

Colorado Water Legislation Alert

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Bill Requires "Sufficient and Sustainable" Water Supply for Development

On January 15, Rep. Kathleen Curry introduced HB-1141, which would require developers to submit information to local permitting authorities confirming whether the water supply for a proposed development is physically available and is "sufficient and sustainable" to meet the requirements of the proposed development. As drafted, the bill would apply to projects that include more than 50 units or single-family equivalents. In determining whether a developer has satisfied the "sufficient and sustainable" standard, the local government would be required to consider the physical source of the proposed water supply, together with the following documentation provided by the developer:

- A report prepared by a Professional Engineer (PE) stating that the proposed water supply is both sufficient and sustainable to meet the requirements of the development;
- A letter from the State Engineer's Office (SEO) commenting on the PE report and independently determining whether the proposed water supply is both sufficient and sustainable; and
- If water is to be provided by a water supply entity, a letter from that entity stating their commitment and ability to supply water to the proposed development.

"Water supply entities" include municipal, county, special district, water conservancy district, water conservation district and all other public and private water supply companies with the legal authority to supply water at retail. It is unclear whether the PE and SEO may rely upon the supply entity's report in making their own independent determinations as to sufficiency and sustainability, or whether they must prepare an independent review of the provider's capability for each proposed development.

Many counties already enforce subdivision water supply requirements. Because those standards vary from county to county in their level of prescription, HB-1141 would have a widespread impact upon the planning and permitting process that has heretofore proceeded as a local matter. Furthermore, the bill amends Title 29 local government statutes, which defines "local government" to include counties. Since the Title 30 county government statutes also set forth subdivision regulations and referral and review requirements, the latter of which requires an opinion from the SEO as to the "adequacy" of water supply for a proposed subdivision, it is unclear how HB-1141 might fit into or complement the existing regulatory scheme.

Rep. Curry has indicated to the Colorado Water Congress that the bill is not intended to impose a detailed and restrictive definition of "sufficient and sustainable," and that she is open to modifying the bill's language. As introduced, HB-1141 defines "sufficient and sustainable" as "capable of providing the estimated peak daily, monthly, and yearly water supply requirements" of the proposed development. Some observers have noted that while this definition might adequately define "sufficient," it seems to read "sustainable" out of the requirement and therefore opens the door to uncertainty in implementation. That uncertainty is cause for legitimate concern in the developer community as to just what would be required under the bill and what the scope of any potential future liability might be.

Water Bills Introduced in 2008 General Assembly

Bill #	Short Title	Sponsors	Comment
SB-13	<p>Reallocation of funds in the Operational Account of the Severance Tax Trust Fund.</p> <p>Senate Ag amended and referred to Appropriations Jan. 31</p>	<p>Sen. Schwartz, Rep. Fischer</p>	<p>Authorizes the allocation of up to 5% of the operational account away from the Oil & Gas Comm'n and the Div. of Reclamation, and to the Div. of Wildlife and Parks & Rec., without mandating spending in new areas.</p> <p><i>Water Congress No Position</i></p>
SB-28	<p>Assignment of State's rights in Bonny Reservoir to CWCB, to be used to reduce evaporative losses.</p> <p>Discussed in Senate Ag Jan. 24; awaiting fiscal note</p>	<p>Sen. Brophy, Rep. C. Gardner</p>	<p>Controversial – Intent of sponsor unclear, but appears designed to allow draining of Bonny Reservoir to eliminate evaporation and seepage losses that are allocated to Colorado as consumptive use under the Republican River Compact. The bill implicates a complex web of issues that include compact compliance, declining aquifer levels, depletion of surface flows by well pumping, and large-scale augmentation projects.</p> <p><i>Water Congress Deliberating</i></p>

Bill #	Short Title	Sponsors	Comment
SB-36	<p>Conditions CWCB allocation of severance tax trust fund account upon applicant's adoption of a water conservation plan.</p> <p><u>Passed</u> third reading in Senate Jan. 25, with amendments</p>	Sen. Isgar, Rep. Curry	<p>Allows CWCB to condition loans or grants from the water supply reserve account of the severance tax trust fund, and specifies that repayments of principal and interest are credited to the account.</p> <p><i>Water Congress <u>Supports</u></i></p>
SB-53	<p>Amends statutory definition of "designated ground water."</p> <p>Calendared for Senate Ag Feb. 7</p>	Sen. Brophy	<p>Controversial – Intent of sponsor not clear but appears to be to assist isolated well operators; bill would expand statutory definition of designated ground water to include that pumped from wells that takes more than 100 years to travel to a stream.</p> <p><i>Water Congress <u>Deliberating</u></i></p>
HB-1014	<p>Small capacity well ownership reporting requirement.</p> <p><u>Passed</u> House Jan. 23</p>	Rep. Looper, Sen. Gordon	<p>Requires residential home buyers to report change in ownership to the Div. of Water Resources, and directs the real estate commission to promulgate rules to reflect the requirement in appropriate form contracts.</p> <p><i>Water Congress <u>Supports</u></i></p>
HB-1030	<p>Exempts certain augmentation plans from replacing pre-1974 well pumping depletions in Water Div. No. 1.</p> <p><u>Passed</u> House Ag with amendments Jan. 30</p>	Rep. Hodge, Sen. Brophy	<p>Controversial – Originally recommended by the South Platte River Task Force, the bill provides that "aug plans" hereafter applied for or amended shall not require replacement of depletion caused by pumping that occurred prior to March 15,</p>

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			<p>1974. Controversy focuses on the policy of exemption itself, as well as confusion over the intent of the Task Force with respect to whether the exemption should extend to plans applied for, amended in the future, and/or already adjudicated.</p> <p><i>Water Congress Deliberating</i></p>
<p>HB-1044</p>	<p>Facilitation of the use of excess water augmentation credits.</p> <p><u>Passed</u> House Ag with amendments Jan. 30</p>	<p>Rep. Hodge</p>	<p>Allows excess credits to be loaned for use in another decreed augmentation plan or substitute water supply plan to replace current-year depletions caused by prior pumping.</p> <p><i>Water Congress Deliberating</i></p>
<p>HB-1141</p>	<p>Requires real estate developers to demonstrate to local land-use permitting authorities a "sufficient and sustainable" water supply to serve peak daily, monthly, and annual water supply requirements.</p> <p>Calendared for House Local Govt. Feb. 5</p>	<p>Rep. Curry, Sen. Bacon</p>	<p>Applies to developments larger than 50 single-family equivalents. The developer must file a water demand report completed by a PE, and the local government must obtain (i) a letter from the State Engineer commenting on the PE's report, and (ii) a letter from the developer's water supplier summarizing the supplier's water portfolio. As drafted, the bill defines "sufficient and sustainable" essentially as "sufficient," leaving open questions as to just how draconian these requirements may be.</p> <p><i>Water Congress Deliberating</i> *subcommittee meeting 1/31</p>

Bill #	Short Title	Sponsors	Comment
HB-1148	<p>Statutory modification of elements of adverse possession claim against real property.</p> <p>Calendared for House Judiciary Feb. 6</p>	Rep. Witwer, Sen. Tupa	<p>Bill drafted in response to high-profile 2007 adverse possession case in Boulder. As drafted, the bill does not sufficiently protect statutory recognition of ditch and other easements that may be compromised by the broad language of the bill.</p> <p><i>Water Congress has drafted proposed amended language</i></p>

This document is intended to provide you with general information about issues related to legislative updates pertaining to water-related legislation in the State of Colorado. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact one of the attorneys listed below or your regular Brownstein Hyatt Farber Schreck, LLP, attorney. This communication may be considered advertising in some jurisdictions.

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