

# SENATE BILL REPORT

## SB 5298

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As of February 2, 2015

**Title:** An act relating to the diversion of certain municipal waters.

**Brief Description:** Concerning the diversion of certain municipal waters.

**Sponsors:** Senators Ericksen, Hatfield, Honeyford and Warnick.

**Brief History:**

**Committee Activity:** Agriculture, Water & Rural Economic Development: 1/27/15.

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### SENATE COMMITTEE ON AGRICULTURE, WATER & RURAL ECONOMIC DEVELOPMENT

**Staff:** Diane Smith (786-7410)

**Background:** Water may be produced by means separate and apart from the natural cycle of rain, surface water, and groundwater in any drainage. This water is foreign to the drainage, that is from elsewhere. As an example, industrial plants dehydrate natural products such as vegetables, fruits, or milk, and extract the water from within the natural product thereby producing water that has never been part of the natural water cycle of the drainage in which the dehydrating plant is located.

This being the case, this created, foreign, or extracted water does not fit neatly within existing water law that operates on surface water and groundwater. It is not part and parcel of existing water codes. A line of Washington case law from the the early 1900s, with several cases in the 1920s, and apparently suspended in the late 1980s held in principle that water brought into a watershed from outside of it belonged to the person who brought it. If abandoned by that person, the water belonged to the first person to put that foreign water to beneficial use. However, this was not a perpetual right of beneficial use of water that may or may not be brought again into the watershed by the work of an outside agent. There is no right to this water derived from its prescriptive beneficial use. This water is not subject to the permitting system that applies to the natural water in a drainage, including not being available to a senior appropriator of water within the drainage.

The water available to municipal water systems for sale to its customers is derived from a water right like any other water put to beneficial use.

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**Summary of Bill:** If foreign water is owned by a municipal water system and the foreign water is discharged into the Nooksack river between river miles 17 and 19, the municipal owner has a right to divert an equal quantity of water annually from the same river under certain conditions and without having to satisfy appropriation laws.

These conditions are that the diversion occur at a municipal intake structure that is located not more than one mile upstream from where the foreign water is discharged into the Nooksack River and the increased quantity of diversion from the Nooksack River is, measured on a daily basis, not greater than the foreign water discharge.

The term foreign water is defined. It is water that, before the work of the developer of the water, was not part of a source of water supply that would reach the river, basin, or groundwater associated with the location of the municipal intake structure.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Committee/Commission/Task Force Created:** No.

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

**Staff Summary of Public Testimony:** PRO: This is a simple bill that allows the city to meet its drinking water standards with cow water that amounts to distilled water. It also solves a nitrate problem that finds 2000 people drinking from nitrate-contaminated wells. Currently, if the outflow is below the outtake, there is a credit. The bill allows the credit if the outflow is within a short distance from the outtake. The city has been working with the Department of Ecology (Ecology) under a memorandum of understanding for the last ten years. That Ecology declares itself against the bill is a startling surprise. This stretch of the river is not spawning grounds or habitat; it is a fish highway. It is written so specifically, the bill can't be used anywhere else. It just makes it unnecessary to build a million-dollar pipeline to move the cow water output upstream.

CON: Calling this foreign water may not be accurate given that there are 30 dairies in the Lynden area. If the plant is shut down, then the city would lose water it would be relying on. The city should use the regulatory process to mitigate taking more than its annual water right. Tribes are the most senior water right and their right must be quantified before junior rights can be known. This bill would circumvent and undermine fundamental water law. It is only one of five possible solutions that Ecology has been working with the city on. An impairment of 0.03 percent is still a fundamental impairment of in-stream flows.

**Persons Testifying:** PRO: Senator Erickson, prime sponsor; Mike Martin, Stephen Banham, city of Lynden; Gary Vis, Lynden Chamber of Commerce.

CON: Bruce Wishart, Center for Environmental Law and Policy, Sierra Club; David Christensen, Dept. of Ecology; Steve Robinson, Quinault and Lummi Nations.