ANALYSIS OF HB 1314

House Agriculture & Ecology Committee February 2, 1999

BACKGROUND:

With the adoption of the surface water code in 1917 and the groundwater code in 1945, new rights to the use of water are established under a permit system. However, certain uses of groundwater not exceeding 5,000 gallons per day are exempted from this permit requirement. The permit system is based on the prior appropriation doctrine that "first in time is first in right." Other laws authorize the state to establish minimum flows and levels for streams and lakes. The permit system and the state's laws for managing water resources are administered by the Department of Ecology (DOE).

Statutory policies pertaining to water resources encourage water conservation and water efficiency, but the policies do not require them to be considered a potential source of water in state and local water resource planning processes. State law also authorizes the use of reclaimed water in certain instances. The Department of Ecology (DOE) may reject a water right application if there is no unappropriated water in the proposed source of supply, if the proposed use conflicts with existing rights, or if the proposed use would be detrimental to the public interest. The department does not have specific authority to reject an application if it would better serve the public interest for an alternative source of water to be used.

A water right is appurtenant to the land or place that the right is used. However, the Surface and Ground Water Codes allow the right to be changed, transferred, or amended to change the place of use, the point of diversion, or purpose of use. Such a change requires the approval of DOE and must be done without detriment or injury to existing rights, whether junior or senior to the right being changed. A right transferred, changed, or amended in this manner retains the date of priority (seniority)of the existing right. A right may also be transferred to the state for management by DOE as a trust water right.

In 1997, the State Supreme Court required that an irrigation district's water right be quantified in an adjudication proceeding based on beneficial use and not on system capacity. In a 1998 decision, the Court came to a similar conclusion regarding the extent a water right held by a private developer. The Court declared in that decision that it declined to address issues concerning municipal water suppliers in the context of the 1998 case. Nonetheless, the Court followed this declaration with a discussion of the possible effect of a gubernatorial veto of a bill regarding water rights for municipal water supplies.

DOE has the authority to levy civil penalties for violations of the surface or groundwater codes, of the minimum levels and flows laws, and of the laws governing the use of certain water supply

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grant and loan monies. The penalty is up to $100/day. In general, a person seeking to construct hydraulic projects or perform other work affecting the natural flow or bed of a body of water must get the approval of the Department of Fish and Wildlife (F&W). The Department may levy civil penalties of up to $100/day for a violation of this requirement. Violations of certain other laws administered by F&W are natural resource civil infractions.– The statutory limit to penalties for these infractions is $500 per offense.

The Growth Management Act (GMA) requires every city and county to designate and protect critical areas. Critical areas include wetlands, areas with a critical recharging effect on aquifers used for potable water, fish and wildlife habitat conservation areas, frequently flooded areas, and geologically hazardous areas. Cities and counties which are required or choose to plan under the Growth Management Act are required to adopt a land use element, housing element, capital facilities plan element, utilities element, rural element, and a transportation element. A city or county may also include additional elements as part of its comprehensive plan such as conservation, solar energy, and recreation.

Cities and counties which plan under the Growth Management Act are required to review their comprehensive plan and development regulations at least once every five years to ensure that they are consistent with the requirements of the Growth Management Act.

SUMMARY:

PARTS I & II. Water Conservation & Reclaimed Water

Any city, town, or county may adopt a water conservation program which may include use of conservation measures in addition to those required by the Department of Health (DOH) and the DOE, such as landscape irrigation requirements, public fixture retrofit and rebate programs, and commercial and industrial conservation programs. (Sec. 109-111) A city, town, or county must require any proposed short plat, short subdivision, and building permit to be in conformance with any ordinances requiring conservation measures. (Sec. 108) Local governments may adopt ordinances requiring the use of reclaimed water for nonpotable uses when determined feasible. (Sec. 206)

DOE must require sewer plans that propose an expansion of treatment capacity to include an evaluation of the cost-effectiveness of funding water conservation programs as an alternative to expanding sewage treatment capacity. (Sec. 112)

Public water systems with 15 or more service connections must implement a water conservation program promotion targeted at its customers, and implement other cost-effective conservation measures identified in approved water conservation plans. (Sec. 105) These systems must also collect monthly water use data from all water sources used to serve the system and submit it each year to DOH. (Sec. 107) Public water systems with 1000 or more service connections must implement a leak detection and repair program, conduct water audits to identify opportunities for improved water efficiency, and utilize commodity-based water rates. Public water systems which have completed conservation plans within the past six years do not need to create a new plan, but must address any unaddressed elements the next time the plan is updated. (Sec. 105)

DOH is directed to develop water conservation planning requirements for public water systems based upon system size, and these requirements must be included in water system plans and small water system management programs. In addition, DOH is required to review and approve water conservation plans and monitor their implementation to ensure compliance, and provide technical assistance. Public water systems must demonstrate compliance with water conservation planning requirements by utilizing water use efficiency standards developed by DOE, evaluating service meter installation, evaluating conservation measures and implementing those which are cost-effective, and evaluating the development and implementation of a leak detection and repair program. (Sec. 106)

DOE may make loans or grants from drought preparedness funds to implement agricultural water supply conservation or efficiency projects. The grant portion of a single project cannot exceed 20% of the total project cost. The project must result in at least a 10% decrease in diversion or withdrawal, and at least 50% of the net water savings must be conveyed to the state as a trust water right. In order to be eligible for funding: an entity must be organized as a public body which can accept and administer loans and grants; the entity must have completed an approved water conservation plan that recommends the project proposed for funding; and the project must be sited in an area that has fish species that are listed or proposed for listing as threatened or endangered under the federal Endangered Species Act or that are depressed or critical stocks under the state Salmon and Steelhead Stock Assessment, has agriculture as its economic base, and is prone to drought conditions. (Sec. 104)

DOE is designated as the lead agency for reclaimed water permitting and design approval, and DOH is directed to provide public health input and assessment on all DOE permit decisions. (Sec. 201) DOE must adopt rules in coordination with DOH by December 31, 2000, for industrial and commercial use of reclaimed water and for land applications of reclaimed water, and rules that identify criteria to determine when it is feasible to use reclaimed water as a replacement for nonpotable water uses. (Sec. 202, 203, 206) Coordinated water system plans, regional water supply plans, water system plans, and wastewater plans must be coordinated to ensure reclaimed water use has been fully considered. (Sec. 205)

The owner of a wastewater treatment plant with a permit for reclaiming water has the exclusive right to the reclaimed water subject to the terms of the permit, and is exempted from the requirements to obtain approval of a change or amendment of a water right. If the state or the federal government provides funding for the construction of reclaimed water facilities, the state is required to establish a trust water right in reclaimed water for the fraction of the reclaimed water attributable to the funding. The DOE may accept an alternate right from the reclaimed water project owner in lieu of reclaimed project water if it is more advantageous for instream flow restoration. The priority use for the state's share of reclaimed water is for instream flows. (Sec. 207)

The Department of Ecology (DOE) may reject a water right application if it would better serve the public interest for an alternative source of water to be used, including water that could be acquired through a change or transfer of an existing water right or through use of reclaimed water. (Sec. 103)

In consultation with certain other agencies, DOE must adopt rules establishing water use efficiency performance standards for various water uses by December 31, 2000. The standards shall be based on the minimum amount of water necessary to carry out the intended purpose of a water use without waste. The standards may include a reasonable amount of normal conveyance and application loss. Any of these may be superceded by efficiency performance standards in basin plans adopted by the state under the Water Resources Act of 1971 or to which the state obligates itself in the watershed planning process enacted in 1998. The standards must be used for water demand forecasting, public water system planning, and assessing whether new water rights are needed and as a guide in evaluating plans for using Referendum 38 water supply monies. (Sec. 113.)

A person claiming a right or need to the use more water than identified in the standards carries the burden of showing that special circumstances require a variance from the standards. (Sec. 113(4).)

PART III. Water Rights Changes and Transfers.

When reviewing an application for a transfer of or change in a water right, DOE must make a tentative determination regarding the validity and extent of the right, including actual, reasonable and beneficial use, common law abandonment, relinquishment for non-use, and waste. Repealed is a 1997 provision setting the annual consumptive quantity– of a water right that may be transferred or changed. (Sec. 301.) Expressly added to the tests to be satisfied before a water right may be changed is a determination whether the public interest will be detrimentally affected by the change. A certificate of right is issued only after the water has been beneficially used as authorized for the change. Irrigated acreage within an irrigation district may not be expanded by using conserved water without the approval of DOE. (Sec. 301.)

A water right holder may apply for a change or transfer to use conserved water, and may not expand irrigated acreage or expand the place of use or population served by the water right except in this manner. If the annual consumptive quantity of water would not be increased, the person proposing the change may retain all of the transferrable conserved water. If it would increase, at least ½ of the transferrable net water savings or the proportion of the conservation project funded by state or federal monies, whichever is greater, must be conveyed to the state as a trust water right. Such a reallocation and use of the conserved water may not impair existing junior or senior water rights. This conveyance of trust water may be waived by DOE only if there would be no discernible public purpose served by the conveyance. In this latter case, the proponent must pay an amount equal to the value of the water right that would have been conveyed to the state. Such payments are to be deposited in the state Stream Flow Restoration Account for use in purchasing or leasing trust water rights. (Sec. 302.)

DOE may process applications for changes, transfers, or amendments to water rights as a matter of higher priority than applications for new water rights. An application for a new water right for which a permit decision has not yet been made is not considered in determining the rights to be protected from injury, impairment, or detrimental effect by the

transfer, change, or amendment. (Sec. 303.)

Any person may acquire and hold a water right for a beneficial instream purpose though a transfer or change approved by DOE. Such an instream flow right is appurtenant to a stream or reach of stream specified in the approval and maintains the priority date of the right changed or transferred. (Sec. 305.)

PART IV. Public Water Supply.

Certain types of certificates of water rights for public water systems are to be split into certificated rights and developmental permits for inchoate– rights. This applies to each such certificate that: documents a combination of water actually put to beneficial use and water never put to such use; has a water source that has been approved by the Department of Health (DOH); and has facilities constructed for use of the water under the right. The amount of water actually beneficially used remains governed by the certificated right. The inchoate portion, the amount not actually beneficially used, is governed by a permit for continued development. (Sec. 402.) The developmental permit carries the priority date of the original certificated right, but has the following conditions placed on its continued development:

- the methods for determining the number of service connections and area served by the permit are prescribed by statute and certain limitations are set on the use of interties; (Sec. 402.)
- the development must take place within a schedule that generally is 20 years plus any extensions granted by DOE for good cause under current law, however:
    - the schedule may be for less than 20 years if the permittee can put the water to beneficial use in a shorter time using reasonable diligence;
    - the schedule may be for more than 20 years, but not more than 50 years, if a planned need is demonstrated, withdrawal facilities sized to that need have been constructed, or debt service requirements extend beyond 20 years; and
    - further development may be denied if there is no demonstrated need. (Sec. 405.)
- the development must comply with these performance standards:
    - evidence demonstrating need consistent with DOE and DOH forecasting methods;
    - consistency with local land use planning;
    - consistency with conservation and use efficiency requirements existing at the time of each round of submittals;
    - current information on consistency with state and federal laws; and
    - evidence of participation in any initiated, collaborative, watershed planning efforts or coordinated water system planning, as practicable.
- if the system's source is directly or indirectly water that provides habitat for salmonid stocks listed or proposed for listing as threatened or endangered under the ESA or listed as critical or depressed under the state's salmon and steelhead stock inventory, the system must enter an interlocal agreement with DOE and F&W. The agreement is to entered within 2 years and is to establish commitments to take immediate actions to arrest the further decline of fish stock health and abundance,

establish and restore instream flows and establishing milestones and adaptive management. The agreement and its implementation and effectiveness are to be reviewed by DOE within 4 years and every 3 years thereafter.

- if the system is in an area without stocks listed as threatened, endangered, critical, or depressed, the development must be consistent with instream flow requirements set by rule for a stream. For other areas, it must be consistent with such adopted flows or other flows specified by DOE in consultation with F&W. (Sec. 405 and 407.)

Mediation and appeal to the Pollution Control Hearings Board are authorized for compliance with the performance standards and with the interlocal agreement. Permittees must initially document compliance within 2 to 6 years, and then in their water system plan updates or in other written form. (Sec. 405 and 407.)

DOE must approve an application for a change or transfer of an inchoate right from one public water system to another or for expanding the place of use of the right if, (in addition to the requirements that apply to other transfers and changes):

- the transfer is consistent with a state-approved water system plan and approved comprehensive plan or other applicable approved planning commission plan.
- a transfer of more than 2 million gallons/day of water across a WRIA boundary is consistent with an approved, locally developed WRIA plan or, in its absence, is first approved by the counties affected by the transfer.
- the system's water use meets or exceeds state performance standards. The performance by any system receiving water from an intertie in the transfer must meet or exceed the sending system's performance.
- the use of the water is subject to instream flows set by rule, other instream flows specified by DOE in consultation with F&W or, if adopted flows have not been met in 8 of the most recent 10 years, the applicant assists in the restoration of aquatic ecosystems in the affected watersheds equal to 10% of the volume or value of the unused water transferred. (Sec. 408.)

The developmental portion of the permit may be incrementally converted to certificated rights not more than once every six years. (Sec. 402.)

Interties may be used to acquire water, not just exchange or deliver water, and they are no longer expressly prohibited from including the development of new sources of supply to meet future demands. (Sec. 410.)

Privately and publicly owned public water systems are added to the list of entities that may establish interlocal governmental agreements. (Sec. 404.) DOE may enter agreements with satellite management agencies to effect sound management and public health objectives. (Sec. 409.)

PART V. Ground Water Exemption.

The exemption permit requirements provided by law for certain withdrawals of not more than 5,000 gallons/day of groundwater is replaced. DOE must enter agreements with each county to set the conditions under which new withdrawals of groundwater will be exempt from

permit requirements. These must be done within 2 years and later, as changing water conditions dictate. The agreements must meet state and local land and water objectives including: protecting and restoring salmonid stocks listed or proposed for listing as threatened or endangered under the ESA or state listed as critical or depressed; complying with the GMA; promoting cluster development; and providing means to address or mitigate environmental or resource effects of the exempt withdrawals. (Sec. 501 and 502.)

In the interim, uses for up to 5,000 gallons/day similar to those currently exempt continue to be exempt to the extent beneficially used and in conformance with all other laws, but DOE may require persons withdrawing to furnish information regarding the means for and quantity of their withdrawals. Counties may further restrict the use of the exemptions by ordinance. However, during the interim, use of the exemption in areas with salmonid stocks listed or proposed for listing as threatened or endangered under the ESA or state listed as critical or depressed is either prohibited or may be modified. The prohibition or modification applies if depleted stream flows are an factor contributing to the decline in the fishery resource. In such a case, the use is prohibited where service from an existing public water system or approved satellite management agency is reasonably available. If such service is not available, the exemption is modified to apply only to reasonable single-family domestic purposes not exceeding 400 gallons/day and only until service can be provided by a public water system. (Sec. 503.)

In its written findings that provision has been made for potable water supplies for approving a subdivision or dedication of land, the city, town, or county must ensure that the number of new public water systems established is minimized and the use of new wells is consistent with these new requirements for exempt wells. If the proposed subdivision is within the future service area of an existing public water system identified in a coordinated water system plan or an approved water system plan, the city, town or county must require connection to the system if service is available in a timely and reasonable manner. If it is not in such a service area, any new public water system must conform to the laws regarding satellite management agencies. (Sec. 504.) In issuing a building permit, the local government must, rather than may, require connection to an existing public water system that can provided safe and reliable water service. The local government must also require conformance with water conservation measures consistent with local ordinances. (Section 505.)

PART VI. Capture of Surface Water by Wells.

The methods selected through a framework developed by a technical advisory committee convened by DOE for assessing the relationship between surface and groundwater in a given area may be used to determine the effects that proposed withdrawals of groundwater could have on existing rights, including established instream flows. Measures that would offset the effects caused by the withdrawals should be undertaken in a manner consistent with resource management principles.

DOE must convene a group of stakeholders and scientists to review, assess, and recommend methods for mitigating the effects of such withdrawals. This type of mitigation is to be treated in much the same way that, under current law, the effects of impoundment or other

resource management techniques proposed by an applicant are to be treated when DOE is determining whether or not to issue water right permits. (Sections 601 - 603, 605 and 606.)

When considering an application for a groundwater permit or amendment, DOE must condition the permit with instream flows it specifies in consultation with F&W if instream flows have not been set by rule or those set are not sufficient. These remain in effect until replaced by a flow set by rule. (Sec. 604.)

PART VII. Enforcement.

The Director of DOE and the Director of F&W are authorized to delegate and accept law enforcement powers or functions to or from each other's department. (Sec. 701.)

If a person or government agency fails to follow the requirements of obtaining an hydraulic project approval or fails to carry out any of the conditions of such an approval, F&W may issue an order requiring the person or agency to stop work, and/or to correct or to restore the nonconforming site. The current penalty of up to $100/day for violations is repealed and F&W is authorized to adopt rules designating certain violations of the conditions of such approvals as natural resource civil infractions.– The statutory limit to penalties for these infractions is $500 per offense. (Sec. 702.) Unlawfully undertaking an hydraulic project activity includes violating a stop work order or violating a rule governing small scale mining, except when the latter is also designated as an infraction. (Sec. 703.)

If the terms of a shoreline substantial development permit establish requirements that must be completed after occupancy or use begins or must be done on an on-going basis, the local government may require a bond or other demonstration of financial responsibility to be posted regarding compliance and may require compliance reporting. False claims regarding compliance may be grounds for revocation of the permit and may be considered a violation of the Shoreline Management Act. (Sec. 704.)

The authority of DOE to levy civil penalties for violations of the surface or groundwater codes, of the minimum levels and flows laws, and of the laws governing the use of certain water supply grant and loan monies is expanded to include violations of the Water Resources Act and the Family Farm Water Act. The authorized penalty of up to $100/day is replaced by penalties for three categories of violations: $100/day to $1000/day for minor violations; $1000/day to 10,000/day for serious violations; and $10,000/day to 25,000/day for major violations. Monies collected from these civil penalties are to be deposited in the Stream Flow Restoration Account. (Sec. 705.)

Following an adjudication for an area, a stream patrolman may be appointed by DOE at the Director's discretion, not just upon the application of users of adjudicated rights. The patrolman's area of jurisdiction is now designated water sources and no longer designated streams. DOE may also, for certain purposes, appoint a stream patrolman for any area, with the approval of the affected county. (Sec. 707 and 708.)

DOE's powers to regulate the withdrawal or diversion of public waters and water or water

rights, including regulation based on priority dates, are established. These powers may be exercised whether or not a general adjudication relating to the water rights has been conducted. (Sec. 710.)

If the water rights to be regulated and any senior right to be protected are not embodied in a water right permit or certificate, DOE has the sole power to regulate and may bring an appropriate action in Superior Court at law or in equity, including seeking injunctive relief, as it deems necessary. The Court must make findings and a determination of the validity and priority of the water rights held by the parties to resolve the regulatory situation and issue any necessary orders.

DOE may regulate the water rights in this manner or by issuing regulatory orders in the following circumstances: (a) the water right or all water rights to be regulated and any senior right to be protect are embodied in water right certificates or permits; (b) an instream flow or level has been established by rule; or (c) it appears that public waters are being withdrawn without any right or other appropriate authority whatsoever. (Sec. 710.)

PART VIII. Land Use

A city or county which plans under the GMA may include an economic development element or an environmental element as part of its comprehensive plan. The economic development element should promote economic opportunity for all citizens and encourage appropriate growth in areas experiencing insufficient economic growth. (Sec. 801.) The environmental element may be prepared as a separate document, as a separate element, or integrated as part of each other element of the plan. The environmental element must address system and area-wide improvements and cumulative impacts, and should determine whether the comprehensive plan is consistent with the interests protected under the Shorelines Management Act. (Sec. 802.) A city or county is not required to prepare a detailed statement under the State Environmental Policy Act for the preparation of an environmental element. (Sec. 803.)

PART IX. Shoreline Management.

Local governments which plan under the GMA must review their master program adopted under the Shoreline Management Act at least once every five years to ensure compliance with state guidelines. The first review must occur no later than September 1, 2002. For jurisdictions not planning under the GMA, the master program must be adopted or amended within 24 months after the adoption of guidelines by DOE unless the local government adopts or amends its master program pursuant to a schedule adopted by the department. If DOE adopts such a schedule, the time period for the schedule shall be at least 24 months but no longer than 60 months. The schedule may establish different timelines for different classes of local government. (Sec. 901)

PART X. Funding.

Drought preparedness is added as one of the purposes for which monies may be used that are

currently dedicated to use for drought emergencies. (Sec. 1003.) A state Drought Preparedness Account is created in the State Treasury. Of the drought emergency monies, $6.8 million are transferred to this Account and $0.5 million are left in the original account. (Sec. 1004.)

A Stream Flow Restoration Account is created in the State Treasury and is subject to appropriation. Expenditures from the Account may be used only for DOE's purchases or leases of water rights for placement in the state's trust water rights programs. (Sec. 1005.) The state is no longer prohibited from using funds other than those specifically appropriated for the purchase of water rights to buy water rights for the state-wide water trust system. (Sec. 304.) $43 million in federally appropriated funds are appropriated from the State and Local Improvements Revolving Account - Water Supply Facilities for the following:

- $21.5 million or as much thereof as necessary must be expended by DOE for agricultural water supply conservation and efficiency improvement projects through grants and loans to public bodies; and
- $21.5 million or as much thereof as necessary must be expended by DOH for domestic and municipal water supply conservation and efficiency improvement projects through grants and loans to public bodies. (Sec. 1006.)