

# FINAL BILL REPORT

## ESSB 5028

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Synopsis as Enacted

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

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

**Senate Committee on Natural Resources, Energy & Water**  
**House Committee on Agriculture & Natural Resources**

**Background:** In *Public Util. Dist. No. 1 v. Department of Ecology*, 146 Wn.2d 778 (2002), a case involving a federally licensed hydropower facility, the Washington Supreme Court concluded that the Department of Ecology (DOE) may impose minimum stream flow conditions in a water quality certification pursuant to Section 401 of the Clean Water Act, regardless of whether the applicant had existing water rights that might be affected.

A recent proceeding has raised the issue of whether DOE may use its water quality enforcement authority to impose similar restrictions upon a water right diversion that reduces instream flow and contributes to increased water temperatures that violate Washington State's Water Pollution Control Act.

**Summary:** DOE is prohibited from using state water quality authority to abrogate, supersede, impair, or condition the full exercise of a water right permit, certificate, exemption or claim. DOE is expressly allowed to use voluntary, incentive-based methods (water right lease/purchase, conservation funding, etc.) to improve water quality when water quality standards cannot reasonably be met through the issuance of water quality permits or orders.

It is expressly stated that provisions of the bill shall not be construed to affect past or future court decisions involving water quality certifications issued for federally licensed hydropower projects under Section 401 of the Clean Water Act. With respect to such hydropower projects, DOE may only require mitigation or remedies to the extent there is substantial evidence the project has caused the water quality violation or problem.

With certain exceptions, the Department of Ecology is authorized to levy civil penalties ranging from \$100 to \$5,000 per day for water code violations, to be determined after mandatory consideration of specified factors. DOE is expressly allowed to follow the sequence of enforcement actions provided in RCW 90.03.605 (educate water right holders, seek voluntary compliance) for circumstances involving water waste.

### **Votes on Final Passage:**

Senate 26 23

First Special Session

Senate 26 22

House 61 31

**Effective:** September 9, 2003