

Municipal Water Law 1338: Questions and Answers

Water is an exceptionally valuable resource. Whether it flows in our rivers to sustain salmon runs or is withdrawn to support uses such as irrigated agriculture, it is essential to our quality of life in Washington. In 2003, after contentious debate, the Washington legislature passed Municipal Water Law (MWL) 1338. MWL 1338, however, fails to strike a proper balance among competing needs. The law allows developers and municipalities to extract millions of gallons of water from our rivers and streams at the expense of the environment and existing water rights holders. Instead of providing sensible water management, it creates a loophole that favors some users over others.

The following Q&A provides background on why MWL 1338 is not a reasonable solution for how to manage water in Washington.

What does MWL 1338 do?

MWL 1338 made a number of changes to Washington's water law. Three aspects are worth highlighting:

- First, the law redefined “municipal water supplier” to include any private developer with connections for fifteen or more homes.
- Second, the law expands existing water rights for many “municipal water suppliers” without considering the harm to rivers and streams as well as other water users.
- Third, the law allows municipal water suppliers to extend where water can be pumped, again without any review of potential impacts.

How can a developer be a “municipal water supplier”?

Developers have not traditionally been considered “municipalities” under Washington's water law, a fact that was upheld by the state Supreme Court in 1998. MWL 1338 attempts to overturn the court's decision and provide special advantages to larger developers.

What does it mean to “expand” existing water rights?

MWL 1338 overturns established law requiring that when a water right is created it is only for the amount of water actually being used at that time. In doing so, it creates a loophole for those water rights owned by any “municipal water supplier” – now including many private developers. For those users, MWL 1338 allows water rights to include the original maximum capacity of the applicants' “pumps and pipes” rather than actual use and need. In other words, the law allows a water right for how much someone hoped to use instead of measuring actual use. And water users can now pump this water without any determination of what the impacts will be to the rivers and streams. This is particularly troublesome given that the water in our rivers and streams belongs to the public. Water rights are granted by the state for a nominal processing fee with the expectation that the water will be put to good use, not hoarded for later speculation.

How does that expansion work in practice?

Before MWL 1338, if a developer planned for 1000 houses in 1960 and received a confirmed water right from Ecology when only 100 houses were built, the water right was for 100 houses. After MWL 1338, that same developer is now a “municipal water supplier” and the water right has been expanded retroactively to include enough water for 1000 houses. Moreover, the water right has priority over all rights that came after 1960, including the minimum flows recognized by the Department of Ecology as necessary to protect fish and wildlife.

Why is a water right’s “priority” important?

In Washington, water law is based on the doctrine of “first in time, first in right.” The first people to secure a water right have priority in using water. Water right holders can be thought of as permanently standing in long line for a finite number of tickets to claim water. Those in the front of the line – the older rights – can use all of the water they are entitled to before those in the back of the line are permitted to use any.

In a wet year, those at the back of the line may get their full share, but in dry years, often there’s not enough to go around. MWL 1338 changes the rules to allow some parties who are at or near the front of the line to claim additional water. Those further back in line – and this includes the minimum flows that rivers and streams need to remain healthy – are left empty handed.

Isn’t there more than enough water in Washington to go around?

No. Although some parts of the state receive significant rainfall and Washington is blessed with a number of major rivers, today most of the state’s watersheds do not have enough water. Thousands of miles of rivers and streams suffer from illegal, inefficient, and excessive water use. Sixteen stocks of salmon and steelhead in Washington are threatened with extinction, in part because of inadequate water in our rivers. Water quality problems are at their all-time worst. If not protected and restored, many of Washington’s rivers and streams – and the wildlife they support – will continue to suffer.

How does MWL 1338 harm rivers and streams in Washington?

In deciding whether to grant a water right, the Department of Ecology considers impacts to existing water rights as well as overall public interest factors – such as potential pollution issues, environmental harm, or health concerns – before allowing new water to be withdrawn. MWL 1338 disrupts this balance by allowing millions of gallons of water to be taken from rivers without any consideration of those effects. The law also allows users to expand where water can be pumped without any review by Ecology, leading to increased demand and allowing water to be permanently moved from one watershed to another.

Does anyone know how much additional water will be taken out of rivers and streams because of this law?

Not exactly. While the legislature was unwilling to evaluate the likely future effects of MWL 1338 in 2003, available information reveals potentially disastrous results. In 1997,

several cities surveyed just 10 of the state's large water suppliers. Those 10 suppliers held permits to 816 million gallons / day (mgd) but were using only 474 mgd at the time.¹ Under MWL 1338, the additional 342 mgd can be withdrawn without any environmental review. Were the survey expanded to include the thousands of water systems and developments that are immunized by MWL 1338, that amount would no doubt be considerably higher.

Didn't the legislature add some conservation requirements to MWL 1338?

Water conservation was pledged during the debate around MWL 1338, but has proven to be an empty promise. Three years after passage, conservation regulations are still not in place, despite a requirement to finish rulemaking by December 2005.

More importantly, there are significant problems with the proposed conservation measures. First, the proposed rules allow municipal water suppliers to set their own conservation goals, without reference to objective standards. With the additional water granted by MWL 1338, purveyors have little incentive to conserve, and without meaningful goals, the "conservation requirement" has no teeth. Finally, the only penalty for failing to reach self-stated goals is to go back and keep trying.

If we don't give more water to cities and developers, how can Washington state continue to grow?

The real problem today is how we use the water that we do have. Although MWL 1338 was portrayed as necessary to accommodate the state's expanding population, it is clear that draining Washington's rivers and streams is a bad approach. MWL 1338's lack of balance will create significant hardship as the state attempts to make real gains in restoring Puget Sound and recovering its endangered salmon and steelhead. A healthy economy in Washington depends on a healthy environment. We should demand both.

Didn't the legislature previously address this issue?

Yes. In 1997, the legislature passed a law that contained similar provisions similar to those in MWL 1338. Then-Governor Gary Locke vetoed those portions of the bill that would have greatly expanded municipal water rights, finding that it would give "an unfair advantage to public water systems by creating great uncertainty in trying to determine what water is available for other water rights, new applications, and the protection of instream resources." Veto Message, SB 5783, May 20, 1997.

Governor Locke was correct in 1997. The water in Washington's rivers and streams belongs to the public, and water rights are distributed by the state – for free – based on the notion that the water will be put to good use. Instead of treating water as a valuable resource, the legislature in 2003 simply created a loophole to allow for access to millions of gallons of water that are now in our rivers. Washington can do better.

¹ A million gallons is enough water to cover two and one-half football fields with one foot of water. A typical multi-person household uses around 300 gallons per day.