

Agriculture & Ecology Committee

HB 1879

Brief Description: *Regarding public water systems.*

Sponsors: *Representatives Linville, G. Chandler, Haigh, Delvin, Doumit, Cairnes, Rockefeller, Roach, Lantz and Cooper.*

Brief Summary of Bill

- *Explicitly adopts a growing communities doctrine that governs water rights for municipal water supplies and allows municipal water suppliers to acquire and maintain water rights for reasonably anticipated future needs.*
- *Allows such a municipal water use to take place under such a right within 50 or more years of the latest approval of certain water system plans and for the use to take place within the service areas identified in such plans.*
- *Identifies the water right holders who are municipal water suppliers for these purposes.*
- *With certain exceptions, prohibits the Department of Ecology (DOE) from rescinding or reissuing any water right certificate.*
- *Establishes requirements for the development of water rights held as inchoate water rights including, for the development of such rights by public water systems with 1000 or more service connections, requirements for the systems to meet 6 year water withdrawal target rates.*
- *Allows interties to be used to acquire water, no longer prohibits interties from including the development of new sources of supply to meet future demands, and, with certain exceptions, prohibits an intertie from being used to deliver a primary or secondary supply of water on a temporary basis.*

Hearing Date: *2/16/01*

Staff: Kenneth Hirst (786-7105).

Background:

Water Rights for Municipal Use. The Surface Water Code identifies certain information that must be provided by an applicant for a water right and allows the DOE to require additional information. If the application is for a municipal water supply, the information must include the present population to be served and an estimate of the future requirements of the municipality. If a water right is claimed for municipal water supply purposes under the code, it is not subject to relinquishment under the water right relinquishment statutes. (RCW 90.03.260 and 90.14.140.)

Once a water right permit is issued to an applicant, the applicant must diligently implement its requirements, including a construction schedule. (RCW 90.03.320.) The code as it was enacted in 1917 and as it is today requires the state (originally the State Hydraulic Engineer, now the DOE) to issue a water right certificate upon a satisfactory showing that the appropriation has been "perfected" in accordance with the code. (RCW 90.03.330 and Section 34, Chapter 117, Laws of 1917.) The Ground Water Code enacted in 1945 requires a certificate stating that the appropriation has been "perfected" to be issued upon a showing that construction has been completed in compliance with the terms of the permit. The latter code identifies specific information that is required for such a showing and allows the DOE to require additional information. (RCW 90.44.080.)

Through the years, 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. This is sometimes referred to as a "pumps and pipes" basis for issuing a certificated water right. In a 1998 case involving the water right of a private developer, the state's Supreme Court stated that a final water right certificate could not be issued for the developer's right for a quantity of water that had not actually been put to beneficial use. The court stated in its decision that it declined to address issues concerning municipal water suppliers in the context of the case. (Dep't of Ecology v. Theodoratus, 135 Wn.2d 582 at page 594.) Nonetheless, the court followed this declaration with a discussion of the possible effect of a gubernatorial veto of a bill regarding water rights for municipal water supplies. In a draft policy that the DOE circulated last year 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. (Draft Water Resource Program Policy 1250.)

Water System Plans. The State Board of Health has the authority to adopt rules for public drinking water, including those regarding the design, construction, operation, and maintenance of public water systems and planning for such systems. (RCW 43.20.050(2)(a).) Rules adopted under this authority require certain public water systems to submit system plans to the Department of Health (DOH) for approval at least every 6 years and provide that DOH's approval of such a plan is for a 6 year period. (WAC 246-290-100.) State law directs the DOH to develop procedures and guidelines regarding water use efficiency which are to be included in the development and approval of cost-efficient water system plans. (RCW 43.20.230.)

Interties. Interties are connections between public water systems that allow an exchange or delivery of water between them. Interties were expressly acknowledged by statute in 1991, and new interties were authorized under certain circumstances. (Section 1, Chapter 350, Laws of 1991.) Interties include such connections between systems for the delivery water that serve as primary or secondary sources of supply, but do not include the development of new sources of supply to meet future demand. (RCW 90.03.383(2)(a).) The exchange or delivery of water between public water systems made through an intertie must be within the established instantaneous and annual withdrawal rates specified in their existing water rights. (RCW 90.03.383(2)(a) and (4).)

Summary of Bill:

Water Rights of Municipal Water Suppliers. It is declared to be in the public interest for municipal water suppliers to be able to use water resources to meet current and future water supply needs and to achieve the objectives of the state's Growth Management Act, where applicable. A growing communities doctrine that acknowledges the role of municipal water suppliers to maintain sufficient water to support future growth within the state is explicitly adopted. Water rights must be interpreted and administered in recognition of the role and duties that municipal water suppliers have to serve growing communities. Municipal water suppliers may acquire and retain water rights for reasonably anticipated future needs. Water rights held by municipal water suppliers must have a place of use that is consistent with applicable growth management and water system planning statutes. (Section 1.)

The reasonable diligence required by water law for fully developing new and existing water rights must, for rights held by municipal water suppliers, be interpreted in a manner that is consistent with the needs of growing communities for reasonable assurance of continued future water supply. (Section 1.) The Surface Water Code's protection of an inchoate right that is prosecuted with reasonable diligence extends to the water right of a municipal water supplier that has been or is identified to meet existing or reasonably anticipated future needs. It must be so identified in a water system plan approved by the DOH or an approved coordinated water system plan. Other means of prosecuting a water right with reasonable diligence are not precluded, including installed system capacity. Municipal water suppliers have a minimum of 50 years from the latest approval of such a plan to put to use the water rights identified as being for reasonably anticipated future use. They may have additional time based on the particular facts and circumstances involved. (Section 4.) The place of use for a water right held by a municipal water supplier is the water service area or areas in the municipal water supplier's approved water system plan or approved coordinated water system plan, as either plan may be amended from time to time. (Section 5.)

A water right certificate previously issued and held by a municipal water supplier is a right in good standing if the water has been applied to beneficial use or is to be used for reasonably anticipated future needs. The DOE cannot rescind or reissue any water right certificate without the consent of the water right holder except as authorized at the conclusion of a general adjudication proceeding for water rights. This prohibition does not apply to correcting ministerial errors in a water right certificate, nor may it be construed as prohibiting the DOE from issuing a modified water right certificate following a transfer,

change, or amendment of a water right when the water right holder applies to the DOE for such a modification in the right. (Section 3.)

For the purposes of the Surface Water Code, the Ground Water Code and the water right claims and relinquishment laws, a "municipal water supplier" is an entity that owns or operates a public water system for wholesale or retail service and is either:

- a municipal corporation; or*
- entitled or obligated to serve existing and additional customers and uses within one or more approved water service areas to the extent such customers and uses are allowed under an applicable land use plan, and has an water system plan approved by the DOH that includes supplies of water for domestic use, commercial use, and use by publicly owned institutions or structures. (Section 2.)*

Water Withdrawal Target Rates. Each year, the DOH must determine the annual average amount of water withdrawn per service connection by each public water system with 1000 or more service connections. The DOH must group the systems by geographic areas with similar climatological characteristics and determine the annual average amount of water withdrawn per service connection in each geographic group. This average for the public water systems in a geographic group constitutes the water withdrawal target rate for the group. The DOH must publish these target rates annually. (Section 7(1).)

Under certain circumstances, the Secretary of Health may adjust the annual average calculated for a public water system if the Secretary determines that the use of water provided by the system is dominated by one or more very large commercial or industrial users. The Secretary must adopt rules identifying the circumstances under which such adjustments may be made and how they may be made. (Section 7(2).)

Target Rates and Inchoate Rights. Each water system plan of a public water system with 1000 or more connections submitted to the DOH for approval must be for a 6-year planning period. Beginning January 1, 2004, an inchoate portion of such a public water system's water right cannot be developed or modified for development unless the development or modification is described in a water system plan approved by the DOH for the system and the development or modification takes place during the 6 year life of the water system plan. The plan must identify how the annual average amount of water withdrawn per service connection by the system will meet the water withdrawal target rate for the system's geographic group for either of the 2 calendar years preceding the system's submission of the plan for approval. The DOH cannot approve such a plan involving such an inchoate water right unless the plan identifies how the system will meet the water withdrawal target rate during the 6 year life of the plan. (Sections 6(2) and 7(1)(b)&(c).)

The DOH must provide enhanced technical assistance to public water systems that are developing water system plans to meet water withdrawal target rates. The objective of the enhanced support is to assist the systems in identifying and evaluating tools and techniques that might be used to meet the target rates. (Section 7(3).)

Other Conditions for the Use of an Inchoate Right.

In addition to this target rate requirement for public water systems with 1000 or more service connections, a beneficial use of water governed by an inchoate water right or the inchoate portion of a water right that begins after this enactment is subject to the following:

- It must be consistent with any plan adopted under the state's watershed planning laws for the watershed in which the water is withdrawn and for the watershed in which the water is used.*
- It must be consistent with any requirements for mitigating the effects of water withdrawals in the watershed that are identified in such a watershed plan and a municipal water supplier holding the right must participate in any planning conducted under those laws for the watershed.*
- If it is to be used from or in a watershed in which one or more aquatic species have been listed as threatened or endangered under the federal Endangered Species Act, the use must be consistent with requirements imposed by the federal government under the Act on such a use in the watershed. (Section 6.)*

Interties. Interties may be used to acquire water, not just exchange or deliver water, and they are no longer expressly prohibited from including the development of new sources of supply to meet future demands. An intertie cannot be used to deliver a primary or secondary supply of water to a receiving system on a temporary basis. This prohibition applies unless the terms of the intertie agreement specify the source of the water that will be used to replace the temporarily delivered water and provide that replacement water will be available for delivery before delivery under the agreement is terminated. If such a supply of water is currently delivered on a temporary basis and the intertie agreement does not contain such a provision for replacement water, the delivery of the water cannot be terminated until the agreement is modified to establish these provisions and replacement water is available for delivery to or use by the receiving system. (Section 8.)

Appropriation: *None.*

Fiscal Note: *Requested on February 11, 2001.*

Effective Date: