

HOUSE BILL REPORT

ESHB 2050

As Amended by the Senate

Title: An act relating to determining the impairment of water rights and uses.

Brief Description: Identifying when a new water right would interfere with an existing water right.

Sponsors: By House Committee on Agriculture & Ecology (originally sponsored by Representatives Mastin, Chandler, Clements and Honeyford).

Brief History:

Committee Activity:

Agriculture & Ecology: 2/24/97, 3/3/97 [DPS].

Floor Activity:

Passed House: 3/14/97, 59-35.

Senate Amended.

HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Chandler, Chairman; Parlette, Vice Chairman; Schoesler, Vice Chairman; Delvin; Koster; Mastin and Sump.

Minority Report: Without recommendation. Signed by 4 members: Representatives Linville, Ranking Minority Member; Anderson, Assistant Ranking Minority Member; Cooper and Regala.

Staff: Kenneth Hirst (786-7105).

Background: Protection of Senior Rights. If, upon investigating an applicant for a water right permit, the Department of Ecology (DOE) finds that the use of water proposed in the application would impair or conflict with existing rights, it must deny the issuance of the permit. (RCW 90.03.290.)

Relationship of Groundwater Rights to Surface Water Rights. The Groundwater Code states that to the extent that groundwater is part of or tributary to a surface stream or lake or the withdrawal of groundwater would affect the flow of a body of surface water, the right to use the surface water is superior to any subsequent right acquired to use the groundwater.

Instream Flows and Permit Processing. The establishment of a minimum flow or level constitutes an appropriation with a priority (seniority) date that is the effective date of the establishment of the flow or level. The Water Resources Act of 1971 provides a number of general fundamentals that are to guide the use and management of the waters of the state. One of these fundamentals requires that base flows be retained in perennial rivers and streams to preserve certain instream values. Withdrawals of water which would conflict with the base flows may be authorized only for overriding considerations of the public interest.

If the Department of Ecology (DOE) approves a water right permit relating to a body of water for which minimum flows or levels have been adopted, the Surface Water Code requires the permit to be conditioned to protect the levels or flows. Further, (hydraulic code) allows the DOE to refuse to issue a permit to divert or store water if it determines that issuing the permit might result in lowering the flow of water in a stream below the flow necessary to adequately support food fish and game fish populations in the stream.

Summary of Bill: Policies are established that govern decisions made by the DOE regarding whether the issuance of a water right permit or the approval of a water right transfer, change, or amendment would injure or impair existing water rights. These policies are the following:

- The availability of water and the effect of granting a water right permit or change are those that exist with the incorporation of the effects of any impoundment or any other water supply augmentation or mitigation to be provided by the applicant.
- The existence of hydraulic continuity between groundwater and a surface body of water does not, in itself, mean that an existing water right in the surface water body will be impaired by a proposed permit for a groundwater right or an amendment to such a right.
- The DOE must take into consideration seasonal variations in water supply and in the recharge of surface and ground water bodies.

A rule is provided for determining whether an existing water right in a surface body of water would be impaired by a proposed permit for a groundwater right or for an amendment to a ground water right. Impairment does not exist if the withdrawal of water under the permit or amendment would reduce, within 100 years, the supply of water to the surface water body by less than one-tenth of 1 percent of the annual rate of groundwater withdrawal proposed under the permit or amendment. In considering the cumulative effects of multiple applications for such permits and amendments and of groundwater rights that are junior to the existing water rights in the surface water body, the DOE may find impairment by those applications that would, taken in the order of their priority dates, cause a reduction in the supply of water to the surface

water body by 1 percent or more within 100 years and would, by that reduction, result in the impairment of existing water rights.

This rule of impairment is provided for water allocation decisions made by the DOE and is provided to adjust for the uncertainty that is inherent in evaluating the effects of proposed groundwater withdrawals on surface water bodies. It does not provide a standard for reviewing any claim made by a person with a senior water right in superior court or in a subsequent appeal in which the person's senior water right is impaired by the use of any junior water right. A decision by a superior court regarding any claim of impairment of existing water rights must be made based on the preponderance of the evidence presented. The superior court must consider any such claim *de novo* and cannot not grant deference to determinations that may have been made by the DOE or by the Pollution Control Hearings Board regarding such a claim.

The "existing water rights" referred to in these policies and this rule are rights to water existing before a determination of impairment is made, instream flows set by the DOE by rule before such a determination, and any flows determined by the DOE to be necessary for fish under the hydraulic code.

Any right represented by an application for a water right for which a permit for water use has not been issued by the time a transfer, change, or amendment of an existing right is approved is not considered to be injured or detrimentally affected by the transfer, change, or amendment.

EFFECT OF SENATE AMENDMENT(S): In lieu of the 100-year tests established by the engrossed substitute bill, the amendments establish two tests for determining whether the withdrawal of water from a confined aquifer causes interference with surface rights and one test for withdrawals from an unconfined aquifer. The only bases upon which a permit for the use of groundwater from a confined aquifer can be denied or conditioned on the grounds that it would impair or conflict with an existing surface water right are: (1) withdrawal of the groundwater will cause a head reduction measurable in the field within 50 feet of the surface water body in question in the shallowest unconfined water table aquifer that underlies that surface water body; or (2) withdrawal of the groundwater will cause a reduction measurable in the field in the flow or level of the surface water body. This prohibition does not prevent the DOE from limiting future permits by adopting rules after following the procedures of a section of law that allows the adjustment of water use management under an existing groundwater area or subarea management plan; statutes that permit groundwater management studies to be initiated locally and allow local governments to assume the lead agency role in developing local groundwater management programs; or the Water Resource Act of 1971.

Rights to surface water are affected or impaired by the withdrawal of groundwater from an unconfined aquifer only if, after no more than six months of pumping, the surface water will lie within the cone of depression of a well tapping the groundwater.

The DOE must consider the effects of augmentation and mitigation; under the engrossed substitute bill these effects were required elements of the permit issuing decisions of DOE. Certain forms of mitigation are provided as examples.

If an application is denied between November 1, 1995, and the effective date of this bill and one of the grounds for the denial is impacts on existing water rights, established instream flows, or surface water closures, the applicant may have the application reconsidered by the DOE without losing the priority date of the original application. The application must be submitted for reconsideration within 30 days of the effective date of the bill.

The Senate amendments expressly allow a local superior court, in a case in which it is claimed that senior water rights are injured by the use of junior rights, to enjoin the use of junior water rights in reverse order of priority to protect senior rights if the court deems it necessary to protect the senior rights. However, the provisions of the Senate amendments regarding appeals and permit issuing considerations do not apply if the claimed senior water right is a minimum instream flow or level or surface water closure.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: (1) The DOE's policy for determining whether a groundwater permit would interfere with surface flows has gone from a measurable reduction-test to a calculable reduction-test. This is reflected in a large number permit denials being appealed to the Pollution Control Hearings Board (PCHB); the PCHB decisions are mostly against the applicants. (2) The policies of the DOE do not allow groundwater permits to be issued: it has determined that all groundwater and surface waters are in hydraulic continuity; it has set instream flow protections that are greater than the natural flow of streams; and it denies a groundwater permit if only one drop of water from a well would have reached the stream. However, no technical data shows there is a groundwater supply problem in western Washington. The bill establishes tests that are measurable. (3) Unless someone does something to change state policies, small businesses, even those located above abundant groundwater resources, will not be able to afford the costs and delays necessary to get groundwater permits. (4) The DOE's policy that one gallon or molecule causes impairment does not provide a state water use policy. The Legislature needs to establish such a policy.

Testimony Against: (1) Because the first test does not take into account the rate at which water moves in the ground, a well could be drilled in gravel next to the Columbia River and since water could flow too fast to the well for a cone of depression to develop, only the third test would apply: a permit for the well could be denied only if it reduced the flow of the Columbia River by more than 5 percent. (2) If the DOE finds problems after six months under the first test, is it going to shut down the well? The bill will result in more sinking creeks.– (3) The bill represents bad timing: the bullhead trout which relies for spawning on cold water from groundwater recharging a stream is a candidate for listing under the Endangered Species Act. (4) There is too much variation in conditions statewide for just these three tests. Good basin assessments should be done instead. (5) Who is going to pay for the six months of monitoring? (6) The bill may reduce the ability of senior rightholders to protect their rights. (7) The exemption provided for new rules may undo the tests.

Testified: Charles Lean, Law Offices of Bogel and Gates (pro); James L. Hawk, Jade Greens (pro); Mike Krautkramer, Robinson and Noble, Inc. (pro); Greg Stewart, Rivers Council of Washington (con); Judy Turpin, Washington Environmental Council (con); Karla Kay Fullerton, Washington Cattlemen’s Association (commented); LeRoy Jorgensen (pro); and Kathleen Collins, Washington Water Policy Alliance (pro).