



CLEAN, FLOWING WATERS FOR THE WEST

The Center for  
**Environmental Law & Policy**

November 25, 2008

Honorable Christine Gregoire  
Washington State Governor's Office  
Olympia, Washington

Dear Governor Gregoire,

This letter provides information about the evolving controversy over Washington's groundwater statute, RCW 90.44.050, and its "stockwater" exemption. This letter is sent on behalf of the Center for Environmental Law & Policy, a public interest water advocacy organization, and Five Corners Family Farmers, an Eltopia-area group of dry land wheat farmers. We are responding in part to a Joint Policy Memorandum, dated 11/20/08, submitted to you by the Columbia-Snake River Irrigators Association and others (CSRIA).

Several legal interpretations of the stockwater exemption have been circulating. Unfortunately, important facts and policy considerations are not much discussed. The applicability of the stockwater exemption must be understood in the context of the scale of the use at issue. Factory-scale animal operations are being built in arid eastern Washington, based on unlimited use of groundwater. Generally speaking, these operations are occurring in areas where water is scarce and water right applicants have waited many years to receive permits. A synopsis of the legal and factual chronology is set forth below:

Legal History:

- In AGO 1997 No. 6, the Attorney General issued an opinion regarding exempt wells that, although not focused on the stockwater prong, noted the policy basis of the exempt well statute, to allow for "very small withdrawals" of water that would not have an impact on the source of supply and other water users.
- In 2001, in DeVries v. Ecology, the Pollution Control Hearings Board ruled that a Yakima County dairy could not use more than 5000 gallons per day (gpd) of groundwater without first obtaining a permit. The PCHB also defined the term "stockwater" to include industrial animal operations.
- In 2003, in Kim v. PCHB, the state Court of Appeals iterated Ecology's longstanding position that stockwater use for dairies and CAFOs is an industrial use and subject to the 5000 gpd limitation.
- In AGO 2005 No. 17, the Attorney General issued an opinion stating that stockwatering is not subject to the 5000 gpd limit on permit exempt wells, i.e., that unlimited quantities of water

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may be used – without a water right – for stockwater purposes. The AGO analysis was based on the placement of a comma in the statute.

- In 2008, University of Washington Law Review published an article by Kara Dunn, [Got Water? Limiting Washington's Stockwater Exemption to 5,000 Gallons Per Day](#), examining the legislative history of the stockwater exemption in RCW 90.44.050.

What is missing from the legal analyses described above is perspective on what is actually happening on the landscape and with respect to eastern Washington's scarce and disappearing groundwater resources. Factual concerns include the following:

- Since the 2005 AG Opinion, at least three industrial animal facilities (two dairies and one feedlot) have been built or proposed in eastern Washington that use (or propose to use) permit exempt wells for water supply. The water required for these facilities substantially exceeds the 5000 gpd limit authorized in RCW 90.44.050.
- The proposed feedlot, owned by Easterday Ranches, would house 30,000 head of cattle. The Easterday proposal has received land use approval from Franklin County, but will also require air quality, grading, and reservoir permits. Franklin County explicitly based its approval on a finding that the Easterday facility may use unlimited quantities of water without permit (as interpreted by the 2005 AG opinion).
- The Easterday feedlot would require substantial quantities of water. Easterday's land use application indicates the facility will need about 500,000 gpd. However, that amount does not account for aerial spraying for dust control, which Ecology estimates will require up to 2.5 million gallons per day (mgd).
- The Easterday feedlot is proposed for a parcel located near Eltopia, Washington (north of Pasco), an extremely arid area.
- There are virtually no surface water sources in the Eltopia vicinity. Groundwater is the source of supply for domestic, irrigation and all other uses, and is obtained by drilling into deep basalt aquifers. These are the same aquifers that have been declining to the north and east at substantial rates (e.g., in the Odessa Subarea, Palouse Basin and West Plains areas).
- Ecology maintains a list of water right applicants for groundwater permits in Franklin County. That list presently contains 65 applicants, with applications dating back to 1993. Ecology is not issuing water rights in this area.
- Franklin County issued a conditional use permit (CUP) to Easterday Ranches on 11/17/08. An appeal of the CUP is likely.

Easterday's feedlot, which proposes to use as much as 3 million gallons of water per day without a water right, illustrates the issues that arise from the proposal to allow pumping of unlimited quantities for industrial animal operations. It is simply not reasonable to assert that water usage at this scale was contemplated by the 1945 Legislature when it enacted the Groundwater Code and its permit exemption.

Moreover, this water would be withdrawn in an area of the state where water is in limited and diminishing supply. These scarcity problems are compounded by climate change. A new U.S. Geological Survey study, "Potential Impacts of Ground-Water Resources of the Columbia River Basin," concludes that reduced recharge could result in groundwater declines in excess of 100 feet over current conditions for Columbia Plateau aquifers, with impacts to both groundwater users and instream flows. Unlimited access to groundwater by feedlots will further exacerbate these declines.

In addition, equally meritorious water users have been standing in line for up to 15 years, awaiting water rights. Applicants include numerous farms and domestic users, including school districts.

We encourage you to stand by the principles of prior appropriation and require Easterday Ranches to obtain a water permit for its feedlot operation. If new water rights are not available, then Easterday may have to resort to the market to purchase and transfer existing rights, just as other applicants are doing.

We urge you to reject an interpretation of the permit exemption that would allow a special class of users to access unlimited quantities of groundwater. This proposal will lead to water anarchy and increased uncertainty about eastern Washington's water future. It is the scenario of unregulated pumping that poses real threats to Washington's agricultural economy and family farmers.

Finally, we wish to speak up on behalf of Ken Slattery, Water Resources Program Manager for the Department of Ecology. Mr. Slattery, a longstanding employee of extraordinary integrity, has spent his entire career bringing order and balance to the state's water resources program. CSRIA's personal attacks on Mr. Slattery are unwarranted and create a level of discourse that should not be countenanced.

Thank you for your consideration of these comments. Please feel free to contact me if I can provide further information.

Yours very truly,



Rachael Paschal Osborn  
Executive Director

cc: Jay Manning, Director, Department of Ecology

Attorney General Rob McKenna

House Speaker Frank Chopp

House Committee on Agriculture and Natural Resources, Rep. Brian Blake, Chair and Representatives Kevin Van de Wege, Bill Grant, Lynn Kessler, Dan Newhouse, Steve Hailey, Kelli Linville, Judy Warnick, Joel Kretz, William Eickmeyer, Patricia Lantz, Liz Loomis, John McCoy, Sharon Nelson, Daniel Newhouse, Ed Orcutt

Senate Committee on Water, Energy & Telecommunications, Sen. Phil Rockefeller, Chair, and Senators Ed Murray, Jerome Delvin, Karen Fraser, Brian Hatfield, Janea Holmquist, Jim Honeyford, Bob Morton, Eric Oemig, Craig Pridemore, and Debbie Regala; and Senator Mark Schoesler