

SENATE BILL REPORT

SB 5289

As Reported By Senate Committee On:
Environmental Quality & Water Resources, March 2, 1999
Ways & Means, March 8, 1999

Title: An act relating to water resource management and facilitating fishery protection and recovery.

Brief Description: Strengthening laws concerning water resources in order to protect and restore fish stocks.

Sponsors: Senators Fraser, Morton, Jacobsen, Winsley, Rasmussen, Patterson, Spanel, Haugen, Eide, Shin, Costa, Fairley, Heavey, Prentice, Gardner, Franklin, Kohl-Welles, Thibaudeau and Kline; by request of Governor Locke.

Brief History:

Committee Activity: Environmental Quality & Water Resources: 1/26/99, 1/28/99, 1/29/99, 2/26/99, 3/2/99 [DPS-WM, DNPS].
Ways & Means: 3/5/99, 3/8/99 [DP2S, DNPS].

SENATE COMMITTEE ON ENVIRONMENTAL QUALITY & WATER RESOURCES

Majority Report: That Substitute Senate Bill No. 5289 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Fraser, Chair; Eide, Vice Chair; Jacobsen and McAuliffe.

Minority Report: Do not pass substitute.

Signed by Senators Honeyford, Morton and Swecker.

Staff: Genevieve Pisarski (786-7488)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 5289 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Loveland, Chair; Bauer, Vice Chair; Brown, Vice Chair; Fairley, Fraser, Kline, Kohl-Welles, Rasmussen, B. Sheldon, Snyder, Spanel, Thibaudeau, Winsley and Wojahn.

Minority Report: Do not pass substitute.

Signed by Senators Honeyford, McDonald and Zarelli.

Staff: Kari Guy (786-7437)

Background: As amended since its adoption in 1917, the Water Code governs the creation and regulation of private rights to divert and use surface waters according to the requirements of the common law doctrine of prior appropriation. Recognizing the legitimacy of water rights established before 1917, the code established a state permit process administered by the Department of Ecology as the only means of acquiring water rights. A water right under a permit remains inchoate until it is put to actual beneficial use, when it becomes certificated. Every water right is appurtenant to specific land. Change or transfer of the place of use, point of diversion, or purpose of use must be approved.

The Shoreline Management Act requires local governments to adopt shoreline master programs to regulate development in shoreline areas. Local governments must amend the shoreline master program within 24 months of Department of Ecology adoption of revised guidelines.

Summary of Second Substitute Bill: The Department of Ecology must give priority to processing applications for transfers and changes in water rights. Applications for changes and transfers of water rights may be processed independent of the order for processing application for new withdrawals within the same basin or within other basins.

Three, four, and five-year schedules are established for shoreline master program amendments, for any guidelines adopted by the Department of Ecology before December 31, 2000.

Second Substitute Bill Compared to Substitute Bill: The deadline for processing of all water right transfer applications is removed. Sections related to instream flows, water conservation, reclaimed water, public water systems, integrated water supply management, land use, enforcement, and future action are removed.

Substitute Bill Compared to Original Bill: Provisions for adopting instream flows are added. Mandatory conservation programs and use of reclaimed water are limited to areas with listed fish species, urban growth areas, and public water systems. Development of recommendations for use of drought contingency funds for agricultural conservation projects in areas with listed species is part of the water resource management system for agriculture, as is development of agricultural water use efficiency performance standards.

Additional criteria for approval of changes and transfers are removed. The provision that all conserved water can be used to irrigate additional acreage or put to other additional uses, if consumptive use does not increase, together with provisions for conveying a portion of the conserved water to a trust water right or making a payment, is also removed.

A schedule for priority processing of applications to change, transfer, or amend water rights is added.

Provisions allowing common service areas, transfer of inchoate water, satellite management agencies, and acquisition and development of new sources of water supply through interties are also removed.

The existing permit exemption for ground water withdrawal is not changed. Provisions establishing local regulation of exempt wells are removed. Provisions are added requiring

distribution of findings if ground water withdrawals are found to be materially affecting surface waters, and including ground water withdrawals in water quantity assessment by watershed planning units.

Subdivision regulations and building permits are not required to limit creation of new water systems and require connection to existing public water systems, but subdivision water supplies must be determined to be adequate for intended uses. Growth Management Act jurisdictions are required to have water supply policies.

Schedules for amendment of shoreline master programs pursuant to Department of Ecology guidelines are established according to requirements of the state salmon recovery strategy and population projections, rather than the Growth Management Act.

Requirements relating to rulemaking and to mitigation regarding the effects of capture of surface water by wells are removed.

The Departments of Ecology and Fish and Wildlife are not authorized to cross delegate their enforcement powers. Provisions for serious and major violations with corresponding civil penalties from \$100 to \$25,000 per day per violation are removed. The Department of Ecology is authorized to fund stream patrollers in unadjudicated areas. Authorization to the Department of Ecology to regulate among water right claims, after obtaining a Superior Court ruling on priority, is removed.

Provisions for an optional economic development element and an optional environmental element that would replace a programmatic environmental impact statement in county comprehensive plans are removed.

Provisions for the Attorney General reports, the Water Resource Management Task Force, and for the water resource management system for agriculture are added.

Authorization for use of drought preparedness funds for agricultural conservation projects is removed. Appropriation of \$43 million in federal funds to the state and local improvements revolving account is removed to avoid duplication of budget provisions.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For (Environmental Quality & Water Resources): This bill is one necessary part of the overall salmon recovery package, which also includes budget requests and changes in existing programs. It is designed both to accommodate growth and recover fish. It takes an incentive approach and does not change the legal status of water rights. It focuses on management of water resources, because water is the key habitat element. More water will be made available by creating flexibility to move existing water and by freeing up additional water through conservation. Protection of existing certificates and permits gives public water suppliers certainty about serving growth and allows water exchanges. Provisions are needed to promote recharging of ground water with reclaimed water and

provide grants. The ability to move water between surface and ground is needed as well as between areas. Retaining inchoate rights under a permit and adding public interest criteria deserve support, but these should be tied to conservation and instream flows. Priority for transfers and the ability of anyone to hold an instream water right deserve support, but transfers should result in water, rather than monetary payments. Authorization of temporary transfers must assure that a permanent supply will be available. A better approach to expediting transfers is to presume they are valid, distinguish among the different types, set a time certain for decisions, investigate only the ones that appear needed and recover the cost. A simple standard for transfers would be no net harm. Conservancy boards should handle transfers, and the Department of Ecology should handle new rights. Ecology should be required to expedite transfers. It is inconsistent to restrict movement of water for agriculture and encourage it for municipal uses.

Existing conservation requirements are strengthened and necessary rule making authority is added. Data on water use is crucial. Conservation performance standards must be realistic and uniform. Incentives for conservation are needed, along with requirements to stop wasteful practices that attempt to assure retention of a right. Regulation of exempt wells will be based on need to regulate. Local governments get better ability to plan for economic development and environmental impacts. Shoreline master programs need to be updated everywhere, and funding is needed.

Fish and Wildlife officers are already in the field and can efficiently help with compliance and education, as well as enforcement. Administrative enforcement, in addition to criminal penalties, is needed to realistically apply the hydraulic code. Regulation of capture of surface water by wells will be based on measurement and mitigation of effects. Increasing stream flows will have the most immediate effect on fish recovery. Ability to purchase and lease water rights is very important for increasing stream flows.

The provisions for stream flows are needed. Many of the provisions are good and are needed. The effect of exempt wells needs to be tracked.

Testimony Against (Environmental Quality & Water Resources): Different, better approaches to creating flexibility in moving existing water need to be included, such as designation of the Central Puget Sound Urban Growth Area as a common place of use, compensating some salmon recovery actions, linkage and expansion of transmission and supply connections in designated growth areas, water concurrency requirements for GMA planning, incentives to conserve, and creation of a Central Puget Sound resource planning process. Less regulation and more partnership is needed; processes such as section 401 permitting also establish instream flows and funding would build incentives for more trust water rights. The limits of what public water system water rights can grow into must be defined specifically. Public water systems should not be the only ones required to measure and report use. Requiring that 50 percent of conserved water be conveyed to trust water rights is a disincentive. It is a less effective approach than facilitating and providing incentives for transfers, including transfers of inchoate and conserved water. Requiring agreements and performance standards creates uncertainty and duplication of efforts. The performance measures do not account for factors that are beyond a public water systems control. Provisions for conserved, reclaimed, perfected, certificated, and permitted water result in five types of water rights and additional complexity. Provisions for tentative

determination of validity of water rights raise due process concerns. Instream flows and municipal uses are made superior to other uses and infringe on existing adjudicated rights.

Mandatory conservation measures will not produce results. This bill deals with water but not fish. Reclaimed water is not widely feasible and discharge is needed for stream flow. Others, besides municipalities, should be allowed to use reclaimed water. Exempt wells are necessary for rural economic development. They represent only 1 percent of water use in the state. The effect of exempt wells on surface water is not firmly established. No viable alternatives exist to exempt wells in most rural areas. Property rights in water, local control and watershed planning are disappearing and negatively affect agriculture. Shoreline master programs should be updated only where there is an effect on fish, given the substantial effort and money involved.

Conservation should be accomplished through tax credits. Land use and economic development planning do not belong here. Public participation needs to be provided when procedures are streamlined. The schedules for updating shoreline master programs are too long. There should be a full Sinking Creek fix. The civil penalties are too low. Penalties for each day of violation are unfair, because legal and policy problems often cause delay. Uniformed officers with guns are not appropriate for water code enforcement. Use water masters and conduct small, local adjudications. Mitigation allows development but does not assure positive results. Enforcement authority over water right claims is essential, because illegal use and overuse are reported to be rampant.

The water code needs to be enforced, not changed. Only immediate compliance needs to be addressed now. Exempt wells do not affect enough water to affect immediate compliance. Existing cooperative planning processes should be funded and used for setting stream flows, rather than authorizing conditioning of water rights. Changes and transfers should be expedited through conservancy boards, not new requirements. Full mitigation is too strict. Integrated water supply management needs to be added. Ability to move water between ground and surface, as well as to move surface water, is needed. Incremental certification of municipal water systems jeopardizes financing. Conservation rates are incompatible with rate base requirements. Flexibility and innovative approaches should be promoted, including satellite management and transfer of inchoate water. The public interest is not defined.

Testified (Environmental Quality & Water Resources): Dennis Beich, Okanogan County Water Resources; Max Benitz, Jr, Benton County Commissioners (con); Peggy Benton, League of Women Voters (pro); Peter Birch, Dept. of Fish and Wildlife (pro); Pam Bissonette, King County Natural Resources (pro); Bruce Bjork, Dept. of Fish & Wildlife (pro); Tim Botkin, Kitsap County Commissioners; Charlie Brown, Washington State Potato Commission (con); Mary Burke, Washington Cattlemen's Association (con); Bill Clarke, Washington Realtors (con); Kathleen Collins, Washington Water Policy Alliance (con); Dick Ducharme, Yakima Growers & Shippers (con); Tom Eaton, Dept. of Ecology (pro); Eric Espenhorst, Friends of the Earth (pro); Scott Fowler, Washington State Drilling & Groundwater (con); Kari Frank, Puyallup Tribe; Karla Kay Fullerton, Washington Cattlemen's Association (con); Diana Gale, Seattle Public Utilities; Scott Hazlegrove, Association of Washington Business (con); Mark Hullinger, Lakewood Water District (con); Jeff Johnson, Water Cooperative of Pierce County; Linda Johnson, Washington Farm Bureau (con); Bob Joy, Washington State Grange (con); Lynn Kohn, Association of Washington Cities; John Kounts, Washington PUD Association (con); Stephen L. Kreider, Country

Town Drilling; Doug Levy, City of Everett; Steve Lindstrom, Sno-King Water District Coalition (concerns); Brenda Longmire; Bob Mack, City of Spokane (con); Joe Mentor, Washington Realtors; Ken Merry, City of Tacoma; Tom Myrum, Washington State Water Resources Association; Diane Nelson, Colville Tribe (pro); Judy Nelson, Covington Water District; Rick Nelson, Washington Cattlemen's Association (con); Drew Noble, Mason County; Claire Olivers, City of Everett; Rachael Paschal, Center for Environmental Law & Policy; Lisa Pelly, Fish & Wildlife Commission; Larry Phillips, King County Council (pro); Joseph Quinn, Buttes Water-Sewer District (pro); Paul Roberts, City of Everett (pro); Bill Robinson, Trout Unlimited (pro); Rebecca Sayre, Sierra Club (pro); Peter Skowlud, Dept. of Ecology; Denise Smith, League of Women Voters (pro); Jon Stier, WashPIRG; David Taylor, Washington State Association of County & Regional Planning Directors (con); Harris Teo, Yakama Nation; Bruce Thompson, Buttes Water-Sewer District (pro); Rich Thorsten, 1000 Friends of Washington (con); Bob Tuck, Fish & Wildlife Commission; Judy Turpin, Washington Environmental Council (pro); Bev Tweddle, Lakehaven Utility District; Dawn Vyvyan, Yakama Nation (pro); Steve Wells, CTED (pro); Dave Williams, Association of Washington Cities (pro); Joe Williams, Dept. of Ecology (pro); Terry Williams, NW Indian Fisheries Commission; Bruce Wishart, People for Puget Sound (pro); John Wolpers, Kittitas County (con); Charlie Wright, Arrowleaf Resort (pro with concerns).

Testimony For (Ways & Means): This bill will increase water in streams, which is critical for salmon recovery. Relaxing the dates for shoreline master program amendments will enable local governments to better prioritize limited resources.

Testimony Against (Ways & Means): There will be a significant financial impact for water districts. There should be some measure of outcomes for the money spent. Local governments will have significant fiscal impacts; the bill should include null and void clauses for local governments. Increased water supply costs for local purveyors will encourage exempt wells. The future studies are not needed.

Testified (Ways & Means): Dawn Vyvyan, Yakama Nation (pro); Kathleen Collins, Washington Water Policy Alliance (con); Dick Ducharme, Yakima Growers and Shippers, Wenatchee Valley Traffic Assn., BIAW (con); Tom Fitzsimmons, Ecology/Governor's Salmon Team (pro); Tony Meinhardt, Washington Association of Sewer/Water Districts (concerns); Martha Hawden, Superior Ct. Judges Assn. (con sec. 909); Steve Lindstrom, SnoKing Water Dist. Coalition (concerns); Judy Turpin, Washington Environmental Council (pro w/concerns); Dave Arbaugh, Kitsap PUD (concerns); Steve Robinson, Northwest Indian Fisheries Commission (pro); Bob Mack, Tacoma, Bennie Barnes, Seattle, Jim Miller, Everett, Dave Williams, Assn. WA Cities (concerns).