

STOCK WATER WORKING GROUP

DATE: August 4, 2009

TIME: 9 am – 3 pm

LOCATION: Conf. A, B & C

The meeting was called to order at 9:10 by Ken Slattery, Department of Ecology (DOE)

Introductions:

- Mo McBroom, WA Environmental Council
- Representative John McCoy
- Kimberly Ordon, Tulalip Tribes
- Rachael Osborn, Center for Environmental Law & Policy
- John Stuhlmiller, WA Farm Bureau
- Representative Bruce Chandler
- Representative Judy Warnick
- Chris Cheney, WA State Dairy Federation/Poultry Industry
- Jay Gordon, WA State Dairy Federation
- Todd Kelsey, Cattle Producers Organization of WA
- Lee Faulconer, WA Department of Agriculture
- Ed Field, WA Cattle Feeders Association
- Maia Bellon, Attorney General's Office
- Mary Sue Wilson, Attorney General's Office
- Jack Field, WA Cattlemen's Association
- Senator Brian Hatfield
- Senator Phil Rockefeller
- Peter Dykstra, WA Rivers Conservancy

Others and staff introduced

Legislative Directive

- Karen Epps, overview of material
 - o Agenda
 - o List of workgroup members
 - o Page 107 of ESHB 1244 - proviso language
 - o RCW 90.44.050
 - o Attorney General's Opinion 2005 No. 17
 - o Letter from the DOE dated February 17, 2009
 - o Letter from the DOE dated December 4, 2008
 - o Narrative of the Responses to the Top Five Issues Survey
 - o Table of the Responses of the Top Five Issues Survey
- Senator Hatfield, 1945-2008 comparison chart in numbers of dairy cows, cattle and calves, hogs and pigs, sheep and lambs, and horses in Washington, Idaho, California, and Oregon prepared by Bob Lee
- Representative McCoy, HB 1091
- Senator Rockefeller, SB 5888
- Discussion concerning selection of members of the work group
 - o DOE asked that organizations from the agricultural community and the environmental community determine who from their organizations would act as members on the Work Group.

- DOE contacted the Majority and Minority Leaders in the Senate, the Speaker of the House, and the Minority Leader in the House to request designation of Legislators to participate on the Work Group.
- DOE contacted both the Department of Agriculture and the Attorney General's Office and asked for their participation on the Work Group.

Ground Rules & Discussion of Process

- Number of meeting/open or transparent process
 - Discussion about having as many meetings as necessary.
 - Discussion about having meetings around Legislative Assembly days.
 - Discussion about having one meeting in Eastern Washington
 - Suggestion of 4 meetings, one in September, October, November, and December.
- Leadership: suggestion of co-chairs
- Senator Hatfield suggested Senator Rockefeller
- Representative Warnick suggested Representative Chandler
- Report due to the Governor and legislative committees on December 1
- Vote of members to elect Co-Chairs Rockefeller & Chandler (began to chair the meeting)
- Request for suggestions and rules
 - Request for recorded votes
 - Minority responses - important to include the minority voice, minority report needs to be clearly explained and there needs to be justification of member's views.
 - Areas of common ground
 - Acknowledgment of different view points/not so much the numbers themselves
- General agreement as opposed to consensus
- Clear explanation of minority reports (justification of views)
- The report should reflect who feels what.
- The workgroup should strive for general agreement and include the minority views within the report.
- There is a need to get close to consensus as the industry has too much on the line and this cannot be a win/lose situation.
- Concern about straight consensus could paralyze a group this size.
- The requirement to operate under unanimous consensus does not have to be made at today's meeting.
- If the workgroup gets to common ground, that will be captured in the report and if someone feels strongly, their view can also be included in the report.
- Base line understanding of stock water operation (suggested personal visit)
- There is a need for the workgroup to educate ourselves and get out in the field and tour livestock operations.
 - The workgroup could tour a stock watering operation, possibly a dairy or a confined animal feeding operation.
 - A tour would be very informative and enlightening
 - Representative Warnick would be glad to put a tour together for the workgroup.
 - Industry offered to put together a couple of different proposals for tours.
 - The tour should be earlier in the process.
- There is no budget appropriation to offset costs of workgroup - one of the reasons the discussion during session focused on meetings in Olympia was to save money.
- Discussion about the focus of the workgroup limited to stock watering, but concern about the broader issue of water scarcity
- Discussion about the need for the workgroup to look at all the ways exempt wells are used and the need to ensure that information is presented in a balanced and full way.

- Discussion about the possibility of subcommittees.
- Discussions that could lead to potential legislation, but looking for new ideas
 - o It is obvious that the DOE plans to run a bill.
 - o There will be other bills out there.
 - o It may not be necessary for legislation at all.
- Discussion about a work plan for the group
 - o Work plan should include areas that the workgroup needs researched, possible tours, and potential briefings.

Background: Permit-exempt Withdrawals and the Water Code

- Ken Slattery, DOE
 - o Appropriation doctrine
 - Most western states have similar water code, with this focus initially on surface waters
 - There has been more and more development of groundwater since WWII
 - Regulation of groundwater has occurred since WWII
 - Most western states have some permit exempt uses, except for Utah which requires permits for all uses.
 - With a few exemptions, most new water uses come from groundwater
 - Starting in 1945, a permit was necessary for the withdrawal of groundwater with some exemptions as set forth in RCW 90.44.050
 - 95% or more of new wells being established in WA are permit exempt
 - Currently, there are around 750,000 wells in WA
- Well Log Database
 - o DOE receives a notice of intent when a new well is drilled, these are used to verify that drilling standards are being met
 - o Currently, there are about 1000 licensed well drillers in the state
 - o The drop in the housing market has affected the revenue from the well drilling fee
 - o After a well is drilled, DOE receives a well log
- Discussion of AG opinion
 - o Maia Bellon, AGO
 - This is black letter law statutory interpretation of RCW 90.44.050.
 - From a statutory construction purpose, there is no overall quantity limitation for stock watering
 - DOE cannot limit the use of water for stock watering purposes but they could set broader limitations by rule under the broader closure of basins with a reservation of water for some limited use
 - DOE did for some time believe there was some limitation because of the language "small withdrawal", but the AG opinion states that while the Legislature may have thought of stock-watering withdrawals as "small", this reference was not intended to quantify the maximum quantity of water which could be withdrawn for stock-watering purposes without a permit
 - o Discussion about the AG opinion, some question of the validity of the opinion, and the currently pending lawsuit in Thurston County
 - There is some concern about the lawsuit being a focal point of this workgroup.
 - It is inappropriate for Legislators to be involved in the court proceedings.
 - This group is looking forward and considering potential changes to the statutes.

- Everyone in the workgroup has experience with AG opinions and understands what they are and what they aren't.
- Legislative History re: the 1945 Groundwater Code
 - There was no requirement to archive legislative documents at the time the Groundwater code was adopted; nobody has found any legislative intent.
 - DOE is hampered by a lack of legislative history from the 1945 Groundwater Act.
 - Jaclyn Ford - Rural Domestic Water Supply, Tentative Draft of Final Report, May 1942 - The Draft Report from the WA State Planning Council, dated May 1942, given to the Governor and the Legislature described the water needs for settlers. The table on page 4 of the draft report provides low and high consumption levels, of 974 gallons per day up to 1,470 gallons per day for a family of 4. This document was distributed to the workgroup members. Suggestion made to contact the Bureau of Reclamation to find a copy of the final report.
 - Discussion about the history of exempt wells, why the groundwater code was enacted, how the use of exempt wells has grown, why did the Legislature create permit exempt wells, what was the problem the Legislature was trying to fix at the time they passed the groundwater code.
 - Several states adopted groundwater codes that are similar to Washington's code.
 - Legislative staff could look at that time period, especially industry considerations at that time as it relates to water to understand what the conditions were at that time.
 - History may be helpful but our task is looking at what will work going forward.
- Discussion around RCW 90.54.040 which requires DOE to review statutes and when those statutes appear ambiguous, unclear, unworkable, unnecessary, or otherwise deficient, DOE must make recommendations to the Legislature. In this case, there is a fair amount of ambiguity with the words "stock watering purposes."

Survey Results – Top 5 Issues for Group Focus

- Karen Epps, overview of two documents concerning the results of the survey
 - Included in the packet of information for members is a narrative of survey responses. This narrative is basically a direct cut and paste of the emails that were received from workgroup members.
 - Also included is a table that shows where there are similar concerns among the workgroup members.
 - As an example, various workgroup members are concerned about the impairment of senior water rights.
 - A number of workgroup members are interested in the history of exempt wells, stock watering, and the livestock industry in general.
 - Some of these topics could certainly be combined, as an example, the comments about the effects of limiting stock water usage and the need to consider the economic impacts of changing this exemption could be combined. Legislative staff was attempting to not editorialize the comments that were received from the workgroup members.
- Mo McBroom - In looking at the table provided by legislative staff, it appears that there are four themes to be 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)
- Legislative staff will review the table and pair down the list to 3 to 5 large concepts for review by the workgroup.

- Jack Field – would like to have a discussion about whether there is a problem, is there evidence of impairment happening from stock water permit exempt wells, or is the workgroup trying to address some future problem.

Break for Lunch

Additional handouts were provided to workgroup members:

- *3 Letter dated August 4, 2009 from Senator Honeyford
- *4 RCW 90.54.040
- *5 Letter dated August 3, 2009 from Yakama Nation

Senator Rockefeller re-convened the meeting

Top 5 Issues for Group Focus (Cont.)

- Would like to refocus the conversation towards what are the issues
- Senator Rockefeller:
 - o State has water resource management responsibility
 - o Are we ensuring that we are drawing on the aquifers in a sustainable manner?
 - o If the state does not account for the unlimited use of water, the state cannot track the water use. There is concern about impairing the senior water rights and it behooves the workgroup and the state in general to avoid that situation
- Representative McCoy:
 - o Water resources are limited in Washington
 - o Concern is exempt wells in general
- Senator Hatfield:
 - o The exempt well issue is an issue, but the bigger question is whether stock watering by itself is an issue.
- Discussion of the nature of problem and challenges to livestock industry
- Discussion around how big is the stock water issue
 - o DOE will look into this and will provide information as it is gathered.
 - o One workgroup member suggested that stock watering is less than 5% of the state's water usage.
- Discussion around lack of data
- Discussion about change in public policy and in farming practices.
- Discussion of tribal concerns
- Discussion about closed basins and possible curtailment
- Concern is about the cumulative impacts of exempt wells that are used for stock watering purposes.
 - o Analogy was provided that each well is a swimming pool and the problem is with the swimming pools as a whole.
- There was discussion about 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. In order to know how much water someone is using, there needs to be metering, so that if someone is using more than their authorized amount, DOE can take action.
- Discussion about how and when DOE learns about a permit exempt well that is being drilled for stock watering purposes
 - o The notice requirement in the statutes requires a well driller to provide notice to DOE 72 hours before a well is drilled.
 - o DOE Water Resources Program may learn about a large project because the project may have SEPA issues or air quality impacts
- There were questions to DOE about what types of operations present concern for DOE

- There is some concern about large confined animal feeding operations.
 - There are challenges and battles in some areas over very small amounts of water
- There were questions to DOE about whether there are any areas closed to future groundwater withdrawal.
 - The Odessa is not closed but there are streams that are in continuity that are closed. DOE is no longer issuing permits there, so there is a defacto closure.
- Suggestion was made that if permit exempt wells are the bigger issue then the report should reflect that.
- Discussion of whether water for stock watering purposes should be part of the permitting system.
- Representative Chandler:
 - One of the issues to be considered is whether the volume of water being used by livestock is increasing, which makes livestock numbers useful.
 - Additionally, the average amount of water per head is less than what it used to be.
 - Aquifers do not recharge in the same way as streams.
 - It is useful to consider whether there is more water use for livestock than there was in 1945, need to look at the exemption as it relates to water management
- The workgroup should refrain from considering the broader issue of permit exempt wells because the workgroup won't reach consensus. There was a reason the 1945 Legislature passed the stock watering exemption and the workgroup should consider the exemption as it relates to water management.
- Discussion of the Sinking Creek case and whether DOE can regulate permit exempt wells
- There was a request that DOE bring a map of where new operations should locate in the state from a water resource perspective.
- DOE stated that there is some risk for businesses when starting a new operation with a 2009 water right.
- Discussion of water permit backlogs
 - Request from the workgroup that DOE provide the group with the number of pending applications for stock water.
 - Discussion about what DOE considers when approving or denying a permit application, including looking at whether there is no impairment of existing rights
- Discussion of what types of water use make up "stock watering", need for water for misting is important for the health of the animal. DOE has recommended to livestock operations that they may want to obtain a water right for the more industrial water uses, if those water uses will exceed the 5000 gallon limitation for industrial uses.
- There needs to be some discussion about what might work from a water management perspective, i.e. maybe a 5000 gallon limit won't work, but the workgroup could consider other limits, a fix to the Sinking Creek case, and other ideas or a framework that will allow DOE to better management the water resource.
- The industry needs to provide the workgroup with information about the issues facing the industry, their needs for water, etc.
- The Tulalip Tribe asked that Kimberly Ordon monitor the workgroup, but is declining to participate as a workgroup member. The Tribe is concerned about exempt wells affecting tribal treaty rights, in particular as it relates to instream flows.
- Discussion about how changes to the stock water exemption might affect livestock operations operated by tribal members.
 - If a Tribe is operating a livestock operation off reservation, then the water being used is a state right. If a Tribal livestock operation is on reservation, then the operation is using a tribal reserved right.

Direction of Work Group

- Future meetings:
 - o Suggestion of one a month
 - o Suggestion of up to 6 meetings
 - o Suggestion about having meetings in Eastern Washington and Northwest Washington
 - o Co-chairs will meet with staff to prepare a proposed calendar and a proposed work plan
 - o Discussion that a tour may not make sense given the short period time in which the workgroup is operating under.
 - o Suggestion that industry provide the workgroup with a presentation on water use on livestock operations, possibly film an operation
- Representative Chandler:
 - o The workgroup needs to define the problem
 - o Present alternatives, alternatives do not necessarily have to be legislative.
 - o The economics are important to consider
- Senator Rockefeller:
 - o Need historical context and legislative intent behind the 1945 exemptions
 - o Need information about what is going on now
 - Request for graphics of users of exempt wells (i.e. by county)
 - Industry numbers
 - State map of operations
 - o Need to look at existing definitions of stock watering
 - Pollution Control Board definition
 - Case law summary, including the DeVries case
 - DOE's interpretation
 - o Metering - to what extent are withdrawals tracked and metered?
 - o What are the existing legal protections for senior water rights, instream flows
 - Is there case law?
 - Anything to show impacts to streams
 - Are there situations in which stock watering is also used for water for wildlife?
 - o Management challenges/data challenges
 - o What water supplies are needed for a healthy and economical livestock industry in the future? Would like an industry presentation of where do you want to go.
 - o Should existing wells be treated differently than new uses?
 - o Are there management alternatives to a broad permit exemption for stock watering? Managing instead of rationing
- Senator Hatfield:
 - o In 1945 agriculture was supported. There have been questions today about why should agriculture be treated so special is because agriculture is part of the solution.
 - o The reason we have the legislative session when we do is because of agriculture.
- Senator Rockefeller asked about agricultural water being recycled. Jay Gordon responded that the dairy industry is making more economic value of the water.
- DOE, Department of Agriculture, and Legislative staff will provide the workgroup with information
 - o History of exempt well statute
 - o Existing reliance on exempt wells (graphics) and future reliance
 - o What is stockwatering? PCHB definition, guzzlers, etc.

- Case law summary
- Information regarding tracking/metering
- Impacts on senior water rights: cases/allegations
- Impacts on instream flows where hydraulic continuity exists
- Issues regarding protections that are in place now
- Challenges of determining the problem, future problem. If no problem, then what do we have to do?
- Information regarding pending applications
- Groundwater areas that are at risk, closed groundwater areas
- Managing vs. rationing
- Information from the Western State Water Council on groundwater exemptions in other states
- About a website for the workgroup
- Aquifer recharge and conditions of the aquifers
- Information about stock facilities existed, size of operations, dairies, feedlots, etc.

Next Meeting: September 3, Thursday 9:30 am

MEETING ADJOURNED: 3:50 pm
MINUTES SUBMITTED BY: Dixie Huff

AN AUDIO RECORDING OF THE MEETING IS NOT AVAILABLE.