

HOUSE BILL REPORT

ESHB 2050

As Passed Legislature

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 Concurred.

Passed Legislature.

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 application 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.

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. 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.

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.

The 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.

Other Rules For Issuing Groundwater Permits. The DOE cannot grant a permit for the use groundwater beyond the capacity of the groundwater body to yield the water within a reasonable or feasible pumping lift or within a reasonable or feasible reduction of artesian pressure. The DOE may determine whether the granting of such a permit will injure or damage any existing rights and may require further evidence before granting or denying the permits.

Summary of Bill: Groundwater. A rule is established for determining whether a permit for the use of groundwater from a confined aquifer can be denied or conditioned on the basis of its impairment of or conflict with an existing surface water right. The permit cannot be denied or conditioned on this basis unless: (1) the withdrawal of groundwater will cause a measurable head reduction within 50 feet of the surface water body in question in the shallowest unconfined aquifer that underlies that surface water body; or (2) withdrawal of the groundwater will cause a measurable reduction in the flow or level of the surface water body. If these effects occur, the surface water right that is not being satisfied, including an instream flow set by rule, is deemed to be affected or impaired.

Neither this rule nor the rules of current law regarding the capacity of an aquifer to yield water prevent the DOE from limiting future withdrawals by adopting rules after following the procedures of: the Water Resource Act of 1971; a section of law that allows the adjustment of water use management under an existing groundwater area or subarea management plan; or statutes that permit groundwater management studies to

be initiated locally and allow the development of local groundwater management programs.

A rule is also established for determining whether the withdrawal of groundwater from an unconfined aquifer would affect or impair surface water rights. The surface water rights are affected or impaired 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.

If a surface water right would be impaired, the DOE may still grant a groundwater permit if the applicant proposes a satisfactory plan for mitigating the impairment.

These rules of impairment regarding the use of water from a confined aquifer are provided only for the DOE's decisions regarding water permit applications and reflect the uncertainty that is inherent in making determinations regarding future impacts of withdrawing groundwater. A person claiming that a senior water right is injured by one or more junior water rights may file an action in a local superior court to enjoin the junior water rights. The superior court must hear the action de novo and if it finds, by a preponderance of the evidence, that the senior right is injured, the court may enjoin the use of the junior rights in reverse order of priority to protect the senior right. These provisions do not apply to a senior right that is a minimum flow or level or the closure of a surface water body to further appropriation.

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; and the effects of any impoundment or any other water supply augmentation or mitigation provided by the applicant on the availability of water and the effects of granting the permit.

Reconsideration of Applications. If an application for a groundwater permit 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.

Transfers in General. 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.

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).