

ANALYSIS OF HB 1920

House Agriculture & Ecology Committee
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- Requires the following to occur before a federally owned or federally licensed dam may be breached, removed, or circumvented or its reservoir may be reduced below operating level: issuance of a state certification or permit regarding discharges to water; issuance of a final EIS for the certification or permit; a determination that existing water rights will not be impaired; and the development of a comprehensive water resources program.
- Requires a finding regarding the ability of obligations to be met for fulfilling contracts held by bond holders before such an action may be taken regarding a federally licensed dam.
- Prohibits the issuance of a temporary water quality modification permit for any such action.

BACKGROUND:

The state's water pollution control statutes give the Department of Ecology (DOE) the jurisdiction to control and prevent the pollution of surface and ground waters in this state. DOE administers a state permit system under those statutes. (Chapter 90.48 RCW) DOE is also designated as the state water pollution control agency for all purposes of the federal Clean Water Act and administers a National Pollutant Discharge Elimination System permit system under the authorities delegated to it under the federal Act. (RCW 90.48.260.)

One provision of the federal Clean Water Act requires an applicant for a federal license or permit to conduct any activity which may result in any discharge into the navigable waters to secure a certification from the state in which the discharge originates. (33 U.S.C. Section 1341(a)(1).) In a 1994 involving a proposed Elkhorn Hydroelectric Project on the Dosewallips River in this state, the United States Supreme Court described this provision as applying before a federal license or permit can be issued for activities that may result in any discharge into such waters. (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 114 S.Ct. 1900 at page 1907.) The Court also stated that a 1987 amendment to the federal Act clarifies that the Act . . . also contains an 'antidegradation policy' - that is, a policy requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation.- (*PUD No. 1 v. Ecology*, at pages 1905 and 1906.)

DOE has divided the surface waters of the state into several classes and has adopted water quality standards for each of these classes. (Chapter 173-201A WAC.) In addition to these

class specific standards, the Department has adopted an anti-degradation narrative policy that applies to all of these waters. This policy: (1) requires that existing uses of the waters be maintained and protected with no degradation that would interfere with or become injurious to those existing uses; (2) protects existing water quality that is of higher quality than the standards set for a body of water except in certain instances, which must still support all existing beneficial uses; (3) declares that natural conditions constitute the standards whenever the natural conditions are of lower quality than the assigned standards, and (4) provides for short-term water quality modifications to be permitted. (WAC 173-201A-070 and 173-201A-110.)

SUMMARY:

Unless certain requirements are first met, breaching, removing or circumventing a federally owned or federally licensed dam or reducing the reservoir of such a dam below the operating level of the dam is prohibited. The requirements that must be satisfied before such an action may be taken are:

- (1) The Department of Ecology (DOE) has issued a discharge permit for the action under state water quality laws or has granted certification regarding water quality for the action under the federal Clean Water Act;
- (2) a final environmental impact statement (EIS) has been issued by DOE regarding the permit or certification;
- (3) DOE determines that the action will not be detrimental to or impair existing water rights; and
- (4) A comprehensive water resources program has been developed and adopted by the department that identifies how unallocated water resources will be managed in the portion of the river basin in which the dam and the reservoir for the dam are located. (Section 3(1).)

A fifth requirement applies regarding a federally licensed dam: the state's Attorney General must certify that the action will not directly preclude the entity operating or owning the dam from fulfilling its obligations in any contract held by or impliedly held by holders of bonds issued by the entity. (Section 3(2).)

DOE may issue the water quality permit or certification only if the proposed action will not cause water quality standards, including anti-degradation policies, to be violated in the reservoir of the dam, at the dam, or in any segments of water bodies downstream from the dam. DOE must examine the effects of the action on any habitat protected by the standards. A temporary water quality modification permit may not be issued for the action. (Section 4.)

DOE's comparison of the environmental impacts of the proposed action and alternative actions in the EIS is to include an analysis of the environmental impacts of generating electrical power to replace any hydroelectric generation reduced or lost under the proposal. DOE must also

append to the EIS an analysis of the economic costs of the proposal and must compare these costs to the economic costs of the alternatives. (Section 3(1)(b).)

DOE must review its water rights records and prepare a draft report and draft determination on the effects of the action on existing water rights. It must make these available to the public without charge. Not sooner than 30 days after that public availability, DOE must convene a public meeting of water right holders and take public testimony from them on the draft report and determination.

DOE must provide public notice of the meeting in a newspaper of general circulation in the area of the dam and must mail a notice of the meeting to holders of water rights who collectively hold rights or claims to a certain amount of the water use in the area of the dam. DOE must also provide written notice of the meeting to each federally recognized Indian tribe with tribal treaty rights to the waters or to activities or resources directly affected by the waters.

In its final report and determination, DOE must summarize and respond to the testimony. Copies of the final report and determination must be readily available to the public without charge and must be submitted to the appropriate committees of the Legislature. (Section 5.)