

HOUSE BILL REPORT

2E2SHB 1338

As Passed House:

June 5, 2003

Title: An act relating to certainty and flexibility of municipal water rights and efficient use of water.

Brief Description: Providing additional certainty for municipal water rights.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives Linville, Kirby, Lantz, Rockefeller, Shabro, Jarrett, Grant, Quall, Hunt, Delvin, Wallace, Woods, Benson, Morris and Conway; by request of Governor Locke).

Brief History:

Committee Activity:

Agriculture & Natural Resources: 1/29/03, 2/4/03, 2/28/03 [DPS];
Appropriations: 3/8/03 [DP2S(w/o sub AGNR)].

Floor Activity:

Passed House: 3/18/03, 57-40.

First Special Session

Floor Activity:

Passed House: 6/5/03, 83-14.

Brief Summary of Second Engrossed Second Substitute Bill

- Defines which water rights are held for municipal water supply purposes and establishes provisions regarding such rights.
- Declares such rights represented by certificates issued under a "pumps and pipes" principle to be rights in good standing but, from now on, allows certificates for new municipal water rights to be issued only for the water actually beneficially used.
- Identifies how the "place of use" of a municipal water supplier's water right may be the same as the supplier's service area and when limitations found in water right documents do not limit the number of service connections or population that may be served under a municipal water right.

- Requires water service under water system plans for new industrial, commercial, and residential uses to be consistent with comprehensive plans, land use plans, and development regulations; establishes a duty for a retail supplier to serve new residences in its service area under certain criteria; and requires certain consultation in the system plan approval process where further coordination between water system planning and watershed planning needed.
- Requires certain water conservation planning and practices and authorizes the Department of Health to charge municipal suppliers a specified fee until June 30, 2007, to provide funding for conservation activities.
- Authorizes the transfer of inchoate municipal water rights under certain conditions and requires the DOE to prioritize its resources for streamflow restoration in watersheds where the use of inchoate water rights may have a larger effect.
- Authorizes certain watershed agreements on a pilot project basis in water resource inventory area number one and requires any such contracts to be originally entered before July 1, 2008.
- Establishes new requirements for wastewater plans.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Linville, Chair; Rockefeller, Vice Chair; Kristiansen, Assistant Ranking Minority Member; Chandler, Eickmeyer, Grant, Hunt, McDermott and Quall.

Minority Report: Do not pass. Signed by 4 members: Representatives Schoesler, Ranking Minority Member; Holmquist, Assistant Ranking Minority Member; Orcutt and Sump.

Staff: Kenneth Hirst (786-7105).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Agriculture & Natural Resources. Signed by 21 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Sehlin, Ranking Minority Member; Pearson, Assistant Ranking Minority Member; Clements, Cody, Conway, Dunshee, Grant, Hunter, Kagi, Kenney,

Kessler, Linville, McDonald, McIntire, Miloscia, Pflug, Ruderman, Schual-Berke and Talcott.

Minority Report: Do not pass. Signed by 6 members: Representatives Alexander, Boldt, Buck, Cox, DeBolt and Sump.

Staff: Amy Hanson (786-7118).

Background:

Water Rights. A water right has several elements or conditions that identify limitations on the use of water under the right. One is its priority. Other elements of the water right include: the amount of water that may be withdrawn from a particular water source under the right, the time of year and point from which the water may be withdrawn, the type of water use authorized under the right (such as an agricultural or municipal use), and the place that the water may be used.

In the past, many water right certificates were issued by the state for municipal use once the main withdrawal and distribution works had been constructed for using the water, but before all of the water was actually put to use. Under this "pumps and pipes" philosophy, a municipality could develop its actual use over time, without affecting its certificated water right. In a recent case involving the water right of a private developer, the state's Supreme Court stated that a final water right certificate cannot be issued for the developer's right for a quantity of water that has not actually been put to beneficial use. The court stated that it declined to address issues concerning municipal water suppliers in the context of the case. However, in a draft policy that the Department of Ecology (DOE) circulated and subsequently withdrew, the DOE stated its conclusion that the holdings of the court in the case apply to all water rights, including municipal water rights.

Transfers. Certain of the elements or conditions of a water right may be modified with the approval of the DOE. These modifications are referred to in the water codes as transfers, changes, and amendments. They are referred to here collectively as "transfers." Where a county or counties have created a water conservancy board, the board may process applications for transfers and may act on the applications. A board's decision regarding an application is subject to approval by the DOE. Approving a transfer does not affect the priority date of the right. The transfer cannot be approved if it would impair other existing water rights, whether junior or senior.

Watershed Planning. The Water Resources Act (Act) directs the DOE to develop a comprehensive state water resources program for making decisions on future water resource allocation and use. The Act permits the DOE to develop the program in segments. Under the Act, the DOE has divided the state into 62 water resource inventory areas (WRIAs). The watershed planning law enacted in 1998 establishes a

process for the development of watershed plans under a locally initiated planning process. Such watershed planning may be initiated for a single WRIA or for a multi-WRIA area.

Water System Plans. The State Board of Health is directed by state law to adopt rules regarding public water supply systems. Under these rules, certain public water systems are required to submit water system plans or small water system management programs to the Department of Health (DOH) for review and approval. Other law requires the development of coordinated water system plans for critical water supply areas.

Summary of Second Engrossed Second Substitute Bill:

Water Rights for Municipal Supplies. A water right represented by a water right certificate issued in the past for municipal water supply purposes once works for diverting or withdrawing and distributing water were constructed, rather than after the water had been placed to actual beneficial use, is declared to be in good standing. However, from now on, the DOE must issue a water right certificate for a new water right only for the perfected portion of a water right as demonstrated through the actual beneficial use of water. The DOE must not revoke or diminish any water right certificate held for municipal water supply purposes unless the certificate was issued with ministerial errors or through misrepresentation, and then only to the extent of the errors or misrepresentation. This prohibition does not apply to the DOE's fulfilling its responsibilities to issue certificates at the conclusion of a general adjudication proceeding or following the change, transfer, or amendment of a water right.

A water right that is held for "municipal water supply purposes" is defined for the water code. It is a beneficial use of water: for residential purposes through 15 or more residential service connections or for a nonresidential population that is, on average, at least 25 people for at least 60 days a year; for governmental or governmental proprietary purposes by certain units of local government; or indirectly for either of these purposes through the delivery of treated or raw water to a public water system. If an entity's use of water satisfies any of these criteria, its other beneficial uses of water generally associated with the use of water within a municipality are also uses for municipal water supply purposes. When requested by a municipal water supplier or when processing a change or amendment to a right, the DOE must amend the water right documents and related records to ensure that municipal supply purpose rights are correctly identified.

The use of water that has been diverted or withdrawn for municipal water supply purposes may also include uses that: benefit fish and wildlife, water quality, or other instream resources or related habitat; or are needed to implement environmental obligations called for by an approved watershed plan, by a federal hydropower license, by a habitat conservation plan prepared in response to a listing of a species as being threatened or endangered under the federal Endangered Species Act, or by a comprehensive irrigation district management plan.

Hook Ups; Population Served; Place of Use. Information in an application or subsequent water right document for a water right for municipal water supplies regarding the number of hookups or the population to be served under the right does not limit the exercise of the right regarding the hookups or population if: the municipal supplier has a water system plan approved by the DOH or has the approval of the DOH to serve a specified number of service connections; and water service to the hookups or population served is consistent with the plan or DOH approval.

The effect of the DOH's approval of a planning or engineering document that describes a municipal water supplier's service area, or the local legislative authority's approval of service area boundaries under a coordinated water system plan, is that any part of the service area that had been outside of the place of use for the water right involved becomes part of the water right's place of use. This applies if the supplier is in compliance with the terms of its water system plan or small water system management program, including those regarding water conservation, and adding an area to the place of use under the right is not inconsistent with the applicable comprehensive plans, land use plans or development regulations of cities, towns, or counties or with an approved watershed plan for the area.

Conservation Requirements. The DOH must develop conservation planning requirements which ensure that municipal water suppliers: implement programs to integrate conservation with water system operation and management; and identify how to fund and implement conservation activities. It must review its current conservation planning guidelines and include those elements that are appropriate for rules. These requirements apply to all municipal water suppliers; they must be tailored to be appropriate to system size, forecasted system demand, and system supply characteristics. Conservation planning requirements must include the: selection of cost-effective measures to achieve a system's water conservation objectives; evaluation of the feasibility of adopting and implementing water delivery rate structures that encourage water conservation; evaluation of the system's water distribution system leakage and an identification of any steps necessary for achieving DOH's leakage standards; collection and reporting of water consumption, source production, and water purchase data and the frequency for reporting such information; and establishment of minimum requirements for water demand forecast methodologies.

The DOH must also develop water distribution system leakage standards. It must institute a graduated system of requirements based on levels of water system leakage, but must not require less than 10 percent leakage for the total system's supply. The DOH must establish minimum requirements for water conservation performance reporting which must include: the adoption in a public forum and achievement of water conservation goals by suppliers; the adoption of implementation schedules; a public reporting system for regular reviews of conservation performance against adopted goals; requirements for modifying plans if conservation goals are not being met. If a municipal water supplier determines that further reductions in consumption are not reasonably

achievable, it must identify how current consumption levels will be maintained. The DOH must adopt implementing rules by December 31, 2005, and must establish a compliance process that incorporates a graduated approach employing the full range of compliance mechanisms.

The DOH must establish an advisory committee to assist it in developing rules for water use efficiency, including conservation planning, distribution leakage standards, and conservation reporting requirements. The agency must provide technical assistance upon request to municipal water suppliers and local governments regarding water conservation, which may include development of best management practices for water conservation programs, landscape ordinances, rate structures for public water systems, and public education programs regarding water conservation.

Before DOH's new conservation rules take effect, a municipal supplier must continue to meet DOH's existing conservation requirements and must continue to implement its current conservation programs.

A municipal supplier with 1,000 or more service connections must, in preparing its regular water system plan updates, describe its conservation measures, the improvements in efficiency resulting from the conservation measures in the last six years, and projected effects of conservation on delaying its use of inchoate water rights before it may divert or withdraw additional inchoate water. This requirement must be taken into consideration by the DOE when it establishes or extends a construction schedule under a water right permit. The time-lines and interim milestones in a detailed watershed implementation plan (required by Engrossed Second Substitute House Bill No. 1336) must address the planned future use of existing water rights for municipal water supply purposes that are inchoate. In doing so it must address how these rights will be used to meet the projected future needs identified in the watershed plan and how the use of these rights will be addressed when implementing instream flow strategies identified in the watershed plan.

The DOE must prioritize the use of its funds and resources related to streamflow restoration in watersheds where the use of inchoate water rights may have a larger effect on stream flows and other water uses.

Funding. The DOH is authorized to charge municipal suppliers an annual fee of 25 cents per residential connection or its equivalent until June 30, 2007, to provide funding for conservation activities.

Approving Plans; Duty to Provide Retail Service. In approving the water system plan of public water system, the DOH must ensure that water service under the plan for any new industrial, commercial, or residential use is consistent with the requirements of comprehensive plans, land use plans, or development regulations. A municipal water supplier has a duty to provide retail water service within its retail service area if: its service can be available in a timely and reasonable manner; the supplier has sufficient

water rights to provide the service; the supplier has sufficient capacity to serve the water in a safe and reliable manner as determined by the DOH; and it is consistent with the requirements of any applicable comprehensive plan, development regulations, or land use plan adopted by a city, town, or county for the service area. For water service by the water utility of a city or town, the service must also be consistent with the utility service extension ordinances of the city or town. The DOH must annually compile lists of water system plans to be reviewed in the next year and to consult with certain other state agencies to identify watersheds where further coordination between system planning and watershed planning is needed and to develop a work plan to accomplish that coordination.

Wastewater Plans. Certain opportunities for water reclamation and reuse under the reclaimed water laws must be evaluated in the development of water system plans. This requirement does not apply to plans for serving less than 1,000 hookups.

Sewer plans must include an analysis of the impact of water conservation measures on sewer treatment capacity. They must include a description of its coordination with any reclaimed water elements of a regional water supply plan.

Transferring Inchoate (As Yet Unused) Municipal Water Rights. The right to use water under an unperfected surface water right held for municipal water supply purposes may be changed or transferred for any purpose if: (1) the supplier is in compliance with the terms of an approved water system plan or small water system management program, including those regarding water conservation. If the recipient of the water is a water supply system, the receiving system must also be in compliance with the terms of its approved plan or program; (2) instream flows have been established by rule for the water resource inventory area that is the source of the water for the transfer or change; (3) a comprehensive watershed plan has been approved for the water resource inventory area and a detailed implementation plan (that satisfies the requirements of E2SHB 1336) has been completed; and (4) stream flows that satisfy the instream flow requirements, or the milestones for satisfying those instream flows that are identified in the detailed implementation plan for the watershed, are being met.

If these criteria are not satisfied, the unperfected part of the right may nonetheless be changed or transferred if the change or transfer: is subject to stream flow protection or restoration requirements of an approved habitat conservation plan or a federal hydropower license; is subject to instream flow requirements or agreements and the water right from which it is changed or transferred is also subject to such requirements or agreements; or is needed to resolve or alleviate a public health or safety emergency caused by a failing public water supply system. The criteria for such a failing system are listed and do not include inadequate water rights to serve existing or future hookups.

Watershed Agreements. On a pilot project basis, the DOE may enter watershed agreements with a municipal water supplier to meet the objectives of a watershed plan that has been approved or is under development. The pilot project is to be conducted in

water resource inventory area number one, with the consent of the governments that initiated watershed planning for the watershed. The agreements are for not more than 10 years, but may be renewed. They must be originally entered before July 1, 2008. An agreement must be consistent with: adopted growth management plans developed under the Growth Management Act; approved water supply plans; adopted watershed plans; and the water use efficiency and conservation requirements of the DOH or those of an approved watershed plan, whichever are more stringent. An agreement must require the participating water system to meet obligations under an approved watershed plan; must establish performance measures and time lines and annual reporting regarding them; and provide for stream flow monitoring and metering of water use, as needed to ensure compliance. An agreement is appealable to the PCHB within 30 days of being approved by the DOE. The DOE must report to the Legislature regarding the pilot project before the end of 2003 and 2004.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: (Agriculture & Natural Resources) (Original bill) 1) The bill answers the following fundamental questions regarding municipal water suppliers: a) Who qualifies? Answer, group A systems and above. b) Which of their rights are for municipal use? Answer, any rights they hold. c) Where can they use their water? Answer, in their approved service areas, except regarding certain claims of impairment. d) How many people or connections can they serve? Answer, the old restrictions are eliminated. 2) Conservation is required, but decisions as to what is cost effective are made locally. By removing the hookup restrictions, the bill provides utilities with incentives for conserving water. 3) The bill identifies circumstances under which inchoate municipal water can be moved around to other areas. Among those is under a contract with the state. Since this latter concept is a new, unknown commodity, it is sunsetted and will be tried first in pilot areas. 4) Water utilities have many responsibilities, but outmoded water laws make it almost impossible to meet them. A "growing communities doctrine" needs to be in the water law. Place of use flexibility and having rights that are considered to be in good standing are critical to the utilities. 5) Tacoma has demonstrated that it can benefit both its water customers and the environment when given the flexibility to do so. 6) The bill balances its flexibilities with restrictions that do not now exist regarding: the length of time in which an inchoate right can be used; conservation; and environmental contracts. They are further balanced by the issues raised by the Endangered Species Act and tribal rights that utilities must face anyway. 7) The bill's new policy limiting development to 50 years and its mandatory conservation requirements are appreciated; its provisions on environmental contracts are intriguing. 8) Utilities are required to meet today's and tomorrow's water needs; the bill is an important

step in allowing utilities to plan responsibly. 9) The bill is a good start at allowing utilities to plan for both people and fish.

(Comments) (Original bill) 1) The flexibilities provided by the bill do not apply to smaller systems because it applies only to those with expensive, approved "water system plans," not those with much less expensive "small water system management programs." 2) The claims of impairment referred to in the bill should be required to be substantiated. 3) Some DOE policies will result in their always being "impairment," therefore, some of the flexibilities in the bill cannot be used. 4) Requiring a utility request a change in the place of use of its water right to coincide with its service area within 30 days of filing a water system plan does not allow utilities that have already submitted plans to use the service area. 5) Requiring a utility to use its conserved water first creates problems if it has service areas in multiple, different places. 6) Waiting for a watershed plan until inchoate water can be moved creates problems for utilities in areas that will not have those plans for a long time. 7) Special purpose districts should be placed in the same category as cities and counties in the definition of a municipal water supplier. 8) There should be no impairment test for changing the "place of use" of a municipal supply. 9) Water conservation is already practiced by new hookups. 10) Prioritized processing of water rights should not be in the bill. Some of its provisions are beyond the scope of municipal water rights. 10) Irrigation districts should be protected during their development like municipal suppliers. 12) The flexibility provided for municipal water is a diluted version of the objective stated in the intent section. The bill should be made more digestible and less complex. 13) Utilities should get credit for the conservation they have already accomplished. 14) In the Columbia River basin, the fight is over the 1.7 percent of the flow of the Columbia River that is diverted for use. It must be remembered that irrigated farming recharges aquifers.

Testimony For: (Appropriations) If we are going to manage population growth we also need to manage our water resources and ensure that water is managed efficiently with clear guidelines. This bill should result in reduced transaction costs. There is work being done on ways to raise revenue around plan reviews and other areas to help reduce the costs associated with the bill. The Department of Health currently requires that water systems submit conservation plans for planning purposes. Current regulations are not as stringent and additional rule making would be required.

Testimony Against: (Agriculture & Natural Resources) (Original bill) 1) Expanding the use of water cannot be supported. 2) Studies predict a large increase in the state's population yet less water will be available because of global warming. Often instream flows are not being met as it is. 3) Granting inchoate rights validates outdated claims. A 30 to 50 year planning horizon is much too long. 4) Planning should be based on an analysis of instream capacity and implementation should be based on ranked priorities. The bill does neither. 4) The public should have the right to protect an instream flow by filing a claim of impairment. 5) It is not clear who benefits from the expanded use of municipal water allowed by the bill. 6) The environmental contracts could be used for

leverage purposes, not flexibility. 7) The bill allows a future use of an unknown amount of water without environmental considerations; there will be adverse environmental consequences. The flexibility municipalities need should come with environmental standards and meaningful conservation requirements; the conservation standards in the bill will not be adopted for two years and then will be largely procedural. 8) If the City of Everett used the water it claims as inchoate during certain conditions, it could dry up the Sultan River. The flexibility granted regarding the number of hookups served could also have dramatic environmental effects if "paper" rights are used to serve more people, such as in consolidations of systems. 9) Seattle has accommodated 20 years of growth through its conservation efforts; the bill should require conserved water to be used first. 10) The lack of provisions for instream flows may drive the tribes away from the watershed planning process. Since only the flows set by rule are protected, and these are inadequate, the bill will exacerbate the conflicts over water. 11) Use of alternative water supplies, such as reclaimed water, is not required. There should be no new flexibility until the conservation rules have been adopted. 12) The bill will exacerbate problems in smaller communities. 13) The bill contains no flexibilities for agriculture.

Testimony Against: (Appropriations) None.

Testified: (Agriculture & Natural Resources) (In support) (Original bill) Jim Waldo, Office of the Governor; Cynthia First, Snohomish County Public Utility District (PUD); William Hahn, Kitsap County PUD; John Kirner, Tacoma Water Utility; Jim Miller, City of Everett; Paul Fleming, Seattle Public Utilities; Dick McKinley, City of Bellingham; and Don Wright, South King County Regional Water Association.

(Comments) (Original bill) Ralph Ferguson, Camano Water Systems Associations; Richard Price, Stevens County PUD; Hal Schlomann, Washington Association of Sewer and Water Districts; Hertha Lund, Washington State Farm Bureau; Mike Schwisow, Washington State Water Resources Association; Steve Lindstrom, Sno-King Water District Coalition; and Mike Antelope.

(Opposed) (Original bill) Denise Smith, League of Women Voters of Washington; Mason Morisset; Tim Stearns, Center for Environmental Law and Policy (CELP); Mike Moran, Samish Indian Tribe and CELP; Dawn Vyvyan, Yakama Nation; Josh Baldi, Washington Environmental Council; Dave Monthie, King County; and Tim Boyd, Columbia/Snake River Irrigators' Association.

Testified: (Appropriations) Dave Williams, Association of Washington Cities; and Keith Phillips, Governor's Water Team, Department of Ecology.