

HOUSE BILL REPORT

2SSB 5024

As Reported by House Committee On:
Agriculture & Natural Resources

Title: An act relating to public water systems.

Brief Description: Concerning public water systems.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Honeyford and Hale).

Brief History:

Committee Activity:

Agriculture & Natural Resources: 3/28/03, 4/4/03 [DPA].

Brief Summary of Second Substitute Bill (As Amended by House Committee)

- 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.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: Do pass as amended. Signed by 8 members: Representatives Linville, Chair; Rockefeller, Vice Chair; Kristiansen, Assistant Ranking Minority Member; Eickmeyer, Grant, Hunt, McDermott and Quall.

Minority Report: Do not pass. Signed by 5 members: Representatives Schoesler, Ranking Minority Member; Holmquist, Assistant Ranking Minority Member; Chandler, Orcutt and Sump.

Staff: Kenneth Hirst (786-7105).

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 Other elements of the water right include: the amount of water that may be withdrawn from a particular water source under the right, the time of year and point from which the water may be withdrawn, the type of water use authorized under the right (such as an agricultural or municipal use), and the place that the water may be used.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 (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 Amended 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.

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 pilot project applies in water resource inventory area number one. 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. A municipal water supplier's unperfected surface water right may be changed or transferred if it is subject to such a watershed agreement. An agreement is appealable to the PCHB within 30 days of being

approved by the DOE. 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 the pilot project before the end of 2003 and 2004.

The provisions of the bill are to be implemented within existing funds.

Amended Bill Compared to Second Substitute Bill:

The striking amendment: defines municipal water use by the type of use rather than also by the entities that distribute water; allows certain additional uses of municipal water rights; identifies when rights represented by "pumps and pipes" certificates are in good standing; and allows limited revisions to certificates to address ministerial errors and misrepresentation; requires municipal water suppliers to establish water conservation objectives, to improve efficiency over time, and to document improvement in efficiency before using additional portions of their inchoate water rights; and requires water conservation rules to be adopted by the DOH, including those establishing performance measures (rather than requiring an advisory committee to study the effectiveness of water conservation efforts and make recommendations to the Legislature); places conditions on making the approved service area for a water system also the place of use for its water right; no longer requires certain water right documents to identify an annual consumptive quantity for a municipal water right as a condition for allowing the expansion of the number of hook-ups or population that may be served by the right; requires water service by a public water system for a new industrial, commercial, or residential use to be consistent with land use and development plans and regulations and establishes a system's duty to serve new residential uses within the requirements of such plans and regulations and utility extension ordinances; requires other state agencies to be consulted when DOH reviews water system plans; requires a system to demonstrate in the regular updates of its plan that its new use of its inchoate rights will be consistent with meeting the time-lines and milestones in watershed plans; requires public notice for new water system plans or major revisions to them; requires the DOE to prioritize its stream flow restoration efforts for watersheds where the use of inchoate rights may have greater effects; authorizes a pilot project in water resource inventory area number one for certain watershed agreements and allows inchoate rights to be transferred under such agreements; and requires the bill to be implemented within existing funds (rather than requiring specific funding for it in the omnibus appropriations act).

Appropriation: None.

Fiscal Note: Not Requested.

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

Testimony For: (Original bill) (1) The bill allows municipalities to grow into their water rights. The House version of this bill puts a moratorium on new use for up to six years, provides a disincentive to implementing early conservation because it requires conservation to increase unceasingly, and requires meeting instream flows that may be very unrealistic. (2) The bill requires the state to look before it leaps by studying the cost and effectiveness of conservation first. It is important to know what kind of conservation efforts are already underway, that is, what is currently being done. (3) The bill does not tie up water use with growth management planning or unknown watershed requirements. The provisions of the bill should not be linked to plans that do not yet exist and must be consistent with utility extension-of-service policies. (4) The bill allows the use of inchoate water within a utility's place of use. (5) Some version of this bill is needed; it is important for the House and Senate to resolve their differences.

(Comments) (Original bill) (1) The bill should be expanded to include smaller water systems that have small water system management programs but not full-scale water system plans. (2) The bill does not address inchoate rights; there are 10,000 certificated rights that are in question in this regard. The issue needs to be addressed. (3) It is time to get on with conservation, not study it. Require efficiencies in delivery systems and implement some standards proposed by the utilities. (4) The House version of the bill that links the expansion of municipal water use to growth management and watershed planning is preferred.

Testimony Against: (Original bill) By extending the definition of a "municipal water supplier" to include private developers, the bill will have a large impact on other water rights. The definition is so broad it includes all of the water delivered by an irrigation district. Its provisions need to be linked to growth management and other planning.

Testified: (In support) Senator Honeyford, prime sponsor; Senator Morton; Bill Hahn, Washington PUD Association and Kitsap County PUD; Scott Hazelgrove, Washington Association of Sewer and Water Districts; and Dave Williams, Association of Washington Cities.

(Comments) Ralph Ferguson, Camano Water Systems Association; Jim Miller, City of Everett; and Dave Monthie, King County.

(Opposed) Steve Wehrly, Muckelshoot Tribe; and Josh Baldi, Washington Environmental Council.