

# HOUSE BILL REPORT

## E2SHB 1338

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### As Passed House:

March 18, 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.

### Brief Summary of Engrossed Second Substitute Bill

- Defines which water rights are held for municipal water supply purposes and establishes provisions regarding such rights.
- Declares the rights represented by certificates issued under a "pumps and pipes" principle to be rights in good standing as long as they are used or to be used in a manner that is consistent with that principle.
- 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 of cities, towns, and counties and establishes a duty for a supplier to serve new residences in the service area under certain criteria.
- Requires certain water conservation planning and practices.

· Authorizes certain watershed agreements on a pilot project basis.

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## 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).

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## 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.

Reservations of Water. When a reservation of water is established by the DOE by rule for instream flows, the reservation is considered to be an appropriation of water (a water right) and has as its date of priority the date the reservation is established.

With certain exceptions, the state's water laws require a water right to be used or be relinquished. A person who abandons the right or voluntarily fails to beneficially use it or a part of it for any period of five successive years is to relinquish the right or portion not used unless the nonuse is exempted from relinquishment or is the result of certain statutorily listed "sufficient causes." Among the rights exempted are those claimed for municipal water supply purposes.

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) and has adopted management plans or "basin plans" for a number of them. 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 Engrossed Second Substitute Bill:**

Water Rights for Municipal Supplies. The Legislature states its intention to provide within the water laws a curative clarification of the relationship of water rights held for municipal water supply purposes to the requirements of other law and the realities of growth. 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. The use and potential use of water under the right must be consistent with the principles of the policy that led to its being issued. 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 and for the water right claims and relinquishment laws. 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; or indirectly for either of these purposes through the delivery of treated or raw water to a public water system. If a use of water satisfies any of these criteria, other beneficial uses of the water generally associated with the use of water within a municipality are also uses for municipal water supply purposes.

The use of water 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.

While the supplier diligently seeks the DOE's approval of the change of use of a water right it holds to a municipal use, the right is not subject to relinquishment. 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.

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 the place of use of the water right involved is the same as the approved service area. 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. Before DOH's new conservation rules take effect, a supplier with 1,000 or more service connections is in compliance with its plan regarding conservation if it is in compliance with its current plan and it can document an improvement in water efficiency over the last six years and there is no loss of conservation performance. Expanding the place of use must not be inconsistent with the comprehensive plans, land use plans or development regulations of cities, towns, or counties or with an approved 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.

Criteria for a failing water system are listed.

Conservation Requirements. By December 31, 2005, the DOH must adopt rules that establish: performance measures to be used in measuring the progress a municipal water supplier is making in achieving its water conservation objectives, including those regarding distribution system leakage, data reporting, and time-lines for setting and achieving cost-effective conservation objectives over time; minimum requirements for water demand forecast methodologies to be used by municipal water suppliers; and criteria that identify how the DOH will determine whether municipal water suppliers are fulfilling their conservation obligations when it reviews the conservation elements of water system plans and small water system management programs. The criteria must take into consideration the historic conservation performance and conservation investment of the supplier, regional climate variations, and the supplier's customer base demographics, forecasted demand, and system supply constraints. The rules must also ensure compliance by municipal water suppliers with their water conservation requirements. The compliance processes must incorporate the graduated approach specified by the water code for the enforcement of water laws. The new conservation requirements of the DOH must not be less stringent than current requirements.

The DOH must also: establish an advisory committee to assist it in developing these rules; and provide, upon request, technical assistance to public water systems and local governments regarding water conservation.

A municipal water supplier must integrate conservation planning into its overall system operation and management and appropriately fund conservation activities. It must adopt and achieve water conservation objectives as part of its water system plan or small water system management program that are for improving the efficiency of its water system over time, relative to past performance. It must improve its efficiency over time and must assist the users of its water in improving the efficiency of their water use. The supplier must implement cost-effective water conservation as part of its approved water system plan or small water system management program. A supplier with 1,000 or more service connections must document an improvement in its water efficiency under a right over the last six years before it may divert or withdraw further amounts of its inchoate right for beneficial use. This requirement must be taken into consideration by the DOE when it establishes or extends a construction schedule under a water right permit.

Approving Plans. The DOH must consult with the DOE and the departments of Fish and Wildlife (WDFW) and Community, Trade, and Economic Development when it approves water system plans of public water systems. In approving a plan, the DOH must ensure that water service under the plan for any new industrial, commercial, or residential use is consistent with the requirements of any comprehensive plans, land use plans, or development regulations of a city, town, or county. A public water system must demonstrate that any new use of its inchoate water right under the plan will be consistent with achieving time-lines and milestones for instream flows established under E2SHB 1336 (regarding watershed planning). Before regularly submitting a plan or major revisions to its plan for approval, a system must provide public notice.

Duty to Provide Water Service. In approving a water system plan, the DOH must ensure the plan accommodates the duty of the public water system to provide water for new residential use within its service area. The first choice of water supply for a new residential use of water within the service area of a public water system, for which a public water system plan is required, is water service from the public water system. The public water system has a duty to provide the water service within its service area if its service can be available in a timely and cost-effective manner and it has sufficient water rights to provide the service. The service must be consistent with any comprehensive plans, land use plans, or development regulations of a city, town, or county and, for water service by the water utility of a city or town, with the utility service extension ordinances of the city or town. The service is available in a timely manner if the water can be provided within 120 days, unless the new residential user requests a longer period. The service is available in a cost-effective manner if the total cost to obtain the water from the system, including construction and engineering costs, connection fees, and operating costs, does not exceed 120 percent of the total cost of providing water service from an "exempt well" for the new residential use.

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.

Watershed Agreements. On a pilot project basis, the DOE may enter watershed agreements with a municipal water supplier to meet the objectives of an approved watershed plan. 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 and the WDFW must solicit up to two areas that are engaged in watershed planning to participate voluntarily in the pilot project, with county approval. Any physical projects implemented must be first approved by a planning unit or, for other planning, by the DOE and the WDFW. The DOE must report to the Legislature regarding these pilot projects 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.