

SENATE BILL REPORT

SB 5028

As Reported By Senate Committee On:
Natural Resources, Energy & Water, February 6, 2003

Title: An act relating to water pollution.

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

Sponsors: Senators Morton and Hale.

Brief History:

Committee Activity: Natural Resources, Energy & Water: 1/21/03, 2/6/03 [DPS, DNPS].

SENATE COMMITTEE ON NATURAL RESOURCES, ENERGY & WATER

Majority Report: That Substitute Senate Bill No. 5028 be substituted therefor, and the substitute bill do pass.

Signed by Senators Morton, Chair; Hewitt, Vice Chair; Hale, Honeyford and Oke.

Minority Report: Do not pass substitute.

Signed by Senators Doumit, Fraser, Hargrove and Regala.

Staff: Sam Thompson (786-7413)

Background: In *Public Util. Dist. No. 1 v. Department of Ecology*, 146 Wn.2d 778 (2002), the Washington Supreme Court ruled that the Department of Ecology (DOE) might impose bypass flow conditions in a water quality certification regardless of whether the applicant had existing water rights, including withdrawal or diversion rights, that might be affected.

A recent proceeding has raised the issue of whether DOE may, through an enforcement order, impose similar restrictions upon a water right based upon a claim that a water right holder violated state water pollution control law by causing insufficient instream flow in rivers from which the holder diverted water.

Summary of Substitute Bill: Exercise of any water right claim, permit, or certificate granted under state law to withdraw or divert water does not constitute "pollution" under state water pollution control law administered by DOE. DOE may not rely on state water pollution control law it administers to condition, limit, regulate or control any claim, permit or certificate to withdraw or divert water.

Substitute Bill Compared to Original Bill: It is clarified that withdrawal or diversion of water pursuant to water rights granted under any of three legal sources (state surface or groundwater codes or claims registry provisions) does not constitute "pollution" as defined in state water pollution control law administered by DOE.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: A water right is independent of water quality concerns--water quantity and quality issues are separate; the bill simply clarifies the essence of current law, and affords more certainty to water rights; the Department of Ecology's linking of current water quantity and water quality law is incorrect; the bill does not restrict the effect of the U.S. Supreme Court ruling establishing that states may regulate water quantity as a condition of water quality certification under the federal Clean Water Act, but clarifies that federal water quality laws should not be used to limit a use of water; unless the law is clarified, third party enforcement actions may compel the state to consider water quantity limitations as part of water quality review.

Testimony Against: Water quantity and quality issues are linked; temperature can increase if water withdrawals cause flows to diminish, harming fish; the bill may restrict the effect of the U.S. Supreme Court ruling establishing that states may regulate water quantity as a condition of water quality certification under the federal Clean Water Act; paramount water rights of Indian tribes should be recognized.

Testified: Senator Morton (pro); Nancy Rust, Center for Environmental Law and Policy (con); Mike Moran, Center for Environmental Law and Policy and Samish Indian Nation (con); Denise Smith, League of Women Voters (con); William Hahn, PUD Association Water Committee and Kitsap County PUD (pro); James Waldo, advisor to Governor Locke (con); Josh Baldi, Washington Environmental Council (con); Richard Reich and Steve Wehrli, Muckleshoot Tribe (con); Kevin Lyon, Northwest Indian Fisheries Commission (con); Mike Kayser, citizen (pro); Tom Myrum, Washington Water Resources Association (pro); Darryll Olson, Columbia-Snake River Irrigators Association (pro); Jim Halstrom, Washington State Horticultural Association (pro); Chris Cheney, Washington State Dairy Federation, Washington Cattlemen's Association, Washington Fryer Commission (pro); Hertha Lund, Washington Farm Bureau (pro); Toni McKinley, Washington State Grange (pro); Scott Hazlegrove, Washington Association of Sewer and Water Districts (pro); Kathleen Collins, Washington Water Policy Alliance (pro); Dawn Vyvyan, Yakima Indian Nation (con).