

DEPARTMENT OF ECOLOGY'S DRAFT "ENLARGEMENT" POLICY PROMPTS SCRUTINY OF WASHINGTON'S APPROACH TO WATER RIGHT CHANGES

On April 10, 2007, the Washington Department of Ecology solicited public comment on a new draft policy on "enlargement" in the context of water right changes and transfers. The draft policy, which would impose a very broad prohibition against changing "the attributes or scope of a water right beyond the limits of the original intent," has been roundly criticized. The bulk of the criticism focuses on inconsistencies between the draft policy and Washington's rules governing water right changes and transfers. The agency has not yet announced whether it will revise the policy, issue the policy as currently drafted, or shift its focus toward the Legislature. The draft policy has prompted considerable discussion about the state's approach to changing and transferring water rights.

Ecology's Draft Policy

The draft policy defines "enlargement" as "unauthorized expansion of the attributes or scope of a water right beyond the limits of the original intent, as shown in the water right documents and as demonstrated through water use custom and practice." The draft policy asserts that water right attributes "may be modified, and in some cases expanded, through the change process where authorized under the water code. Enlargement refers to cases where such expansion is unauthorized."

Under the draft policy, "original intent" is a key factor in determining enlargement. The draft policy defines "original intent" as follows:

Water rights are issued to serve a specific need, in a specific place, from a specific source, with a specific amount of water, and in a specific manner. The water right documents provide a record of the intended quantities, purpose, place, manner of use, and source of water supply. These documents are the sources of information for determining the original intent of a water right. Custom and practice of water use may also be used to help determine intent.

The draft policy explains that "in the context of water rights, the term 'enlargement' embodies a concept that differs from the everyday definition of the word. Rather than solely representing an increase in quantity of water authorized in a water right, enlargement represents the unauthorized expansion or change of water right attributes beyond the original scope."

The draft policy enunciates a concept of "enlargement" as prohibited *per se*:

The prohibition on enlargement in water right changes is not dependent on a specific showing that the changes will harm existing water rights or the public interest. Rather, enlargement is presumed to cause harm and therefore is not allowed.

Under the draft policy, prohibited “enlargement” would include “expansion of the quantities specified, the removal or invalidation of limiting conditions, and increases in consumptive use through the change and transfer process for certain rights.”

Specific examples of changes to water rights that would be considered unauthorized “enlargement” under the draft policy are (1) increasing the instantaneous quantity or annual quantity of water allocated under the water right; (2) transferring “quantities of surface water rights or claims to vested rights which may have been relinquished or abandoned, or are larger than the amounts put to beneficial use (perfected)”; (3) a change that is “in conflict with a condition limiting the use of water under the original water right”; (4) changing a water right issued for a nonconsumptive purpose to a consumptive purpose, “such as a change from hydropower generation to municipal supply purposes”; and (5) increasing consumptive use “under a water right issued for a partially consumptive purpose where the original intent reflects an expectation of return flow or nonconsumptive use.” The first two enumerated examples simply reflect well-established statutory and common law requirements for changing water rights. The latter three examples have generated the most concern and criticism.

Criticism of the Draft Policy

The draft policy has been criticized for relying upon an overly broad concept of “enlargement” that extends far beyond an increase in the quantity of water authorized under a water right. The agency’s expansive notion of “enlargement” appears to have no basis in the Washington Water Code or caselaw interpreting the code. Additional criticism centers on the agency’s proposal to use “enlargement” as a proxy for impairment, thereby avoiding the need to analyze whether a change to a water right would cause injury to other existing water rights.

The Water Code contains only one reference to “enlargement”: a straightforward and unambiguous prohibition against enlarging the *quantity* pumped from new additional wells under a groundwater right. See RCW 90.44.100(2) and (3). Apart from this provision in the groundwater code, there is no other reference to an “enlargement” test.

Under Washington law, it is well-settled that in evaluating an application for change under RCW 90.03.380, Ecology must tentatively determine whether the water right is valid and must tentatively quantify the extent of beneficial use of the right. *E.g.*, *R.D. Merrill Co. v. PCHB*, 137 Wash. 2d 118, 125-27, 969 P.2d 458 (1999); *Okanogan Wilderness League v. Twisp*, 133 Wash. 2d 769, 777-79, 947 P.2d 732 (1997). This established tenet of Washington water law ensures that a change in a water right will not increase the quantity of water appropriated. Similarly, the provisions of RCW 90.44.100(2) and (3) ensure that amendment of a groundwater permit or certificate to add a new well will not result in an increase in the quantity of water appropriated or authorized for appropriation.

An administrative policy which simply restated these well-established rules would be unremarkable. However, the draft policy goes much farther, attempting to address other changes to water right “attributes” in a way that appears inconsistent with the liberal approach to modifying water rights under the Water Code and Washington caselaw.

A key premise of the draft policy is that water rights are restricted by their “original” specific intent or scope, and may be modified in only very limited respects. This premise appears fundamentally inconsistent with Washington water law, which allows comprehensive modification of water rights – *other than increases in quantity* – without reference to the original scope or “intent” of the water right owner, provided that applicable statutory tests are satisfied.

The list of permissible types of changes is far-reaching, including transfer of a right to another person; transfer of a right to other land or place of use; change in the point of diversion; change in the purpose of use; change in the season of use; changes in place or use or point of diversion to enable irrigation of additional acreage or the addition of new uses; transfer of a right from one irrigation district to another; change in the place of use by an individual user of water provided by an irrigation district; development of new water storage in small irrigation impoundments; change in place of use through permanent or emergency interties between public water systems; change in the place or purpose of use of an unperfected surface water right for municipal water supply purposes; seasonal or temporary changes in point of diversion or place of use; rotation of water use between different lands; change in the point of diversion for an unperfected surface water permit; change in the point of withdrawal by constructing replacement or new additional wells for a groundwater permit or certificate; change in the manner of use or place of use for a groundwater permit or certificate; and change in the point of withdrawal by consolidating an exempt groundwater right with a permitted or certificated right. *See* RCW 90.03.380, 90.03.383, 90.03.390, 90.03.397, 90.03.570, 90.44.100, 90.44.105; *R.D. Merrill Co. v. PCHB*, 137 Wash.2d 118, 127-29, 969 P.2d 458 (1999). The Water Code explicitly protects both the priority and the quantity of a valid right when changes are made. *See, e.g.*, RCW 90.03.380(1); 90.03.380(6); 90.44.100(1); 90.44.105.

Although there are various statutory tests that must be met before specific changes can be authorized, it is obvious from the above list of permissible changes that Washington water law does not require maintenance of the “attributes or scope of the original right” – contrary to the suggestion in the draft policy.

Washington water law contains no general “anti-enlargement” doctrine or principle broader than the prohibition against increasing the *quantity* of water appropriated when changing a water right. Moreover, to the extent the draft “enlargement” policy would prohibit modification of “water right attributes” or conditions limiting the use of water (*other than* quantity limits), it has been criticized as undermining explicit legislative policy in favor of allocating water to secure “maximum net benefits.” RCW 90.03.005 provides:

It is the policy of the state to *promote the use of the public waters in a fashion which provides for obtaining maximum net benefits* arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights.

The Attorney General's Office has explained RCW 90.03.005 as the Legislature's recognition of "the principle of maximizing the use of water as a fundamental element of the water law in the state." Office of Attorney General, *An Introduction to Washington Water Law* (2000) at VI:2. The policy of securing maximum net benefits from the use of water is reinforced in the Water Resources Act of 1972, which provides that "[a]llocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost." RCW 90.54.020(2).

The Legislature has set forth several specific tests and criteria to be satisfied when Ecology evaluates applications for water right changes. By imposing a preemptive test of "enlargement" on any application to change a water right, the draft policy could preclude maximizing the use of water rights even where such use would not impair other existing rights, be detrimental to the public welfare, or be contrary to any other applicable statutory criterion.

The draft policy has also been criticized for making "enlargement" a proxy or substitute for impairment and/or detriment to the public interest. Under the draft policy, Ecology could presume impairment or harm from a water right change without undertaking the analysis and evaluation required under the Water Code. This approach is questionable in light of *Postema v. PCHB*, 142 Wash. 2d 68, 11 P.3d 726 (2000), in which the Washington Supreme Court rejected Ecology's attempt to use hydraulic continuity between groundwater and surface water as a substitute for a finding of impairment or unavailability of water (holding that "hydraulic continuity alone is not sufficient to satisfy either of these criteria").

Conclusion and Implications

Regardless of its eventual fate, Ecology's draft "enlargement" policy has sparked a healthy discussion of Washington's rules and policy governing changes to water rights. Applying an "enlargement" presumption to short-circuit the impairment analysis prescribed by the Water Code appears to be ill-considered – but the concept may ultimately find a receptive audience in the Washington Legislature. It remains to be seen whether the agency's trial balloon will engender legislative support for imposing greater restrictions on water right changes and transfers.