

SENATE BILL REPORT

ESHB 2050

As Reported By Senate Committee On:
Agriculture & Environment, April 3, 1997

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: House Committee on Agriculture & Ecology (originally sponsored by Representatives Mastin, Chandler, Clements and Honeyford).

Brief History:

Committee Activity: Agriculture & Environment: 3/20/97, 4/3/97 [DPA, DNP].

SENATE COMMITTEE ON AGRICULTURE & ENVIRONMENT

Majority Report: Do pass as amended.

Signed by Senators Morton, Chair; Swecker, Vice Chair; Newhouse, Oke and Rasmussen.

Minority Report: Do not pass.

Signed by Senators Fraser and McAuliffe.

Staff: Bob Lee (786-7404)

Background: The statutes regarding approval of new water rights and transfer of existing water rights contain provisions that other water rights cannot be impaired. Existing water rights include both rights to divert water for off-stream purposes and to instream flows established through rules adopted by the department. This nonimpairment policy applies both to ground and surface waters.

The statutes do not explicitly create a standard as to the amount of impact on existing water rights that constitutes impairment. Thus discretion has been provided to the Department of Ecology. No administrative rules have been adopted to further define what constitutes impairment. Agency administrative policies have changed over time.

The ground water code states that to the extent that ground water is part of or tributary to a surface water or the withdrawal of ground water would affect the flow of a body of surface water, the right to use surface water is superior to any subsequent right acquired to the use of ground water.

The 1971 Water Resources Act contains a provision that states that full recognition shall be given in the administration of water allocation and use programs to the natural interrelationship of surface and ground waters. Several adopted basin plans contain somewhat different wording as to the degree of hydraulic connection allowed before surface

and ground waters are deemed to be in hydraulic continuity. Administrative policies have changed over time as to when hydraulic continuity exists and when hydraulic continuity results in impairment.

The Department of Ecology made permit decisions on a number of ground water applications based on hydraulic continuity between the proposed ground water uses and protection of instream flows. In 1996, over 100 permit decisions were appealed to the Pollution Control Hearing Board involving a number of issues relating to when hydraulic continuity results in impairment. Further appeals of the hearings board ruling are continuing.

Summary of Amended Bill: Water right applications which have not been approved are not to be construed as being impaired by a request to transfer or amend an established water right.

Three tests are established as the basis upon which a permit for the use of ground water can be denied or conditioned on the grounds that it would impair or conflict with an existing surface water right: (1) if after no more than six months pumping, the surface water will lie within the cone of depression of a well tapping an unconfined aquifer; (2) if the withdrawal of ground water from a confined aquifer causes a measurable reduction in another well drilled into the shallowest aquifer located within 50 feet of a surface water body; or (3) if withdrawal of ground water affects or impairs existing surface water rights, including instream flows adopted by regulation, that are not being satisfied during the period of occurrence. These standards do not apply to challenges of impairment in court by holders of senior out-of-stream water rights.

The existence of hydraulic continuity between ground and surface water does not, in itself, constitute impairment. In making a determination as to whether an application to appropriate public water will impair an existing water right, the department is to consider: (1) any offset, mitigation or augmentation provided by the applicant; (2) seasonal variations in water supply and the recharge of surface and ground water bodies; and (3) the three tests described in the above paragraph.

Persons whose application to appropriate ground water was denied since November 1, 1995 may resubmit their application to the department within 30 days for reconsideration to be based on the standards in this act. Such applications, if approved, retain the date of priority of their original application.

Amended Bill Compared to Substitute Bill: The striking amendment replaces the standards for determining impairment contained in the House version. The standard for impairment in the House version is that impairment does not exist if the amount of reduction in the supply of water to the surface water body would be less than 1/10th of 1 percent within 100 years of the amount of the proposed annual withdrawal of ground water. The cumulative effect of multiple applications for ground water withdrawals could not exceed 1 percent within 100 years.

Appropriation: None.

Fiscal Note: Requested on March 18, 1997.

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

Testimony For: The standard of 1/10th of 1 percent over 100 years is too restrictive and will cause a very high rate of denials of applications for ground water permits. Without the ability to withdraw ground waters, many communities will be without water to meet the needs of a growing population and will not be able to comply with the planning requirements of the Growth Management Act. Individual water right applications should not be judged by the potential of cumulative effects of all current and future ground water withdrawals. For a 1000 gallon per minute well that pumps at 50 capacity, the allowable impact on a stream would be only « gallon and thus the standard in the House version is too restrictive. The standard in the House version ignores the seasonal recharge of the aquifer by snow melt and rainfall.

Testimony Against: It is difficult to measure small changes to the flows in streams. The amended bill does not address cumulative effects. Impacts to surface waters from ground water withdrawals are slow to appear in some aquifers. The amended bill provides two different standards for impairment; one for instream water rights and another for out-of-stream rights. The standard in the amended bill do not provide enough protection to instream flows and will allow further loss in instream flows.

Testified: Ken Slattery, Linda Crerar, Dept. of Ecology (concerns); Lori Johnson, Sarah Mack, Arrowleaf Resort (pro); Judy Turpin, WA Environmental Council (con); Mary Backe, WA Cattlemen's; Greg Stewart, Rivers Council of WA (con); Paul Parker, WSAC; Dick Ducharme, Yakima Growers and Shippers (pro w/amen.); Dawn Vyvyan, Yakama Nation (con).