

SENATE BILL REPORT

SB 5023

As Reported By Senate Committee On:
Natural Resources, Energy & Water, February 27, 2003

Title: An act relating to public ground water.

Brief Description: Concerning the use of public ground water for municipal or domestic supply.

Sponsors: Senators Honeyford and Hale.

Brief History:

Committee Activity: Natural Resources, Energy & Water: 1/22/03, 2/27/03 [DPS, DNP].

SENATE COMMITTEE ON NATURAL RESOURCES, ENERGY & WATER

Majority Report: That Substitute Senate Bill No. 5023 be substituted therefor, and the substitute bill do pass.

Signed by Senators Morton, Chair; Hewitt, Vice Chair; Hale, Hargrove, Honeyford and Oke.

Minority Report: Do not pass.

Signed by Senators Fraser and Regala.

Staff: Evan Sheffels (786-7486)

Background: RCW 90.44.100 pertains to amendments to ground water permits and certificates. Certain changes are allowed without applying for an amendment. For other changes, an amendment is required. The current statute governing the construction of replacement or additional wells does not differentiate among categories of water right holders.

A number of conditions apply requiring that the combined effect of replacement or additional wells is no different than the effect of the original well, including requirements that the same body of public ground water must be tapped, replaced wells must be decommissioned, and new wells must be constructed in the manner specified by the Department of Ecology (DOE). In addition, the combined effect of all original, replacement, and additional wells must not enlarge the original water right.

Ground Water Right Changes Requiring Application for Amendment--Current Law. Existing law allows amendments to change the location of wells or other means of withdrawal, to change the manner of use, and/or to change the place of use of the water. The Washington State Supreme Court has noted that while RCW 90.03.380 expressly allows for changes to the purpose of use, RCW 90.44.100 in the groundwater code does not explicitly authorize amendments to change the "purpose of use." The court did not, however, issue an express holding on how broadly or narrowly "manner of use" should be construed (see *R.D. Merrill Co. v. Pollution Control Hearings Board*, 969 P.2d 458, 464-465 (1999)). This has caused

some interpretive confusion as to whether the 1945 Legislature, when it enacted RCW 90.44.100, intended for "manner of use" to be construed to include and allow changes in the purpose of use of a water right.

Prior to amending a ground water permit or certificate, DOE must determine that the combined effect of the original well, plus any replacement, additional or existing back-up wells, meets the requirements for an issuance of an original water right.

Changes Allowed Without Applying for an Amendment--Current Law. Existing law allows construction of a replacement or an additional well without applying for an amendment to the water right permit or certificate if it is constructed at the same location as the original well-head. The original location may also be determined from the legal description provided in the original water right application.

Summary of Substitute Bill: Subject to certain protections and limitations, new replacement or additional (R/A) wells may be constructed, or currently existing or back-up wells may be substituted for or added to wells at the original permitted location.

With application for amendment, changes in the purpose of use or the body of ground water tapped are allowed so long as R/A wells are located in the same water resource inventory area (WRIA) as the original well, or an adjoining WRIA. Notice is required, and DOE must make findings equal to those required for an original water right.

Without application for amendment, R/A wells may be added or constructed up to one-quarter mile from the old well-head, or further if so described in the original application. The location of the original well is statutorily defined as one-quarter mile. No amendment is required for R/A wells more than one-quarter mile but not more than two miles from the original well-head, though pre-construction notice, followed by a 60-day waiting period, is required.

Pre-construction notice must describe how claims of potential impairment can be filed with DOE. DOE must issue advisory opinions on claims submitted. If the water right holder and claimant cannot reach a resolution, the claimant may bring an action in superior court.

The combined effect of R/A wells must not result in an increase in the annual or instantaneous quantity of the original right.

Substitute Bill Compared to Original Bill: The original bill allowed DOE to issue amendments to tap a different body of public ground water so long as R/A wells remain within the same WRIA as the original well. The substitute extends this to adjoining WRIAs.

The original bill required that the combined effect of R/A wells not result in an increase in the annual quantity of the original water right. The substitute bill prohibits an increase in annual or instantaneous quantity.

The original bill set municipal and domestic supply purposes apart from other purposes, allowing the construction of municipal and domestic supply R/A wells up to two miles from the old well-head without applying for an amendment.

Under the substitute bill, no distinction by type of water right holder is made. The location of the original well is statutorily defined as one-quarter mile, within which no amendment is required. R/A wells more than one-quarter mile, but not more than two miles, from the original well-head require pre-construction notice, followed by a 60-day waiting period to allow for potential impairment claims, DOE advisory opinions, and a dispute resolution process.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: The requirement that a replacement or back-up well be constructed only at the same location as the original well affects the ability of public water systems to respond to changes in land use, water quality, and aquifer productivity that make the location unavailable or unsuitable. Municipalities or domestic supply providers need additional flexibility when consolidating or joining smaller water systems together. It is a good start, but the bill needs additional language to allow additional work on a currently existing well to bring it into a water system. Regarding a change in source, it is difficult to tell what is the same source. This bill, or an improved version, would allow a shift away from high impact sources to lower impact sources, helping instream flows, water quality, etc. For instance, a well by a gas station could be moved to alleviate spill or contamination concerns. Wells close to salmon streams could be moved away, or to deeper aquifers to protect flow. This bill would allow those changes to be made without prohibitive cost.

Testimony Against: Having no chance to amend or review replacement wells up to two-miles from the original could lead to perfection of inchoate paper rights that impair others' rights. This may reward delayed protection of well-heads. The bill includes no mechanism to ensure that protections for other water right holders will be implemented. This problem could be addressed with notice provisions.

Testified: PRO: Charlie Brown, Washington Potato Commission; Bill Hahn, Kitsap PUD; Darryll Olsen, Rep. Columbia-Snake River; Dave Monthie, King County (with concerns); Scott Hazlegrove, Water & Sewer Districts; William D Hahn, Washington P.U.D. Association; Kathleen Collins, Washington Water Policy Alliance (with concerns); CON: Josh Baldi, WEC; Denise D Smith, LWV Washington; Jim Waldo, Governor's Office (comments).