

February 7, 2005

Joe Stohr, Manager
Water Resources Program – Dept. of Ecology
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Dear Joe,

We understand and respect your decision not to discuss the whistleblower report filed with the State Auditor by the Ecology whistleblower. We are writing to share our perspective about the assertions made in the report and how they relate to water resource management in Washington, in the hopes you consider them as the investigation proceeds.

As I'm sure you are aware, we agree with the whistleblower report's assertions, namely: 1) Two Ecology permit writers regularly sign "Reports of Examination" without making the legally required investigation and findings of fact; and, 2) Ecology lacks a system to track water right holders and their water use, resulting in, among other things, an inability to recover water rights that have been relinquished or are otherwise invalid. In fact, based on CELP's review of all ROEs issued in the last six years, it is quite common for ROEs to have inadequate findings for both the determination of whether water is available and whether a proposed appropriation will impair senior water rights. We have attached 11 ROEs as examples of these inadequacies.

It is our understanding that the initial whistleblower report that was submitted described these assertions as broad, systemic problems regarding the program. This initial filing was rejected by the Auditor, who required the whistleblower to provide specific case examples regarding specific individuals. We believe that the case examples are illustrative of a broader problem that permeates the program and that it is imperative for Ecology to consider this, either in the context of the whistleblower report or separate from it.

We are unaware of any but the most general Ecology guidance documents on how staff should investigate or make appropriate findings for water right decisions (e.g., POL-1200, PRO-1000). It is long past time for Ecology to develop systematic guidance for its water resources staff. Additionally, since the 1994 budget cuts, when 65% of the water resource program's competent staff were laid off, turnover has made proper training and guidance a more pressing need. While Ecology has hired new staff, the learning curve for water right processing is extremely steep. Lack of training and the practice of investing inexperienced staff with highly complex decision responsibilities is, from our perspective, a continuing problem.

We believe that Ecology should institute internal guidelines for conducting water availability and water rights impairment analyses in the context of water appropriation decision-making. For

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example, we believe that when Ecology does an availability analysis on an application for a new water right, it should consider the following:

- 1) historical stream flow data from the proposed surface water source, or information about the capacity of the proposed aquifer source;
- 2) the level of water needed, based upon best available science, to retain base flows, meet minimum regulatory flows that may exist, and protect fish and other instream needs, in relation to the proposed appropriation;
- 3) if applicable, the impact to surface water due to hydraulic continuity with proposed withdrawal source; and
- 4) the extent of legal availability of water, based upon a water budgeting method that accounts for all already allocated water rights, including those held outside the state permitting system (exempt wells, navigation servitudes, federally-reserved rights, international and tribal treaty rights, etc.)

Additionally, we believe impairment analysis should include an analysis of all potential diversions for out-of-stream use (or from groundwater in hydraulic continuity with proposed withdrawal or diversion) by holders of all water permits, certificates, claims, and exempt wells, as well as consideration of instream treaty and reserved rights, regulatory minimum instream flows, and base flow needs.

If the above analyses cannot be completed due to lack of information or data, Ecology does not have adequate information to make a legally valid finding and should either deny the appropriation application or take no action.

In addition, Ecology should adopt a universal practice of issuing draft Reports of Examination or Findings of Fact. This will allow other water right holders and the public to review and comment on Ecology's findings at a time when such input is meaningful to the agency and the applicant.

Once these guidelines are finalized, Ecology should also initiate intensive training of permit writers based on these guidelines.

We also concur that historically, water rights have not been tracked in a consistent and systematic way. As a result, and as often admitted by Ecology, Ecology doesn't have good information about how much water is actually being used, and by whom. We know you have taken, and continue to take, steps to address this issue in the context of metering, and we look forward to continuing to work with you in that endeavor.

We appreciate your willingness to talk with us about these important water management issues regardless of the Auditor's investigation, and we look forward to hearing from you about the appropriate timing.

Sincerely,

Karen D. Allston, Executive Director
Center for Environmental Law & Policy

Lea Mitchell, Executive Director
Public Employees for Environmental Responsibility

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Attorney at Law

cc: Keith Phillips
Linda Hoffmann