



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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December 4, 2008

TO: Senators Lisa Brown, Jerome Delvin, Mike Hewitt, Jenea Holmquist, Jim Honeyford, Chris Marr, Bob Morton, Ed Murray, Craig Pridemore, Phil Rockefeller, and Mark Schoesler

Speaker Frank Chopp, Representatives Brian Blake, Bill Grant, Steve Hailey, Lynn Kessler, Joel Kretz, Kelli Linville, Dan Newhouse, Judy Warnick

Bill & Cody Easterday, Easterday Farms
Sean Clausen, Washington State Hay Growers Association
Scott Collin, Five Corners Family Farmers
Ed Field, Washington Cattle Feeders Association
Jack Field, Washington Cattlemen's Association
Jay Gordon, Washington State Dairy Federation
Wade King, Cattle Producers of Washington
Dale Lathim, Potato Growers of Washington, Inc.
Rachael Paschal Osborn, Center for Environmental Law & Justice
Ron Reimann/Darryll Olsen, Ph.D., Columbia-Snake River Irrigators Association
Jack Williams, WA-OR Biofuel Crops Federation

FROM: Jay J. Manning, Director

JJM

RE: Reliance on the groundwater exemption for large stock operations

I am writing in reference to letters and memoranda sent to many of you recently regarding a 30,000 head cattle feedlot proposed by Mr. Bill Easterday for Franklin County. Three of the letters were sent by the Columbia-Snake Rivers Irrigators Association (CSRIA), the Washington State Dairy Federation and the Washington Cattlemen's Association. Those letters expressed disagreement with a November 12, 2008 letter sent by Ecology to Mr. Easterday regarding his proposal to rely upon a permit-exempt groundwater well for all water uses associated with the proposed feedlot. A fourth letter was submitted on behalf of the Center for Environmental Law & Policy and Five Corners Family Farmers (an Eltopia-area group of dry land wheat farmers) expressing support for Ecology's November 12 letter.

The November 20, 2008 Joint Policy Memorandum provided by the Columbia Snake River Irrigators Association (CSRIA) attempts to personalize the matter to Mr. Kenneth Slattery, our Water Resources Program Manager, who signed the letter for the agency. Let me assure you that the letter was the product of the combined effort and involvement of numerous Ecology staff and managers and I approved the



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content of the letter because I believe it represents the best reading of an undefined term ("stockwatering purposes") in state water law.

First Things First

Before getting into the details, I want to be very clear about four preliminary points. First, we strongly encourage legislation to bring clarity to this issue. The appropriate scope of the groundwater permit exemption as applied to stockwater is an important policy issue best addressed by the Legislature. We understand that legislation will be introduced on this topic and we encourage all parties to engage in the legislative forum on this important topic

Second, we understand and appreciate the value, in terms of jobs and rural economic stability, the livestock and dairy industries provide for our great state. We commit to working with the legislature and the industry to find solutions that are consistent with effective water management and which, to the extent possible, meet industry's concerns and interests.

Third, Ecology does not oppose the Easterday project, provided it obtains and complies with the necessary permits. We have every expectation that the Easterdays will do just that, based on our recent conversations with them. We have informed Mr. Easterday that we are prepared to assist if he should decide to pursue a water right for those portions of his proposed operations not exempt from permitting under the groundwater permit exemption.

Fourth, it is not Ecology's intent to create problems for existing livestock and dairy operations. Many of these facilities have obtained valid water rights authorizing their use of water and are unaffected by this controversy. Some existing dairies and feedlots have done what the Easterdays are proposing – relied on the groundwater permit exemption in the groundwater code and thereby avoided the need to obtain a water right from Ecology. Absent an impact to a senior right or stream flow or aquifer concerns, we have no intention of taking action to limit or prevent their use of water. Our concern is primarily a prospective one, and the Easterday proposal is an excellent example of the problem – a proposal to use an unlimited quantity of water, for a wide array of uses, without any examination of the possibility that the proposed water use will harm senior water rights or cause adverse impacts to stream flows or aquifer levels. This exceeds what we believe is authorized by the stockwater exemption and we would simply not be doing our job if we ignored this proposal.

Ecology's Letter to Mr. Easterday

The purpose of Ecology's November 12 letter was to express concerns about Mr. Easterday's intention to rely on the exemption from permitting provided in the ground water code (RCW 90.44.050) for all water use associated with a very large feedlot. In addition to the use of water most typically associated with the stockwater exemption – stock drinking – the Easterdays propose several other water uses from their permit-exempt well, including all other feedlot operations (such as misting the cattle to cool them in the

summer and washing out barns), dust control and even irrigation. Drinking water for the 30,000 head will alone require approximately 600,000 gallons per day.

For dust control, daily summer water use at a 30,000 head feedlot of this size is estimated to require well over 1 million gallons per day, and perhaps as much as 2 million gallons per day based on federal agency guidance. We do not know with certainty the full quantity of water that will be used for other feedlot operations or for irrigation, but it is fair to assume that the Easterday feedlot will use between 3 and 5 million gallons/day during the dry season.

We do not agree with the interpretation of the law proposed by project proponents – that all uses described above come within “stockwatering purposes” as used in the statute. While the phrase is not defined in statute, we believe that the interpretation advocated by the proponents and the industry is not consistent with legislative intent or precepts of sound water resource management and therefore does not represent the best reading of the statute.

The DeVries Case

The industry letters attempt to justify their position using the 2003 Pollution Control Hearings Board decision in DeVries v. Ecology. In DeVries, the PCHB did rule that various water needs relating to the raising of stock are included under the stockwatering purposes prong of the exemption. However, the Board also concluded that all of those uses, including stock drinking, were collectively limited to 5,000 gallons per day. In fact, it was the restrictive nature of the DeVries decision that prompted the project proponent to work with the agency, and to find and transfer an existing water right to the dairy rather than continue the appeal. 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 stockwatering purposes prong.

Attorney General Opinion No. 17

Up until 2005, 60 years after the groundwater exemption was enacted, the stockwatering purposes prong of the exemption, like the other “exempt” uses listed in the statute, was interpreted and applied as authorizing only up to 5,000 gallons of water usage per day. This interpretation was utilized by courts in general stream adjudications and by Ecology and its predecessor agency in various regulations.

Then, in 2005, Attorney General Opinion No. 17 interpreted the language of the groundwater exemption as imposing no quantity limit for stockwatering purposes. The Opinion is based on a careful parsing of statutory language, and Ecology agrees that it is a correct reading of the statutory terms. While we believe that it is unlikely that the 1945 Legislature had in mind the usage of unlimited quantities of water for industrial-size stock operations like the one proposed by the Easterdays, absent a modification by the legislature or a different interpretation by a court, Ecology has and will continue to adhere to the conclusions in Attorney General Opinion No. 17.

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Importantly, the Attorney General was not asked to define "stockwatering purposes," and Opinion No. 17 did not address the question of what uses are included within that term. Ecology believes that the phrase should not be interpreted so as to include uses like dust control and irrigation. In our view, such an interpretation stretches far beyond what the Legislature intended and makes wise water management extraordinarily difficult.

Sound Water Resource Management

Competition for water in Washington is intense and growing more intense every day. Conflict between water users is increasing. In many basins, stream flows and aquifer levels are dropping. In this context, a permit exemption that is unlimited in quantity makes little sense.

Any other use of the state's water in a quantity even approaching that proposed by the Easterday project would require a water right. That permit process would require a careful examination of whether: 1) water is available; 2) the proposed use is beneficial; 3) existing rights will be impaired; and 4) the proposed water use is in the public interest. This scrutiny provides protection to existing water users, stream flows and aquifer levels. It is critical to long-term sustainability and certainty for water right holders. It makes little sense for industrial-sized livestock operations, alone among large water users, to be exempt from such permit scrutiny.

In our view, the Easterday feedlot should obtain a water right for the water it proposes to use for dust control and irrigation. As stated above, we stand ready to assist the Easterdays in this process. We believe the Easterdays' reliance on the stockwater exemption exceeds what is authorized by the law. We do not think such an approach represents the best reading of the current law, especially because it poses an unexamined risk of impairment to existing rights, groundwater resources and/or instream flows.

In closing, effective water management requires clarity, and we sincerely hope the legislature will provide such clarity on this issue in the coming session, so we can effectively manage Washington's water for a strong economy and a healthy environment.

In the meantime, we will continue to work with the proponents of large stock operations to find them safe and reliable water. Once again, we strongly encourage legislation to provide the clarity needed in this important issue. We stand ready to assist. Please let me know how we can help.

cc: The Honorable Christine O. Gregoire, Governor
The Honorable Rob McKenna, Attorney General
Robert Gore, Acting Director, Department of Agriculture
Governor's Executive Policy Office
Senate Water, Energy and Telecommunications Committee
House Agriculture and Natural Resources Committee