

# SENATE BILL REPORT

## ESHB 1337

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As Reported By Senate Committee On:  
Natural Resources, Energy & Water, April 2, 2003

**Title:** An act relating to the construction of replacement or additional wells.

**Brief Description:** Concerning additional or replacement wells.

**Sponsors:** House Committee on Agriculture & Natural Resources (originally sponsored by Representatives Rockefeller, Schoesler, Lantz, Linville, Shabro, Jarrett, Kirby, Grant, Quall, Hunt, Delvin, Woods, Chandler, Morris, Conway, Bush, Anderson and Pflug; by request of Governor Locke).

**Brief History:**

**Committee Activity:** Natural Resources, Energy & Water: 3/26/03, 4/2/03 [DPA, DNP].

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### SENATE COMMITTEE ON NATURAL RESOURCES, ENERGY & WATER

**Majority Report:** Do pass as amended.

Signed by Senators Morton, Chair; Hewitt, Vice Chair; Hale, Hargrove, Honeyford and Oke.

**Minority Report:** Do not pass.

Signed by Senator Fraser.

**Staff:** Evan Sheffels (786-7486)

**Background:** RCW 90.44.100 pertains to amendments to ground water permits and certificates. Certain changes are allowed without applying for an amendment. For other changes, an amendment is required.

A number of conditions apply requiring that the combined effect of replacement or additional wells is no different than the effect of the original well, including requirements that the same body of public ground water must be tapped, replaced wells must be decommissioned, and new wells must be constructed in the manner specified by the Department of Ecology (DOE). In addition, the combined effect of all original, replacement, and additional wells must not enlarge the original water right.

Ground Water Right Changes Requiring Application for Amendment--Current Law. Existing law allows amendments to change the location of wells or other means of withdrawal, to change the manner of use, and/or to change the place of use of the water. The Washington State Supreme Court has noted that while RCW 90.03.380 expressly allows for changes to the purpose of use, RCW 90.44.100 in the groundwater code does not explicitly authorize amendments to change the "purpose of use." The court did not, however, issue an express holding on how broadly or narrowly "manner of use" should be construed (see R.D. Merrill Co. v. Pollution Control Hearings Board, 969 P.2d 458, 464-465 (1999)). This has caused

some interpretive confusion as to whether the 1945 Legislature, when it enacted RCW 90.44.100, intended for "manner of use" to be construed to include and allow changes in the purpose of use of a water right.

Prior to amending a ground water permit or certificate, DOE must determine that the combined effect of the original well, plus any replacement, additional or existing back-up wells, meets the requirements for an issuance of an original water right.

Changes Allowed Without Applying for an Amendment--Current Law. Existing law allows construction of a replacement or an additional well without applying for an amendment to the water right permit or certificate if it is constructed at the same location as the original well-head. The original location may also be determined from the legal description provided in the original water right application.

**Summary of Amended Bill:** Subject to certain protections and limitations, new replacement or additional (R/A) wells may be constructed, or currently existing or back-up wells may be substituted for or added to wells at the original permitted location.

With application for amendment, changes in the purpose of use or the body of ground water tapped are allowed so long as R/A wells are located in the same water resource inventory area (WRIA) as the original well, or an adjoining WRIA. Notice is required, and DOE must make findings equal to those required for an original water right.

Without application for amendment, R/A wells may be added or constructed up to one-quarter mile from the old well-head, or further if so described in the original application. The location of the original well is statutorily defined as one-quarter mile. No amendment is required for R/A wells more than one-quarter mile but not more than two miles from the original well-head, though pre-construction notice, followed by a 60-day waiting period, is required. R/A wells are no longer required to remain at least as far away as the original well from a potentially impacted well. R/A wells changed or moved without amendment must be consistent with a ground water management program adopted by DOE for the area.

Pre-construction notice must describe how claims of potential impairment can be filed with DOE. DOE must issue advisory opinions on claims submitted. If the water right holder and claimant, upon the claimant's initiation of discussions, cannot reach a resolution, the claimant may bring an action in superior court.

The combined effect of R/A wells must not result in an increase in the annual or instantaneous quantity of the original right.

**Amended Bill Compared to Substitute Bill:** The amendment allows changes in the purpose of use with DOE approval. Notice, appeal, and DOE impairment processes are changed. A provision requiring DOE to file claims for potential impairment of state-held water rights is deleted.

**Appropriation:** None.

**Fiscal Note:** Not requested.

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

**Testimony For:** Senate and House versions give more ground water flexibility and are similar in many aspects. Many of the protections in the bill are positive additions. The requirement that a replacement or back-up well be constructed only at the same location as the original well affects the ability of public water systems to respond to changes in land use, water quality, and aquifer productivity that make the location unavailable or unsuitable. This bill would allow a shift away from high impact sources to lower impact sources, helping instream flows, water quality, etc. For instance, a well by a gas station could be moved to alleviate spill or contamination concerns. Wells close to salmon streams could be moved away, or to deeper aquifers to protect flow. This bill would allow those changes to be made without prohibitive cost.

**Testimony Against:** The bill puts instream flows in jeopardy. Because DOE has been processing applications more efficiently, this bill may not be needed. This bill makes the placement of additional or construction of replacement wells too costly. The whole reason for the bill was to reduce burdens. This bill puts the burden on tribes to determine whether or not a tribal water right will be impaired. DOE has the expertise, technical data, and legal understanding and should oversee these changes.

**CONCERNS/COMMENTS:** We need to make it less costly to make replacement well changes. The process needs to reduce burdens, not add procedures. The bill originally allowed amendments to change the purpose of ground water use, as the current Senate bill does. This clarification would simply treat ground water the same as surface water is currently treated.

**Testified:** Bill Hahn, PUD Assoc. Water Commission, Kitsap PUD (pro w/concerns); Doug Levy, City of Kent (pro w/concerns); Josh Baldi, WEC (neutral); Dawn Vyvyan, Yakama Nation (con); Scott Hazlegrove, WA Assn. of Sewer and Water Districts (concerns); Kathleen Collins, WA Water Policy Alliance (comments); Jim Waldo, Governor's Office (comments).