

HOUSE BILL REPORT

SSB 5298

As Reported by House Committee On:
Agriculture & Natural Resources

Title: An act relating to the diversion of certain municipal waters.

Brief Description: Concerning the diversion of certain municipal waters.

Sponsors: Senate Committee on Agriculture, Water & Rural Economic Development (originally sponsored by Senators Ericksen, Hatfield, Honeyford and Warnick).

Brief History:

Committee Activity:

Agriculture & Natural Resources: 3/24/15, 4/1/15 [DPA].

**Brief Summary of Substitute Bill
(As Amended by Committee)**

- Makes a legislative finding that it is in the overriding considerations of the public interest for the Department of Ecology to make certain uninterrupted municipal water supplies available for appropriation between river miles 17 and 19 on the Nooksack River regardless of any minimum instream flows that have been established.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: Do pass as amended. Signed by 9 members: Representatives Blake, Chair; Buys, Ranking Minority Member; Dent, Assistant Ranking Minority Member; Chandler, Hurst, Orcutt, Pettigrew, Schmick and Van De Wege.

Minority Report: Do not pass. Signed by 2 members: Representatives Lytton, Vice Chair; Stanford.

Minority Report: Without recommendation. Signed by 1 member: Representative Dunshee.

Staff: Jason Callahan (786-7117).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

Instream Flows.

The Department of Ecology (Department) has the authority to adopt rules establishing a minimum water flow for stream, lakes, or other public water bodies for the purposes of protecting fish, game, birds, and the recreational and aesthetic values of the waterways. These levels, commonly called "instream flows," essentially function as water rights with a priority date set at the adoption date of the corresponding rule.

Per statute, the instream flow cannot affect an existing water right with a senior time priority date and in turn, the Department 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 serves to satisfy an overriding consideration of the public interest. In 2013 the state Supreme Court found the exception for withdrawals that affect an instream flow to address an overriding consideration of the public interest is narrow and requires extraordinary circumstances before the minimum flow water right can be impaired.

As of today, there is an instream flow rule in place for almost half of the state's 64 identified watersheds.

Water Right Changes.

In general, a water right permit is issued for the purpose of developing the beneficial use for a water right. Once that use has been developed in accordance with the provisions of the permit, a water right certificate is issued for the use. Both the surface water code and the groundwater code allow for "transfers" of rights through the approval of transfers, changes, or amendments regarding water rights.

A change in the place of use, point of diversion, or purpose of use of a water right to allow the irrigation of additional acreage or the addition of new uses may be permitted if the change results in no increase in the annual consumptive quantity of water used under the water right. The "annual consumptive quantity" is the estimated or actual annual amount of water diverted under the water right as that amount is reduced by the estimated annual amount of return flows, averaged over the most recent five-year period of continuous beneficial use of the water right. All change applications must be filed with, and approved by, the Department. The Department may approve the application, after providing public notice, if the change appears to not injure or serve as a detriment to any other water rights.

Summary of Amended Bill:

A legislative finding is made that it is clearly in the overriding considerations of the public interest for the Department to make certain uninterrupted municipal water supplies available for appropriation regardless of whether or not instream flows have been established for the applicable water body. This finding of overriding considerations of the public interest only applies under specific conditions.

The first condition is that the diverting municipal water supplier must also discharge an amount of foreign water no more than one mile downstream from the withdraw point between river miles 17 and 19 on the Nooksack River. The amount of foreign water discharged must be equivalent to the amount of water withdrawn as measured on both an annual basis and as an instantaneous rate. Foreign water is water that does not naturally contribute as a source of water supply for the water basin where it is being discharged.

The other conditions required to be satisfied before a finding of the overriding considerations of the public interest can be made include a requirement that the water diversion represents no more than 0.1 percent of any minimum instream flows and that the introduction of foreign water complies with all water quality regulations. Finally, the total municipal water supply diverted and the total foreign water introduced must be reported to the Department no less than four times per year.

Even if all of the conditions are met, a water diversion is not allowed if the Nooksack River, between river miles 17 and 19, are not satisfying minimum instream flow levels or if the diversion would cause the Nooksack River to fall below the minimum instream flow levels.

Amended Bill Compared to Substitute Bill:

The committee amendment limits the provision of the bill to municipal water diversion occurring between river miles 17 and 19 on the Nooksack river, states that the Legislature can reconsider its finding of an overriding consideration of public interest should circumstances change, limits the provisions of the bill in times when minimum instream flows are not being met or when foreign water diversions will cause river levels to fall below minimum instream flows, and provides an intent section.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) This bill offers the least expensive solution to a problem. The City of Lynden withdraws drinking water less than one mile downstream on the Nooksack River from where a condensed milk plant discharges foreign water that is a byproduct of milk condensation. The City of Lynden is legally allowed to use this foreign water, but it has to build an expensive pipe 2,500 feet to change its point of diversion. As an alternative, this bill would allow the City of Lynden to avoid the construction of the pipe without causing any detriment to the river or its instream flows. The milk that comes to the condensed milk plant comes from all over the Northwest and is true foreign water as approved by the Department. The effect on the river of allowing the city to receive credit for the foreign water is less than one

shot glass in a 55 gallon barrel in a stretch of the Nooksack River with no salmonid spawning grounds. Cities need to be able to provide services to their residents.

Simple solutions can become unnecessarily complicated. Earlier expressed concerns have all been addressed. The City of Lynden has explored all other options and each one has at least one serious defect. The bill addresses instream flows and is narrowly tailored so that its policies cannot be applied anywhere else in the state. This bill allows a worthy project based on sound science and common sense and has all of the necessary protections built into it.

(Opposed) Giving favoritism for out-of-stream uses over instream flows does not reflect a cooperative stance towards working towards solutions. Instead of changing the Water Code, the project proponents and the Department should work towards quantifying the water in the Nooksack River and finding solutions and agreements that would be ratified by a court of law. Cooperation is possible, but the process needs to be given time to work. It makes it hard for all parties to work in good faith towards cooperative solutions when rules are changed to benefit special interests. This bill undermines the cooperative spirit. Solutions to water issues need to provide solutions for everyone, not just one party.

The Nooksack River is already heavily over appropriated. The reliance on foreign water is not sustainable. That water will cease to exist if the associated condensed milk plant lowers production or ever goes out of business. In addition, the water that the cows drank to make the milk may have been illegally withdrawn in the first place. If the cows were from the Nooksack River Basin, then the resulting foreign water is not foreign water at all. The Nooksack River needs to have basin-wide solutions based on existing laws.

(Other) The Department has worked closely with the bill's proponents to find a legislative solution that can be supported. However, there are existing administrative processes available under existing law that can be the basis of a different negotiated solution. It is a positive sign that the parties in the watershed are having conversations.

Persons Testifying: (In support) Senator Ericksen, prime sponsor; Mike Martin, City of Lynden; and Kathleen Collins, Washington Water Policy Alliance.

(Opposed) Steven Robinson, Stillaguamish Tribe; Victor Johnson, Lummi Nation; and Bruce Wishart, Sierra Club and Center for Environmental Law & Policy.

(Other) Dave Christensen, Washington Department of Ecology.

Persons Signed In To Testify But Not Testifying: None.