
Stock Water Working Group Report

During the 2009 Legislative Session and over the past several months, there have been legislative hearings, several media stories, and a lawsuit filed concerning the stock water exemption under the groundwater code. In the 2009 Legislative Session, the Legislature adopted ESHB 1244, which required the Department of Ecology (Ecology) to convene a Stock Water Working Group (Working Group). The Working Group met four times during the interim to review issues surrounding the use of permit-exempt wells for stock-watering purposes. Furthermore, the stakeholders from the Working Group met an additional two times to discuss the proposals that were brought forth by Working Group members. The Working Group does not have specific recommendations to bring forth at this time. However, the Working Group has discussed various issues as noted below. The Working Group presented these issues to the Senate Environment, Water and Energy Committee and the House Agriculture and Natural Resources Committee on December 4, 2009. Finally, the Working Group would like to continue discussions on how best to address the issues surrounding the use of permit-exempt wells for stock-watering purposes.

Legislative History:

According to State Archives, there are no documents regarding the legislative history from when the Ground Water Code was enacted in 1945. In looking at the Journals from the House and the Senate, House Bill 536 (Representative H. Rosellini) and Senate Bill 366 (Senator Albert Rosellini) were introduced on February 26, 1945. House Bill 536 was referred to the House Judiciary Committee and Senate Bill 366 was referred to the Senate Appropriations Committee. On March 2, the House Judiciary Committee reported the bill without recommendation. The House bill was read the second time on March 3, the second reading being considered the third, and the bill was placed on final passage. The bill passed with a vote of 96 yeas and 3 absent or not voting. On March 4, the Senate read House Bill 536 for the first time, suspended the rules and read the bill for the second time, and referred the bill to the Senate Judiciary Committee. The Senate Judiciary Committee reported the bill back with a do pass recommendation on March 6. The Senate passed the bill on third reading on March 7, with a vote of 42 yeas, 1 nay, and 3 absent or not voting. The Senate moved to postpone indefinitely Senate Bill 366 on March 8. House Bill 536 was approved by the Governor on March 19 and took effect on June 7, 1945.

There have been few court cases dealing specifically with the stock water exemption. However, in *DeVries v. Washington PCHB* 01-073 (2001), the Pollution Control Hearing Board (PCHB)

interpreted the stock water exemption as limited to 5,000 gallons per day for all uses. The PCHB felt that "[t]o read this section otherwise would result in an unlimited, and uncontrollable, potential withdrawal of groundwater." The PCHB stated that "in construing a statutory exemption a court must narrowly construe the exemption in a manner that gives maximum effect to the objectives of the general rule from which the exemption is made." Additionally, the PCHB stated that stock watering is "all reasonable uses of water normally associated with the sound husbandry of livestock. This includes, but is not limited to, drinking, feeding, cleaning their stalls, washing them, washing the equipment used to feed or milk them, controlling dust around them and cooling them. But again, the total withdrawal is constrained by the 5,000 gallons per day limitation." The PCHB also stated that "the use of water for washing the milk barn and milking equipment, suppressing dust, misting dairy cows, and providing for dairy worker sanitation is water used in an agricultural process as opposed to an industrial process." The Devries case was settled while on appeal to the Superior Court, and no appellate level court has ruled on the question of what is included under the stock water exemption.

Additionally, there have been a few formal opinions from the Attorney General dealing with permit exempt wells. In 2005, Attorney General Opinion No. 17 (Opinion) interpreted the language of the groundwater exemption, specifically the stock water exemption. The Opinion stated that RCW 90.44.050 authorizes groundwater withdrawals for stock-watering purposes without a water right permit and does not limit the amount of such withdrawals to any specific quantity. The Opinion also concluded that Ecology lacks statutory authority to require a permit as a condition to the withdrawal of groundwater for stock-watering purposes, or to categorically limit the amount of water that may be withdrawn for such purposes. The Attorney General was not asked to define "stock-watering purposes" and did not address the question of what uses are included within that term. On September 21, 2009, the Washington Attorney General's Office issued a formal opinion that upheld Ecology's authority to halt new groundwater appropriations when not enough is known about the adequacy of the resource. However, the Opinion also stated that the agency cannot alter the numeric limits or amounts of water exempted from a permit.

Legislative Directive (operating budget, page 107, ESHB 1244):

(17) (a) The department shall convene a stock water working group that includes: Legislators, four members representing agricultural interests, three members representing environmental interests, the attorney general or designee, the director of the department of ecology or designee, the director of the department of agriculture or designee, and affected federally recognized tribes shall be invited to send participants.

(b) The group shall review issues surrounding the use of permit-exempt wells for stock-watering purposes and may develop recommendations for legislative action.

(c) The working group shall meet periodically and report its activities and recommendations to the governor and the appropriate legislative committees by December 1, 2009.

Formation of the Stock Water Working Group:

Ecology contacted various interested parties and requested that the interested parties determine among themselves who would represent the stakeholders on the Working Group. Additionally,

Ecology contacted the Speaker of the House and the Majority Leader of the Senate and requested that they nominate legislators to participate on the Working Group. Further, Ecology contacted the other agencies included in the proviso and asked that they send someone to participate on the Working Group. Finally, Ecology contacted the 29 federally-recognized tribes seeking their participation on the Working Group.

Stock Water Working Group Members:

Senator Phil Rockefeller, 23rd Legislative District, Co-Chair
Representative Bruce Chandler, 15th Legislative District, Co-Chair
Senator Brian Hatfield, 19th Legislative District
Senator Jim Honeyford, 15th Legislative District
Senator Bob Morton, 7th Legislative District
Representative Brian Blake, 19th Legislative District
Representative John McCoy, 38th Legislative District
Representative Judy Warnick, 13th Legislative District
Evan Sheffels, Department of Ecology
Lee Falconer, Department of Agriculture
Maia Bellon, Office of the Attorney General
Chris Cheney, Washington Dairy Federation
Ed Field, Washington Cattle Feeders Association
Jack Field, Washington Cattlemen's Association
John Stuhlmiller, Washington Farm Bureau
Mo McBroom, Washington Environmental Council (WEC)
Rachael Paschal Osborn, Center for Environmental Law and Policy (CELP)
Peter Dykstra, Trust for Public Lands

Recommendations:

The Working Group would like to continue discussions on the stock water exemption. The Working Group recognizes that, in the existing budget climate, it is difficult to consider proposals that will cost the state money and may harm the industry. The Working Group feels that it is premature to propose legislation at this point as there are still details to be resolved in order to address the stock water exemption. The following topics were offered for the Working Group's consideration:

- Defining "stock-watering purposes".
- Providing a process for Ecology to tentatively confirm the extent and validity of the water rights put to beneficial use by existing operations under the authority of the exemption.
- Providing a process for existing operations that rely upon the exemption to have their authorized withdrawal quantities and beneficial uses of water registered and verified by Ecology.

- Establishing clear quantity limits for new livestock operations that intend to rely upon the exemption in the future.
- Providing a process to recognize and protect from relinquishment the reduced water use of registered livestock operations.
- Facilitating more efficient consolidation and movement of livestock and their associated water requirements among registered livestock operations.
- Creating mechanisms to manage the use of the permit exemption and ensure that existing water rights are not impaired.

Summaries of Working Group Meetings

First Meeting of the Working Group:

The Working Group was convened by the Department of Ecology on August 4, 2009. The Working Group nominated Senator Rockefeller and Representative Chandler as co-chairs. Prior to the first meeting, Ecology distributed a survey to the Working Group members asking them to list their top five issues or concerns with the stock water exemption. The survey results were discussed at the first meeting. Based on the results, four themes were gleaned from survey responses.

- Historical use
- How much is the existing use/status quo - what is going on now
- Potential impact to other water users
- Future needs (industry/growth/water use/barriers)

Additionally, the Working Group discussed the Legislative Directive, the process under which members of the Working Group were selected, and ground rules for the Working Group. The Working Group discussed the need for a work plan that would include information to be researched, possible tours, and potential briefings. Ken Slattery with Ecology provided the Working Group with some background on permit-exempt withdrawals and the water code. Maia Bellon from the Attorney General's Office discussed the 2005 Attorney General's Opinion on the stock water exemption. The Working Group discussed the lack of legislative history around the 1945 Groundwater code. The Working Group also discussed the following:

- The nature of problem and challenges to livestock industry
- How big is the stock water issue
- A lack of data
- Tribal concerns
- Closed basins and possible curtailment
- Cumulative impacts of exempt wells that are used for stock watering purposes.
- Not wanting to put family farms in peril by changing the stock water exemption, but also the need for people to use water that they are authorized to use

Finally, the Working Group discussed that if permit exempt wells are the bigger issue then the report should reflect that. However, the Working Group determined that they should refrain

from considering the broader issue of permit exempt wells as the proviso was specific to stock water. The Working Group also agreed that a webpage should be maintained with information about each meeting, including the agendas, minutes, and handouts. This webpage is located on Ecology's website at: <http://www.ecy.wa.gov/programs/wr/hq/swwg.html>.

Second Meeting of the Working Group:

At the September 3, 2009 meeting of the Working Group, there were a number of presentations from Working Group members. Ecology gave a presentation on Hydrology, Geology, Aquifer Recharge, Stream Flow Data, and Well Use Data. The agricultural industry members gave a presentation on its Needs, How it Operates, Well Use Data, Future Outlooks, and Current Concerns. They additionally provided a video presentation of operations in Eastern Washington that currently rely on the exemption. Bob Lee from Senate Committee Services provided information about the history and trends of the state's livestock industry. Maia Bellon from the Attorney General's Office discussed the implications of the Rettkowski decision, specifically that the decision calls into question Ecology's ability to regulate a junior water right holder in favor of a senior water right holder. Finally, the environmental organizations gave a presentation on the environmental concerns around the exemption.

Third Meeting of the Working Group:

The Working Group met on September 30, 2009 to discuss various proposals brought by members. The proposals included the following:

- From Jack Field, Washington Cattlemen's Association: Forage-based operations (cow-calf, stocker operators, and sheep operations) should remain on exempt wells.
- From Ed Field, Washington Cattle Feeders Association: The CAFOs need assurances that their established operations will be protected, and that they will be able to expand and develop as economic circumstances dictate.
- From Chris Cheney, Washington Dairy Federation: Any changes proposed must allow for the orderly growth of our industry. The definition should be agreed to and codified with no "sharp shooting" of minutiae. We don't have a ready solution to propose as to what is an appropriate amount of water that is less than unlimited.
- From Mo McBroom, Washington Environmental Council: There needs to be policies that take into account the needs of the existing industry, and also gets at the following issues: (1) A prospective quantity limit (with protections for existing facilities); (2) A prospective definition of stock watering use that allows for drinking, cleaning of animals, misting, but does not include dust control, irrigation or other uses not directly related; (3) Recording and reporting of water use for existing and prospective operations; and (4) Safeguards to ensure limits can be effectively put in place where there is impairment of senior water rights, including streamflows.
- From Senator Rockefeller: A "package" of ideas intended to provide a fair and balanced resolution of this very complex and controversial topic, though many could be enacted independently and may stand individually upon their own merits. The proposals address the following topics:

- A definition of "stock-watering purposes"
- Not affecting existing stock water permit exempt well users
- Adopting a sustainability policy for ground water
- Ground water data and management
- Establishing a volumetric cap for the stock water exemption
- Requiring water users that need additional ground water above the volumetric cap in the exemption to obtain a water right permit
- Regulation among water rights based upon priority dates
- General stream adjudications
- Assisting new livestock operations to find water
- From Representative Chandler: Just recently the Attorney General came out with a formal opinion affirming DOE's authority to close basins and rejecting their ability to limit the four uses of exempt wells (of which stock-watering is one). In addition, there is the pending litigation wherein the stock water use of an exempt well of Easterday Ranches is being challenged by the Center for Environmental Law & Policy. With this litigation in the courts, I think it makes much more sense for this work group to meet after the courts have weighed in on this issue.
- From Senator Honeyford and Morton: Having this taskforce evaluate legislative proposals to amend the stock watering exemption from various parties currently engaged in a lawsuit feels like we are being put in the position of acting as mediators.
- From Representative Warnick: We should take a look at Department of Ecology's z-draft from last session.

Stakeholder Meetings of the Working Group:

October 22, 2009 Meeting:

The stakeholders and agency representatives of the Working Group met on October 22, 2009 to discuss the proposals from the previous meeting. The group discussed the potential for conceptual agreement, using the intent section of Ecology's z-draft from last session as a starting point:

FINDINGS—INTENT: The legislature finds that effective water resource management and a stable livestock industry are vital to the economic and environmental well-being of the state. The legislature further finds that achievement of these goals is hindered by controversy (or uncertainty) surrounding the exemption from water right permit requirements for withdrawals of public groundwater for "stock-watering purposes" pursuant to RCW 90.44.050. Therefore, in order to promote the clarity needed for both a sustainable livestock industry and effective water resource management, the legislature intends to:

1. Define "stock-watering purposes"
2. Provide a process for Ecology to tentatively confirm (and register?) the extent and validity of the water rights put to beneficial use by existing operations under the authority of the exemption.

3. Provide a process for existing operations that rely upon the exemption to have their authorized withdrawal quantities and beneficial uses of water registered and verified by Ecology.
4. Establish clear quantity limits for new livestock operations that intend to rely upon the exemption in the future.
5. Provide a process to recognize and protect from relinquishment the reduced water use of registered livestock operations.
6. Facilitate more efficient consolidation and movement of livestock and their associated water requirements among registered livestock operations.
7. Create mechanisms to manage the use of the permit exemption and ensure that existing water rights are not impaired.

November 24, 2009 Meeting:

The group continued its discussions on the intent section of Ecology's z-draft from last session and the seven topics that were identified in the meeting notes from the October 22 meeting.

On the first topic, "define 'stock-watering purposes,'" there was discussion about the impacts a broad vs. narrow definition will have on the legislation.

On the second topic, "provide a process for Ecology to tentatively confirm (and register?) the extent and validity of the water rights put to beneficial use by existing operations under the authority of the exemption," the group discussed the potential retroactive effect of confirming an existing operation's water use. The group also discussed the Municipal Law litigation and the stock water litigation currently pending in Franklin County.

On the third topic, "provide a process for existing operations that rely upon the exemption to have their authorized withdrawal quantities and beneficial uses of water registered and verified by Ecology," the group discussed establishing a process similar to the claims registry because there has not been litigation against that statute. Ecology's z-draft goes farther than the claims registry in that there is an extent and validity review. The group discussed the possibility of setting up a two-part process, a claims process for existing operations (leaving validation of the right up to Superior courts) and a registry/confirmation process for operations who would like the ability to transfer their water use to another operation.

On the fourth topic, "establish clear quantity limits for new livestock operations that intend to rely upon the exemption in the future," Ecology's z-draft establishes a quantity limit of 10 acre feet but it would include all of the exempt uses, stock water, domestic, lawn and garden, and industrial use. The z-draft discusses limitations in areas in which there has been curtailment or in which instream flows are not being met. There was discussion that new operations would need closer to 50 acre feet of water for their operations. The group discussed whether it makes sense for stock water operations to jump ahead of other users.

On the fifth topic, "provide a process to recognize and protect from relinquishment the reduced water use of registered livestock operations," the group discussed the use of the Trust Water Rights Program to protect water from relinquishment. The group discussed the need to establish a process that encourages efficiency.

On the sixth topic, "facilitate more efficient consolidation and movement of livestock and their associated water requirements among registered livestock operations," the group discussed the circumstances that make stock water operations different from other farming operations.

On the seventh topic, "create mechanisms to manage the use of the permit exemption and ensure that existing water rights are not impaired," the group discussed the need to address the broader issue of exempt wells. The group discussed the need to look at impairment and water availability on a basin wide basis.

Fourth Meeting of the Working Group:

At the December 2 meeting, the full Working Group began the discussion with reports from the caucuses on the preferred methods for addressing the seven topics that were identified in the meeting notes from the October 22 meeting.

After a discussion on these topics, Senator Rockefeller discussed his proposals first introduced at the September 30th meeting. Six topics from his package of ideas were discussed:

1. Adopting a sustainability policy for ground water;
2. Ground water data and management;
3. Requiring water users that need additional ground water above a volumetric cap in the exemption to obtain a water right permit;
4. Regulation among water rights based upon priority date;
5. General stream adjudications; and
6. Assisting new livestock operations to find water.

The Work Group concluded that they would prefer to continue discussing these issues.

Conclusions:

The Working Group believes that the discussions concerning the issues surrounding the use of permit-exempt wells for stock-watering purposes have been fruitful. However, there is some concern from some Working Group members that it is premature to weigh in on this issue as there is litigation currently pending in Franklin County. Moreover, challenges to the Municipal Water Law of 2003 are currently before the Washington State Supreme Court on, among other things, a challenge that the law is unconstitutional because it has a retroactive effect as opposed to being curative legislation. Some members would prefer to wait on proposing legislation addressing the stock water exemption until direction is received from the Supreme Court on when water legislation is considered retroactive as opposed to curative. Nonetheless, the Working Group would like to continue discussions.