
**Agriculture & Natural
Resources Committee**

HB 1338

Brief Description: Providing additional certainty for municipal water rights.

Sponsors: Representatives Linville, Kirby, Lantz, Rockefeller, Shabro, Jarrett, Grant, Quall, Hunt, Delvin, Wallace, Woods, Benson, Morris and Conway; by request of Governor Locke.

Brief Summary of Bill

- Defines which water rights are held for municipal water supply purposes and establishes provisions regarding such rights.
- Expressly defines when any inchoate portions of such municipal water rights are considered to be rights in good standing, identifies a 50-year limitation on such standing, and authorizes the transfer of inchoate rights under certain conditions.
- Identifies how the "place of use" of a municipal water supplier's water right may be the same as the supplier's service area.
- Requires certain water conservation planning and practices.
- Allows the departments of Ecology and Fish and Wildlife to establish mitigation requirements for applications for new or transfers of existing municipal rights that would reduce stream flows in critical periods.
- Authorizes certain water management environmental contracts and provides for use of the contracts in certain areas on a pilot basis.

Hearing Date: 1/29/03

Staff: Kenneth Hirst (786-7105).

Background:

Water Rights. A water right has several elements or conditions that identify limitations on the use of water under the right. One is its priority. Other elements of the water right include: the amount of water that may be withdrawn from a particular water source under the

right, the time of year and point from which the water may be withdrawn, the type of water use authorized under the right (such as an agricultural or municipal use), and the place that the water may be used.

In the past, many water right certificates were issued by the state for municipal use once the main withdrawal and distribution works had been constructed for using the water, but before all of the water was actually put to use. Under this "pumps and pipes" philosophy, a municipality could develop its actual use over time, without affecting its certificated water right. In a recent case involving the water right of a private developer, the state's Supreme Court stated that a final water right certificate cannot be issued for the developer's right for a quantity of water that has not actually been put to beneficial use. The court stated that it declined to address issues concerning municipal water suppliers in the context of the case. However, in a draft policy that the Department of Ecology (DOE) circulated and subsequently withdrew, the DOE stated its conclusion that the holdings of the court in the case apply to all water rights, including municipal water rights.

Transfers. Certain of the elements or conditions of a water right may be modified with the approval of the DOE. These modifications are referred to in the water codes as transfers, changes, and amendments. They are referred to here collectively as "transfers." Where a county or counties have created a water conservancy board, the board may process applications for transfers and may act on the applications. A board's decision regarding an application is subject to approval by the DOE. Approving a transfer does not affect the priority date of the right. The transfer cannot be approved if it would impair other existing water rights, whether junior or senior.

Reservations of Water. When a reservation of water is established by the DOE by rule for instream flows, the reservation is considered to be an appropriation of water (water right) and has as its date of priority the date the reservation is established.

Watershed Planning. The Water Resources Act of 1971 directs the DOE to develop a comprehensive state water resources program for making decisions on future water resource allocation and use. The Act permits the DOE to develop the program in segments. Under the Act, the DOE has divided the state into 62 water resource inventory areas (WRIA's) and has adopted management plans or "basin plans" for a number of them. The watershed planning law enacted in 1998 establishes a process for the development of watershed plans under a locally initiated planning process. Such watershed planning may be initiated for a single WRIA or for a multi-WRIA area.

Water System Plans. The State Board of Health is directed by state law to adopt rules regarding public water supply systems. Under these rules, certain public water systems are required to submit water system plans or small water system management programs to the Department of Health (DOH) for review and approval. Other law requires the development of coordinated water system plans for critical water supply areas.

Summary of Bill:

Municipal Water Supplies. An entity that is to be considered a "municipal water supplier" is defined for the water code and for the water right claims and relinquishment laws. (Sections

2 and 5.) It is: a city or a town; a county appointed as the receiver of a failing water system or approved as a satellite management agency for a public water system; or a county that delivers reclaimed water.

It is also a water purveyor that meets certain qualifications. To qualify, such a purveyor must be:

- approved by the DOH to serve existing and/or additional users;
- provide water to the extent allowed under an applicable land use plan;
- in compliance with water system planning requirements established by the DOH that apply either directly to the system or that apply under a coordinated water system plan; and
- provide water directly or indirectly to 15 or more residential hook-ups or to 25 or more residents for at least 180 days per year. (Section 2(3).)

Only these entities may hold water rights for municipal water supply purposes; however, the portion of an irrigation district's water right provided for public water supplies with DOH approval is also considered to be for municipal water supply purposes. (Section 3.)

Any water right held by a city, town, or county for use in its own operations is considered to be a right used for municipal water supply purposes. Any beneficial use of water provided by a municipal water supplier is considered to be used for municipal water supply purposes. Such a beneficial use of diverted or withdrawn water may include: uses designed to benefit fish and wildlife, water quality, or other instream resources or related habitat; or uses called for by a approved watershed plan, by a habitat conservation plan prepared in response to an endangered species listing, or a by a comprehensive irrigation district management plan. (Section 2 (4).)

The purpose of use of a water right acquired by a municipal supplier that is not for municipal use may be changed to municipal use. While the supplier diligently seeks the DOE's approval of the change of use, the right is not subject to relinquishment. (Sections 3(2) and 4.)

Use of Inchoate Rights. A water right certificate for an inchoate (i.e., not perfected through beneficial use) water right, or inchoate portion of a right, that is held or acquired by or issued to a municipal water supplier for municipal water supply purposes is a water right in good standing under certain conditions. The conditions are:

- the water has been beneficially used or it is needed to meet reasonably anticipated future needs within the next 50 years (as demonstrated by DOH rules for forecasting demand); and
- the holder of the certificate is in compliance with all requirements of the water system plan or coordinated water system plan governing the municipal water supplier, including its approved conservation plan, as amended from time to time. (Section 6(2).)

If the certificate holder is not in compliance with the water system plan, further expansion

using inchoate water under the right is prohibited until compliance is attained. By order of the DOE as it deems appropriate, a water right certificate held for municipal water supply purposes may be subject to metering, monitoring, and reporting water use and for the installation of fish protection devices. (Section 6(2)(b) & (3).) From now on, the DOE will issue certificates for new water rights only for the perfected portion as demonstrated through actual beneficial use. (Section 6(6).)

Rescinding Certificates. The DOE cannot rescind, reissue, or supercede any water right certificate held for municipal water supply purposes that is documented to be in good standing unless: the water right holder requests new documents as inchoate rights are beneficially used; or it is done as part of a transfer, change, or amendment of the water right. This prohibition does not apply to the DOE's fulfilling its responsibilities to issue certificates at the conclusion of a general adjudication proceeding. In addition, the DOE may correct ministerial errors in a certificate. Any superceding water right certificate issued by the DOE retains its original priority date. If a transfer would impair an instream flow right, DOE may, with the consent of the holder of the right, condition the use of the water right to avoid the impairment. (Section 6(4) & (5).)

Hook-ups Served. Information in an application or subsequent water right document for a water right for municipal water supplies regarding the number of hook-ups or the population to be served does not limit the exercise of the right regarding hook-ups if the municipal supplier has an approved water system plan that specifies such a maximum number of hook-ups, or regarding the maximum population to be served. (Sections 7 and 8(2).)

Municipal "Place of Use." If a municipal water supplier wishes to have the "place of use" of its municipal water right be the same as the service area described in its approved water system plan, it must (within 30 days of submitting the plan for approval)

- notify the DOE; and
- publish notice as it would for an application for a new right. The notice must inform the public that claims of impairment must be filed with the DOE within 30 days of the last date of publication of the notice.

If no impairment claims are filed with the DOE within the deadline, approval of the water supply plan also alters the place of use of the water right so that it is the same as the service area. If an impairment claim is filed within the deadline, the DOE must render its decision regarding the impairment within 60 days of receiving the claim. Its decision is appealable to the Pollution Control Hearings Board (PCHB). If, upon final resolution, no impairment is found, the place of use is the same as in the system plan. Only the DOE or the Department of Fish and Wildlife (F&W) may file a claim of impairment regarding an instream flow set by rule or any other water right held by the state. (Sections 8(4)&(5), 9 and 10.) Certain deadlines established for DOH's approval process for water system plans are waived if an impairment claim is filed. (Section 11.)

Water Conservation. A municipal water supplier must implement cost-effective water conservation under its approved water system plan and must fully utilize the conserved water before it exercises its inchoate water right. Construction schedules for water right permits must reflect the system's use of conserved water. (Section 8(6).)

The DOH must, with the assistance of an advisory committee, develop water use efficiency requirements designed to ensure efficient use of water while maintaining system financial viability and improving the affordability of supplies. The requirements must include conservation planning requirements, water loss standards and procedures by which public water systems establish and adopt water conservation objectives. The DOH must develop requirements for the conservation element of water system plans and provide technical assistance regarding water conservation. Conservation planning requirements are to be varied based upon the size of the public water system. (Section 12(1) - (4).)

These requirements of the DOH must require a purveyor to:

- 1) adopt conservation objectives and establish procedures to be used by the systems for doing so. These procedures must include:
 - public notification and public meetings;
 - establishing a range of reasonably achievable reductions in consumption over time as measured in reductions per equivalent residential unit or other measurable criteria, and
 - establishing and adjusting conservation objectives taking into account certain listed criteria, such as historical conservation performance and investment; (Section 12(4)(a) & (6).)
- 2) implement all measures determined by the public water system to be cost effective and necessary to achieve the system's conservation objectives;
- 3) evaluate the use of rate structures to encourage conservation;
- 4) evaluate the system's water loss and include a detailed plan for achieving DOH's water loss standards;
- 5) provide water consumption and source production data sufficient to evaluate system conservation performance. Reporting must include reporting to the public; and
- 6) include water demand forecasts developed in accordance with DOH requirements. (Section 12(4)(b) - (f).)

Although the requirements must allow the utilities to select the best methods for achieving their conservation objectives, public water systems must implement all conservation measures that provide water from conservation at or below the cost of the development of new supplies. (Section 12(4)(b).)

The DOH must: develop standards for system water loss, considering system size and its water loss trends; water demand forecast methodology sufficient to meet its requirements and for use in determining "reasonably anticipated future needs" that keep an inchoate right valid; and establish provisions for withholding approval of system expansion and/or state funding in cases where water systems fail to comply with these conservation requirements. The DOH must adopt implementing rules by December 31, 2005. (Section 12(5) & (7) - (9).)

Opportunities for water reclamation and reuse under the reclaimed water laws must be evaluated in the development of water system plans. Proposals for construction in public rights of way must consider infrastructure needed to distribute reclaimed water. These requirements do not apply to utilities developing plans for DOH approval that serve less than

1,000 hook-ups. (Section 15.)

Sewer plans must include an analysis of the impact of water conservation measures on sewer treatment capacity (not just sewer service) and must consider assisting water conservation programs as an alternative new or expanded treatment capacity. (Section 13.) They must include a description of its coordination with any reclaimed water elements of a regional water supply plan. (Section 14.)

Transfers of Inchoate Rights. The unperfected part of a municipal or a community or multiple domestic water right held by a municipal water supplier may be transferred if:

- the applicant is certified by the DOH as being in compliance with DOH's present and future water conservation standards and the transfer is subject to stream flow protection or restoration requirements of:
 - an approved watershed plan (based on the applicant's proportionate share of water use effects on environmental resources); or
 - an approved habitat conservation plan, Federal Energy Regulatory Commission hydropower license, or comprehensive irrigation district management plan;
- the transfer is subject to a water management environmental contract with the DOE; or
- the transfer is needed to resolve or alleviate a public health or safety emergency caused by a failing public water supply system, the criteria for which are listed (and do not include inadequate water rights to serve existing or future hook-ups). (Sections 16 and 17.)

Mitigation. If approval of an application for a new water right or transfer sought for municipal water supply purposes would result in a measurable or calculated reduction in stream flow during critical low periods, the DOE, with the concurrence of the F&W, may approve mitigation measures to offset the result. The mitigation must be requested by the applicant and either:

- an approved watershed plan must be in effect for the source of the water and the mitigation must be consistent with the plan; or
- the applicant must be subject to a water management environmental contract with the DOE.

The applicant must demonstrate that measures can be adopted to avoid or mitigate stream flow reduction using generally accepted scientific standards to determine the amount of the reduction. (Sections 18(1) & (2) and 19.)

Mitigation measures must be directly proportional to the impact caused by the permitted use of water or transfer of water. Elements of the mitigation may include nonwater measures and measures at a location other than the stream reach where the effects would occur. Potential types of mitigation are listed, which are in addition to any other measures deemed effective by the DOE. The measures must

- be maintained and effective during the duration of the right;
- include enforcement provisions such as through financial penalties or injunctions;
- be subject to evaluation periodically regarding their effectiveness and should be modified by

joint agreement to maintain the required performance. (Sections 18(3) - (5) and 19.)

Mitigation measures must not impair existing water rights. They are subject to appeal as part of the report of examination on the application. (Sections 18(6) & (7) and 19.)

Contracts. The DOE may enter water management environmental (WME) contracts with a municipal water supplier to meet the environmental objectives of an approved watershed plan.

WME contracts are for not more than 10 years, but may be renewed. They must be originally entered before July 1, 2008. A WME contract must be consistent with: adopted growth management plans developed under the Growth Management Act; approved water supply plans; adopted watershed plans; and the water use efficiency and conservation requirements of the DOH or those of an approved watershed plan, whichever are more stringent. (Section 20(1) & (2).)

A WME contract must require the participating water system to meet the environmental obligations under an approved watershed plan, based on the proportionate share of the system's effect on the environmental resources; must establish performance measures and time lines and annual reporting regarding them; and provide for stream flow monitoring and metering of water use, as needed to ensure compliance. It is appealable to the PCHB within 30 days of being approved by the DOE. (Section 20(3) & (8).)

The DOE may provide or receive funding as needed to implement contract activities. It must provide for public review of a proposed contract, including posting proposed and approved contracts and annual reports on its website; and conduct pre-approval consultations with local governments, the DOH and the F&W. It must also conduct pre-approval consultation with affected tribal governments, to which applicants are invited to attend. Projects implemented under a contract may be continued after the expiration of the contract. (Section 20(4) - (7) & (9).)

The DOE and F&W must solicit at least two areas (one east of the Cascades, and one west) that are engaged in watershed planning to voluntarily pilot these WME contract provisions before completing their watershed planning. Any physical projects implemented must be first approved by a planning unit or, for other planning, by the DOE and F&W. DOE must report to the Legislature regarding these pilots before the end of 2003 and 2004. (Section 21.)

Priority Processing. The DOE is to give priority to processing applications for water rights and transfers and reservoir permits when necessary to implement an adopted watershed plan or a WME contract. This priority processing is not to affect priority dates of resulting rights. (Sections 23 and 24.)

Appropriation: None.

Fiscal Note: Requested on January 27, 2003.

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