

HOUSE BILL REPORT

ESSB 5028

As Passed House:

June 10, 2003

Title: An act relating to water pollution.

Brief Description: Clarifying the state's authority to regulate water pollution.

Sponsors: By Senate Committee on Natural Resources, Energy & Water (originally sponsored by Senators Morton and Hale).

Brief History:

Committee Activity:

Agriculture & Natural Resources: 3/28/03, 4/4/03 [DPA].

First Special Session

Floor Activity:

Passed House: 6/10/03, 61-31.

Brief Summary of Engrossed Substitute Bill

- Allows the Department of Ecology (DOE) to use voluntary, incentive-based methods to meet water quality standards not reasonably met through water pollution control permits or regulatory orders.
- Prohibits the DOE from impacting the ability to fully divert or withdraw water under a water right permit, certificate, statutory exemption, or claim through exercise of water pollution control authority.
- Includes provisions specific to the DOE's authority to apply water quality standards for federally licensed hydropower projects.
- Authorizes sequence of enforcement actions for situations involving water waste.
- Replaces \$100 per day penalty under the water code with authority to impose penalties of \$100 to \$5,000 per day.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: Do pass as amended. Signed by 8 members: Representatives Linville, Chair; Rockefeller, Vice Chair; Schoesler, Ranking Minority Member;

Kristiansen, Assistant Ranking Minority Member; Eickmeyer, Grant, Quall and Sump.

Minority Report: Do not pass. Signed by 5 members: Representatives Holmquist, Assistant Ranking Minority Member; Chandler, Hunt, McDermott and Orcutt.

Staff: Caroleen Dineen (786-7156).

Background:

Federal Clean Water Act

The federal Clean Water Act (CWA) sets a national goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. The CWA defines "pollutant" to include a variety of materials that may be discharged into water through human activities, construction or industrial processes, or other methods. The CWA also requires states to adopt water quality standards, which specify the desired water quality to be achieved or maintained and require existing water quality to be protected from degradation.

The CWA also requires applicants for a federal license or permit to provide the federal licensing or permitting agency a certification that any discharge to navigable waters associated with the licensed or permitted activity will comply with federal CWA requirements. The state Department of Ecology (DOE) issues these water quality certifications for projects in Washington.

State Water Pollution Control Law

Washington's pollution control law defines "pollution" as contamination or alteration of the physical, chemical, or biological properties of any state waters. The definition includes changes in temperature, taste, color, turbidity, or odor of water or any discharge of liquid, gas, solid, radioactive, or other substances into water likely to create a nuisance or cause waters to jeopardize public health, safety, or welfare or injure beneficial uses or livestock, animals, birds, fish or other aquatic life.

The DOE may bring a legal action, including an action for injunctive relief, to enforce or implement water pollution control.

State Water Resources Law

The water code specifies a sequence of enforcement measures the DOE must follow to achieve compliance with the state's water laws and rules. The DOE must first prepare and distribute technical and educational information to the general public to assist the public to comply with water rights and water law requirements. When it determines a violation has occurred or is about to occur, the DOE must first attempt to achieve

voluntary compliance. If this is not successful, the DOE issues a notice of violation or a formal administrative order or assesses penalties unless noncompliance is corrected expeditiously or the DOE determines no impairment or harm has occurred. The DOE may take immediate action if in its opinion the nature of the violation is causing harm to other water rights or public resources.

The DOE is authorized by the surface water code to levy civil penalties of up to \$100 per day for violation of the surface and ground water, minimum water flows and levels, and water supply facilities statutes.

Minimum Stream Flow Conditions

In 1994 the United States Supreme Court determined that the DOE may condition a water quality certification for a hydroelectric power plant on any limitations necessary to ensure compliance with state water quality standards. *PUD No. 1 of Jefferson County v. Department of Ecology*, 511 U.S. 700 (1994). The court in that case concluded that a minimum stream flow condition was an appropriate requirement of state law on which to condition the water quality certification.

In another case involving a hydroelectric facility, the Washington Supreme Court concluded that the DOE may impose instream flow conditions in a water quality certification without regard to whether the applicant for a federal license has existing water rights. *PUD No. 1 of Pend Oreille County v. Department of Ecology*, 146 Wn.2d 778 (2002).

Summary:

State Water Pollution Control Law

The Department of Ecology (DOE) may use voluntary, incentive-based methods to meet a water quality standard that cannot reasonably be met through issuance of permits or regulatory orders according to the water pollution control statutes. These voluntary, incentive-based methods include funding of water conservation projects, lease and purchase of water rights, development of new storage projects, or habitat restoration projects.

The DOE may not through exercise of its authority in the water pollution control statutes abrogate, supersede, impair or condition a water right holder's ability to fully divert or withdraw water under a water right permit, certificate, statutory exemption, or claim.

These provisions do not affect the DOE's water quality certification authority according to section 401 of the federal Clean Water Act with respect to application of federally authorized water quality standards for federally licensed hydropower projects. With

respect to these projects, the DOE may only require a person to mitigate or remedy a water quality violation or problem to the extent there is substantial evidence the person caused the violation or problem.

State Water Resources Law

The DOE may levy penalties under the water code ranging from \$100 to \$5,000 per day. In determining the amount of the penalty, the DOE must consider the seriousness of the violation, whether the violation is repeated or continuous after notice is given of the violation, and whether any damage has occurred to the health or property of other persons. In situations involving the waste of water (a misdemeanor), the DOE may alternatively follow the sequence of enforcement actions specified in the water code.

Legislative Findings

Legislative findings recognize the United States Supreme Court's decision in *Public Utility District No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994) [Elkhorn], and the Washington Supreme Court's decision in *Public Utility District No. 1 of Pend Oreille County v. Washington Department of Ecology*, 146 Wn.2d 778 (2002) [Sullivan Creek]. These provisions are specified to not expand or contract the legal holdings in these decisions and to not affect in any way the application of these legal holdings to any future case or fact pattern related to water quality certifications for federally licensed hydropower facilities according to section 401 of the federal Clean Water Act.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: The situation with Methow Valley Irrigation District could happen to anyone. Water rights are existing property rights and should not be taken away on the basis of water quality. This bill clarifies the legislative intent regarding the water pollution control statutes. This bill does not try to reverse the *Elkhorn* decision; rather, it alleviates the enormous burden of litigating unlawful claims by the Department of Ecology. Failure to pass this bill could be very damaging to agricultural communities.

The bill could be amended to clarify that these provisions do not affect water quality certification authority. In addition, increased penalties for waste of water could be added to the bill.

Testimony Against: None.

Testified: Senator Morton, prime sponsor; Senator Honeyford; Mike Poulson, Washington Farm Bureau; Vaughn Jolley, Methow Valley Irrigation Association; Jim Miller, City of Everett; and Bill Hahn, PUD Association Water Committee and Kitsap PUD.