

# SENATE BILL REPORT

## SB 5003

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As of January 16, 2017

**Title:** An act relating to clarifying the authority of the department of ecology regarding minimum flows.

**Brief Description:** Clarifying the authority of the department of ecology regarding minimum flows.

**Sponsors:** Senators Honeyford and Warnick.

**Brief History:**

**Committee Activity:** Agriculture, Water, Trade & Economic Development: 1/12/17.

**Brief Summary of Bill**

- Allows the Department of Ecology to approve a use of water that will impair a minimum flow if a mitigation plan that mitigates for the impact of the approval on fish is implemented.
- Authorizes permanent or temporary withdrawals of water which would conflict with instream flow rules where it is clear that overriding considerations of the public interest will be served.

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### SENATE COMMITTEE ON AGRICULTURE, WATER, TRADE & ECONOMIC DEVELOPMENT

**Staff:** Karen Epps (786-7424)

**Background:** Instream Flow Rules. The Department of Ecology (Ecology) has the authority to adopt rules establishing a minimum water flow for streams, lakes, or other public water bodies for the purposes of protecting fish, game, birds, and the recreational and aesthetic values of the waterways. Ecology must set minimum water flows to protect fish, game, or wildlife resources, when requested by the Department of Fish and Wildlife or if Ecology finds it necessary to protect water quality.

These minimum water flow levels, commonly called instream flows, function as water rights with a priority date set at the adoption date of the corresponding rule. Instream flows have been set in 29 watersheds plus the mainstem of the Columbia River. The instream flow

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cannot affect an existing water right with a senior priority date. Ecology may not allow any subsequent water withdrawals with a junior priority date to the instream flow that conflicts with the established flow level, unless the withdrawals clearly serve to satisfy an overriding consideration of the public interest (OCPI).

Supreme Court Decisions. In 2013, the state Supreme Court found that the exception for withdrawals that effect an instream flow to address an OCPI is narrow and requires extraordinary circumstances before the minimum flow water right can be impaired (*Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571; considering a Department rule that established reservations of water for agricultural, residential, commercial or industrial, and livestock uses beyond the instream flow set for the Skagit River basin).

In 2015, the state Supreme Court held that the OCPI exception does not authorize approval of a permanent water right that will impair established instream flows indefinitely and concluded that ecological improvements cannot mitigate the injury when a junior water right holder impairs a senior water right holder (*Foster v. Department of Ecology*, 184 Wn.2d 465; considering a water right permit issued by Ecology to the City of Yelm that relied on the OCPI exception and a regional mitigation plan developed by Yelm and the cities of Olympia and Lacey).

**Summary of Bill:** Ecology may approve a use of water that will impair a minimum flow or other similar policy or standard if the water user and Ecology agree to implement a mitigation plan that mitigates for the impact of the approval of a use of water on fish. A mitigation plan:

- need not be limited to measures that require water to be replaced; and
- may include other or different measures designed to mitigate the impact of uses of water on fish without requiring the replacement of water.

Ecology may not require the water user to implement a mitigation plan that accounts for impacts that do not result from the water user's use of water. The water user may volunteer to implement a mitigation plan that enhances conditions for fish beyond what is necessary for mitigation.

Ecology may establish instream flows to protect fish and wildlife resources or to preserve water quality. Permanent or temporary withdrawals of water that would conflict with instream flow rules may be authorized where it is clear that OCPI will be served. Ecology may determine if OCPI will be served based on an analysis of benefits and costs, including economic benefits resulting from the use of water for out-of-stream uses. Any action by Ecology related to minimum flow setting may be subject to an analysis of benefits and costs, including economic benefits resulting from the use of water for out-of-stream uses.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

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

**Staff Summary of Public Testimony:** PRO: There have been a number of court decisions that have impacted the way Ecology can manage water. This bill is designed to give Ecology some tools so they can better manage our water supply. This bill provides Ecology and water users with some flexibility while still maintaining the goals of what an instream flow is for, specifically, protection of fish. This bill allows Ecology to approve mitigation strategies that are not just water for water. This bill is very much needed so the state can continue to grow.

The fundamentals in the water resources law, in two different places, discuss the balance between using water resources for economic well-being and preservation of natural resources. The series of court cases have caused the balance to be lost. Instream flow rules adopted by the state have been construed as absolutes, flow levels that can never be impacted, but these flows are not adopted as true minimum flows because they are flows that in many years cannot be met. The successes in water mitigation have meant loss of irrigated farmland. This bill would allow Ecology to consider all the environmental and economic costs and benefits of a mitigation plan.

CON: This bill allows for further deregulating of fish bearing streams that already have impaired fish habitat and diminished instream flows due to development. The current statutes make it possible for new development while at the same time ensuring the instream flow rights for fish continue to be in place and not impaired. This bill puts instream flow rights at the mercy of cost benefit analysis that cannot adequately take into account ecological values.

This bill would put the state at risk of takings liability and it would force tribes and others who are concerned about instream flows to utilize federal protections like the Endangered Species Act and adjudications of tribal rights. The bill allows out-of-kind mitigation but does not provide any standards under which Ecology could reject mitigation. This bill would overturn several court cases and would turn the prior appropriations doctrine with regard to instream flows on its head. This bill would allow new land use development and other out of stream users to mine instream flows in order to support development.

OTHER: It is important to be careful when strengthening OCPI so as not to create a tool for officials and give them the ability to prioritize their uses over agricultural uses or other senior water right holders. Economic development can mean many things to many people and that ambiguity should not be used to justify an impairment on a senior and legitimate water right. This bill is designed to resolve a significant challenge managing water resources so an instream flow is protected and there is reasonable water available for domestic needs in rural areas. There are concerns that if this bill is signed into law, it would be immediately litigated, which would continue the cycle of uncertainty.

This bill may not provide the direction and authority needed to ensure that instream flows are protected for the benefit of fisheries and the economies they support. There needs to be more discussion about how to balance in and out of kind mitigation for water withdrawals, authorities for instream flow setting, and how and when it may be appropriate to invoke OCPI.

**Persons Testifying:** PRO: Senator Jim Honeyford, Prime Sponsor; Jan Himebaugh, Building Industry Association of WA; Bill Clarke, WA PUD Association and Pierce County Water Cooperative; Kathleen Collins, Washington Water Policy Alliance; Jim Potts; Evan Sheffels, Washington Farm Bureau; Carl Schroeder, Assoc. of WA Cities.

CON: Jeff Dickison, Squaxin Island Tribe; Emily Haley, Swinomish; Ann Tweedy, Muckleshoot; Denise Smith, League of Women Voters of WA; Bruce Wishart, Sierra Club and CELP; Dawn Vyvyan, Yakama Nation and Puyallup.

OTHER: Dave Christensen, Department of Ecology; Mike Ennis, Assoc, of WA Business; Michael Garrity, Fish and Wildlife.

**Persons Signed In To Testify But Not Testifying:** No one.