

# HOUSE BILL REPORT

## HB 2050

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**As Reported By House Committee On:**  
Agriculture & Ecology

**Title:** An act relating to determining the impairment of water rights and uses.

**Brief Description:** Identifying when a new water right would interfere with an existing water right.

**Sponsors:** Representatives Mastin, Chandler, Clements and Honeyford.

**Brief History:**

**Committee Activity:**

Agriculture & Ecology: 2/24/97, 3/3/97 [DPS].

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### HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Chandler, Chairman; Parlette, Vice Chairman; Schoesler, Vice Chairman; Delvin; Koster; Mastin and Sump.

**Minority Report:** Without recommendation. Signed by 4 members: Representatives Linville, Ranking Minority Member; Anderson, Assistant Ranking Minority Member; Cooper and Regala.

**Staff:** Kenneth Hirst (786-7105).

**Background:** Relationship of Groundwater Rights to Surface Water Rights. The Groundwater Code states that to the extent that groundwater is part of or tributary to a surface stream or lake or the withdrawal of groundwater would affect the flow of a body of surface water, the right to use the surface water is superior to any subsequent right acquired to use the groundwater.

Instream Flows and Permit Processing. The establishment of a minimum flow or level constitutes an appropriation with a priority (seniority) date that is the effective date of the establishment of the flow or level. The Water Resources Act of 1971 provides a number of general fundamentals that are to guide the use and management of the waters of the state. One of these fundamentals requires that base flows be retained in perennial rivers and streams to preserve certain instream values.

Withdrawals of water which would conflict with the base flows may be authorized only for overriding considerations of the public interest.

If the Department of Ecology (DOE) approves a water right permit relating to a body of water for which minimum flows or levels have been adopted, the Surface Water Code requires the permit to be conditioned to protect the levels or flows. Further, (hydraulic code) allows the DOE to refuse to issue a permit to divert or store water if it determines that issuing the permit might result in lowering the flow of water in a stream below the flow necessary to adequately support food fish and game fish populations in the stream.

**Summary of Substitute Bill:** Three tests are established as being the only bases upon which a permit for the use of groundwater can be denied or conditioned on the grounds that it would impair or conflict with an existing surface water right. The permit may be conditioned or denied on these grounds only if (1) the groundwater is in an unconfined aquifer and, after no more than six months of pumping, the surface water will lie within the cone of depression of a well tapping the groundwater; (2) the groundwater is in a confined aquifer and its withdrawal will cause a head reduction measurable in the field within 50 feet of the surface water body in question in the shallowest unconfined water table aquifer that underlies that surface water body; or (3) withdrawal of the groundwater will cause a reduction measurable in the field in the flow or level of the surface water body.

These are the only circumstances under which the surface water is impaired or affected. If they exist, the surface water right that is not being satisfied, including an instream flow set by rule, is affected or impaired. This prohibition against denying permits does not prevent the DOE from limiting future withdrawals by adopting rules after following the procedures of a section of law that allows the adjustment of water use management under an existing groundwater area or subarea management plan; statutes that permit groundwater management studies to be initiated locally and allow local governments to assume the lead agency role in developing local groundwater management programs; or the Water Resource Act of 1971.

If a surface water right would be impaired, the DOE may still grant a groundwater permit if the applicant proposes a satisfactory plan for mitigating the impairment.

**Substitute Bill Compared to Original Bill:** The substitute bill clarifies that: surface water rights are, rather than may be, affected or impaired only if one of the three tests is satisfied; and a condition specified in a test may occur in the present or in the future.

**Appropriation:** None.

**Fiscal Note:** Not requested.

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

**Testimony For:** (1) The DOE's policy for determining whether a groundwater permit would interfere with surface flows has gone from a measurable reduction–test to a calculable reduction–test. This is reflected in a large number permit denials being appealed to the Pollution Control Hearings Board (PCHB); the PCHB decisions are mostly against the applicants. (2) The policies of the DOE do not allow groundwater permits to be issued: it has determined that all groundwater and surface waters are in hydraulic continuity; it has set instream flow protections that are greater than the natural flow of streams; and it denies a groundwater permit if only one drop of water from a well would have reached the stream. However, no technical data shows there is a groundwater supply problem in western Washington. The bill establishes tests that are measurable. (3) Unless someone does something to change state policies, small businesses, even those located above abundant groundwater resources, will not be able to afford the costs and delays necessary to get groundwater permits. (4) The DOE's policy that one gallon or molecule causes impairment does not provide a state water use policy. The Legislature needs to establish such a policy.

**Testimony Against:** (1) Because the first test does not take into account the rate at which water moves in the ground, a well could be drilled in gravel next to the Columbia River and since water could flow too fast to the well for a cone of depression to develop, only the third test would apply: a permit for the well could be denied only if it reduced the flow of the Columbia River by more than 5 percent. (2) If the DOE finds problems after six months under the first test, is it going to shut down the well? The bill will result in more sinking creeks.– (3) The bill represents bad timing: the bullhead trout which relies for spawning on cold water from groundwater recharging a stream is a candidate for listing under the Endangered Species Act. (4) There is too much variation in conditions statewide for just these three tests. Good basin assessments should be done instead. (5) Who is going to pay for the six months of monitoring? (6) The bill may reduce the ability of senior rightholders to protect their rights. (7) The exemption provided for new rules may undo the tests.

**Testified:** Charles Lean, Law Offices of Bogel and Gates (pro); James L. Hawk, Jade Greens (pro); Mike Krautkramer, Robinson and Noble, Inc. (pro); Greg Stewart, Rivers Council of Washington (con); Judy Turpin, Washington Environmental Council (con); Karla Kay Fullerton, Washington Cattlemen's Association (commented); LeRoy Jorgensen (pro); and Kathleen Collins, Washington Water Policy Alliance (pro).