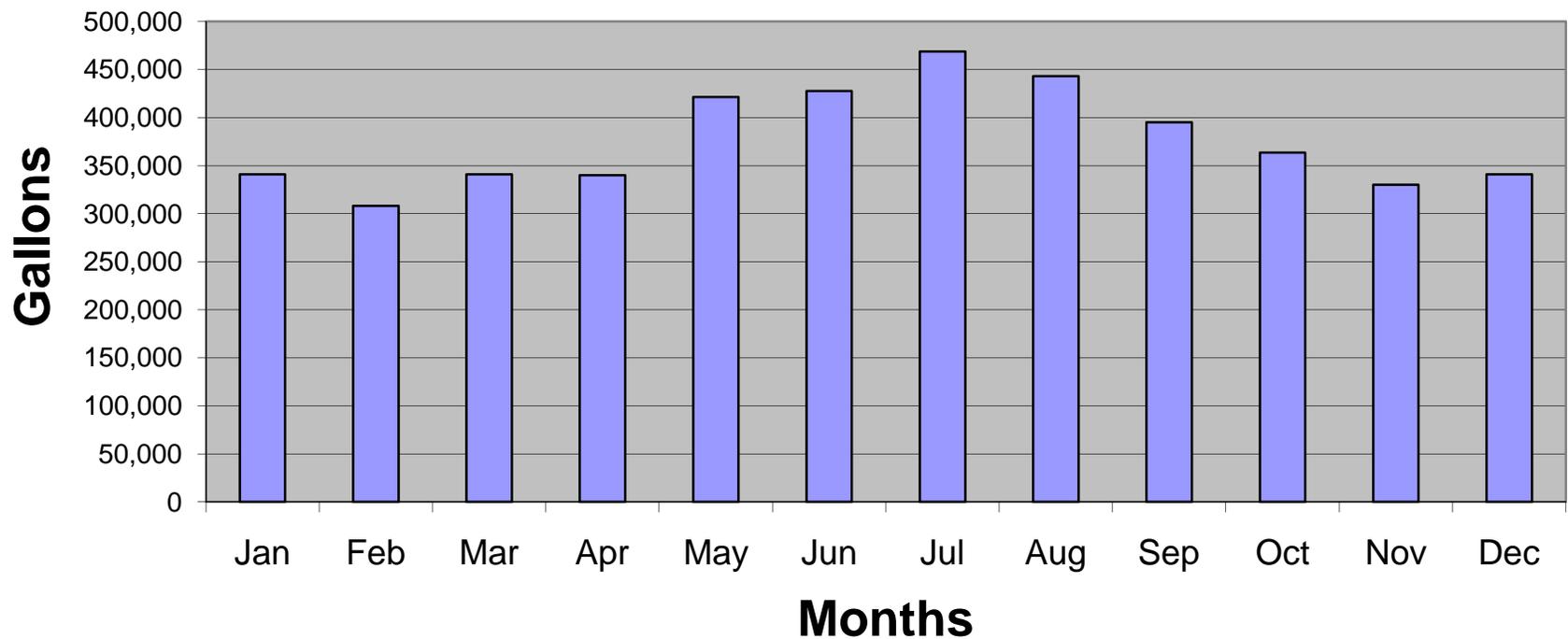
The Permit Exempt Well Lens

- Daily indoor use: 5,000 gpd
- There is no gallon limit for a non-commercial lawn or garden, the limit is acreage: 1/2 acre
- Industrial (includes irrigation): 5,000 gpd
- Livestock: unlimited (Attorney General Opinion)



Permit Exempt Wells: East Side Example

Total Water Use via a Permit-Exempt Well



Lawn irrigation requirements are location specific and based on the WA State Irrigation Guide

Washington State: Rainwater Background Legal Issues

- In 1917 Washington enacted the Water Code
 - “All waters within the state belong to the public”
 - “Any person... hereafter desiring to appropriate water for a beneficial use shall make an application to the department for a permit to make such appropriation.”
 - “Waters” not defined
- 1967 statute: “water resources means all water above, upon or beneath the surface of the earth”

Rainwater Use Barrier: Stormwater Caselaw

- Third runway case (*Port of Seattle v. PCHB*)
 - Proposal by Port to mimic old streamflow regime via stormwater capture from new runway and delayed release into the stream
 - Did the Port need to get a water right?
 - “Use of stormwater requires a water right” Dicta?
 - When does rainwater become stormwater?

Ecology's Policy Interpretive Statement

Department of Ecology recently (October 9, 2009) issued a Policy Interpretive Statement clarifying that rooftop rainwater used onsite does not require a water right

- Problem: “Any person... hereafter desiring to appropriate water for a beneficial use shall make an application to the department for a permit to make such appropriation.”
- Solution: 1917 code laden with historic common law exceptions, rooftop collected rainwater one more
- Problem: 1967 statute: “Water resources means all water above, upon or beneath the surface of the earth”
- Solution: 1967 statute did not amend who's subject to 1917 code, it was intended to regulate cloud seeding.
 - Amendments or clarifications of a statute by implication are disfavored
 - 50 years after the fact

Ecology's Policy Interpretive Statement

- Problem: “Use of stormwater requires a water right” (Port case)
- Solution: Rainwater on a roof is diffused surface waters not subject to permit requirements, historic common law exception.
 - *My opinion: Port case dealt with so much stormwater, it formed a watercourse and water body*
- Problem: Department had previously stated that rooftop collected rainwater is subject to permit process
- Solution: We took a more detailed look and found that another reasonable interpretation exists.

Barrier Removal: Ecology's Rainwater Policy Statement

- **The on-site storage and/or use of rooftop collected rainwater is not subject to water rights permitting**
- If Ecology determines that rooftop rainwater harvesting systems are likely to negatively affect instream values or existing water rights, local restrictions may be set in place to govern subsequent new systems.
- To qualify as rooftop collected rainwater, the roof collecting the rainwater must be part of a fixed structure...with a primary purpose other than the collection of rainwater for beneficial use.
- Rooftop restriction doesn't apply to guzzlers (a device used to catch and store rainwater to provide drinking water for wildlife).
- See <http://www.ecy.wa.gov/programs/wr/hq/rwh.html> for more details

Beneficial Use of Stormwater



Port of Seattle stormwater detention pond with SeaTac Airport third runway in the distance. After being treated, stormwater is discharged to Miller Creek.



Miller Creek south of S. 156th St. on Port of Seattle property.

What About Other Beneficial Uses of Stormwater Without a Water Right?

- Port of Seattle Case (barrier)
 - “Use of stormwater requires a water right...stormwater management does not.”
 - Port did not need a water right because stormwater use merely retimed flows
 - What happens when stormwater management entails a beneficial use? - Thurston County example, they're not always mutually exclusive
- Diffused Water Doctrine (possible off ramp)
 - Diffused water typically not subject to permitting. Water ceases to be diffused when it enters a watercourse (defined bed, bank) or water body (pond)

2009 Uniform Plumbing Code (UPC) Updates

- **Problem:** lumped rainwater, greywater and reclaimed water into the same category
- **Solution:** amended UPC during adoption phase and separate out greywater, rainwater and reclaimed water

- **Problem:** few guidelines on rainwater harvesting (pretreatment, filtering, roof washer, cross contamination test, etc.)
 - Plumbing Inspectors must approve on case by case basis
- **Solution:** adopted guidelines, give local jurisdictions authority to require stricter requirements as needed

UPC New Definitions

- **1614.0 Definitions.** Non-potable reuse water shall include the following:
- **Reclaimed Water** - Water derived in any part from water with a domestic wastewater component that has been adequately and reliably treated, so that it can be used for beneficial purposes. Reclaimed water is not considered a wastewater.
- **Greywater or Gray Water** - Domestic type flows from bathtubs, showers, bathroom sinks, washing machines, dishwashers, and kitchen or utility sinks. Gray water does not include flow from a toilet or urinal.
- **Other non-potable wastewater sources** from appliances and fixtures excluding wastewater streams containing black water.
- **For rainwater harvesting, see Part III.**

2009 Uniform Plumbing Code Update Notables

- Cross connection test and dual system inspection required by Authority Having Jurisdiction (AHJ)
- Requires pretreatment for rainwater harvesting, either roof washer (first flush diverter) or filtration
 - Not required when rainwater is used solely for irrigation
- All cisterns shall be listed for use with potable water
- AHJ shall approve the discharge location of the overflow water

For more information, contact

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