

# SENATE BILL REPORT

## SB 5517

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As of February 6, 2023

**Title:** An act relating to enacting recommendations from the joint legislative task force on water resource mitigation.

**Brief Description:** Enacting recommendations from the joint legislative task force on water resource mitigation.

**Sponsors:** Senators Warnick and Van De Wege.

**Brief History:**

**Committee Activity:** Agriculture, Water, Natural Resources & Parks: 2/06/23.

**Brief Summary of Bill**

- Establishes that hydraulic continuity between groundwater and a surface water source with unmet minimum flows or that is closed to further appropriation is not, in and of itself, a basis on which to deny an application to withdraw groundwater.
- Requires the Department of Ecology (Ecology) to adopt a groundwater modeling rule.
- Allows Ecology to authorize a groundwater withdrawal in reliance upon water resource mitigation measures under a specific mitigation sequence.
- Requires municipal water suppliers to meet water conservation requirements to rely on the mitigation sequence for a groundwater withdrawal.

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**SENATE COMMITTEE ON AGRICULTURE, WATER, NATURAL RESOURCES & PARKS**

**Staff:** Karen Epps (786-7424)

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

**Background:** Water Rights. Washington operates under a water right permit system. With certain exceptions, new rights to use surface or groundwater must be established according to the permit system. Exemptions include any withdrawal of public groundwater for stock watering purposes, for watering a lawn, or for a noncommercial garden less than one-half acre. Single or group domestic uses or industrial purposes not exceeding 5000 gallons a day are also exempt.

The Department of Ecology (Ecology) must consider a four-part test when deciding whether to issue a new water right, specifically whether:

- water is available;
- a beneficial use of water would be made;
- granting the right would impair existing rights; and
- the proposed use would detrimentally affect the public welfare.

If an application passes this test, Ecology issues a permit which establishes a time table for constructing the infrastructure to access the water and for putting water to beneficial use. When the conditions of the permit are satisfied, Ecology issues a water right certificate.

Instream Flow Rules. Ecology has the authority to adopt rules establishing a minimum water flow for streams, lakes, or other public water bodies for protecting fish, game, birds, and the recreational and aesthetic values of the waterways. Ecology must set minimum water flows to protect fish, game, or wildlife resources, when requested by the Department of Fish and Wildlife, or if Ecology finds it necessary to protect water quality.

These minimum water flow levels, commonly called instream flows, function as water rights with a priority date set at the adoption date of the corresponding rule. Instream flows have been set in 27 Water Resource Inventory Areas. The instream flow cannot affect an existing water right with a senior priority date. Ecology 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 serve to satisfy an overriding consideration of the public interest (OCPI).

Foster Decision. On October 5, 2015, the Washington State Supreme Court issued its ruling in *Foster v. Department of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015). The Supreme Court held that Ecology improperly used the OCPI exception to approve a water right permit application by the City of Yelm, reversing decisions of both the Thurston County Superior Court and the Pollution Control Hearings Board (PCHB). According to the Supreme Court, the prior appropriation doctrine does not allow for any impairment, even de minimis impairment, of senior water rights, in accordance with the Court's earlier decision in *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 11 P.3d 726 (2000). Accordingly, out-of-kind mitigation may not be used to remedy impairments to senior water rights, and the OCPI exception may only be used to offset temporary impairment of minimum flows.

Joint Legislative Task Force. In 2018, the Legislature created the Joint Legislative Task Force on Water Resource Mitigation (Task Force) as part of ESSB 6091. The Legislature directed the Task Force to review the treatment of surface water and groundwater appropriations as they relate to instream flows and fish habitat, and to recommend a mitigation sequencing process and scoring system to address such appropriations. The Legislature also directed the Task Force to review the Washington Supreme Court decision in *Foster*. The Task Force submitted its final report in November 2022.

Water Resource Mitigation Pilot Projects. ESSB 6091 required Ecology to issue permit decisions for up to five water resource mitigation pilot projects. The purposes of the pilot projects are to inform the Task Force process created by ESSB 6091, and to enable the processing of water right applications that address water supply needs. Ecology is authorized to issue water right permits in reliance upon water resource mitigation of impacts to instream flows and closed surface water bodies under the following mitigation sequence:

- avoiding impacts by complying with mitigation required by adopted rules that set forth minimum flows, levels or closures, or making the water diversion or withdrawal subject to the applicable minimum flows or levels;
- where avoidance of impacts is not reasonably attainable, minimizing impacts by providing new or existing trust water rights or through other types of replacement water supply resulting in no net annual increase in the quantity of water diverted or withdrawn from the stream or surface water body and no net detrimental impacts to fish and related aquatic resources; or
- where avoidance and minimization are not reasonably attainable, compensating for impacts by providing net ecological benefits to fish and related aquatic resources in the Water Resource Inventory Area (WRIA) through in-kind or out-of-kind mitigation or a combination thereof, that improves function and productivity of affected fish populations and related aquatic habitat;
  1. out-of-kind mitigation may include instream or out-of-stream measures that provide a net ecological benefit to existing water quality, riparian habitat, or other instream functions and values for which minimum instream flows or closures were established in that WRIA.

Ecology must monitor the implementation of these pilot projects, including all related mitigation, at least annually through the end of 2028.

Municipal Water Supply Purposes. The state water code provides a definition for the term municipal water supply purposes, and provides specific procedures relating to those water rights held for those purposes. The definition includes beneficial uses of water for residential purposes above a set number of service connections and for governmental or governmental proprietary purposes by local government. If a portion of the water in a water right is used beneficially for municipal water supply purposes, then any other beneficial use of the water that is generally associated with the municipal use is also considered a municipal water supply purpose. This includes any beneficial uses for commercial purposes, industrial purposes, irrigation of parks and open spaces, institutional purposes, landscaping,

fire flow, water system maintenance and repair, or other purposes. A water right being used for municipal water supply purposes may also be considered to be beneficially used if it is used to benefit instream resources or is needed to implement an environmental obligation under a watershed plan, a habitat conservation plan, or a hydropower license.

**Summary of Bill:** Groundwater Withdrawals. When Ecology considers a proposed appropriation of public groundwater, it must determine whether such a groundwater withdrawal would impair surface water rights or adversely affect surface water sources closed to further appropriations, using the procedures and standards in this act. Hydraulic continuity between groundwater and a surface water source with unmet minimum flows or that is closed to further appropriation is not, in and of itself, a basis on which to deny an application to withdraw groundwater.

If Ecology relies on a groundwater model in considering a proposed appropriation of public groundwater, the creation and use of the model must comply with withdrawal provisions in the groundwater code and the groundwater modeling rule adopted by Ecology.

If Ecology determines that any proposed groundwater withdrawal would impair a minimum surface water flow or level set by rule, or adversely affect a surface water source closed to further appropriation, Ecology may authorize such a groundwater withdrawal in reliance upon water resource mitigation measures under the following mitigation sequence:

- avoiding impacts by complying with mitigation required in adopted rules that set forth minimum flows, levels, or closures; or making the groundwater withdrawal subject to applicable minimum flows or levels;
- where avoidance of adverse impacts is not reasonably attainable, minimizing impacts by providing permanent replacement water supply resulting in no net annual increase in the quantity of water withdrawn from the surface water body and no net detrimental impacts to fish and related aquatic resources; or
- where avoidance and minimization are not reasonably attainable, compensating for adverse impacts by providing in-kind or out-of-kind mitigation that improves the function and productivity of affected fish populations and related aquatic habitat in the water resource inventory area;
  1. out-of-kind mitigation may include instream or out-of-stream measures that improve or enhance existing water quality, riparian habitat, or other instream functions and values for which minimum instream flows or closures were established in the water resource inventory area.

If an applicant is a municipal water supplier and proposes mitigation under the mitigation sequence, prior to Ecology's evaluation the applicant shall obtain a determination from the Department of Health (DOH) that the water system for which additional water rights are being sought is in compliance with or is exercising appropriate effort to achieve all applicable water conservation requirements and rules adopted by DOH.

The mitigation sequence applies to mitigation relating to minimum surface water flows or

levels set by rule, or of a surface water source closed to further appropriation.

Groundwater Modeling. Ecology must adopt a groundwater modeling rule establishing requirements for the creation, modification, and use of groundwater models used in groundwater application decisions. The rule must incorporate the standard that a modeled effect on surface water may not be considered an impairment of a minimum instream flow set by rule or an adverse impact to a surface water source closed to further appropriation if it is within the model uncertainty or its margin of error. The rule must include:

- a list of alternative model types and their appropriate hydrogeologic settings;
- guidance on the use and application of various types of modeling applications and calculation of margin of error;
- professional license and experience requirements for modelers; and
- a process for public input and transparency for the creation and application of models through the posting of preliminary permit decisions on Ecology's website in the same manner as draft and final reports of examination.

As part of the rule-making process, Ecology must convene a Technical Advisory Committee. The committee consists of individuals with expertise in developing and applying groundwater models in the water right permitting and mitigation process. A majority of the members of the committee must be licensed hydrogeologists employed by firms that are on Ecology's list of prequalified firms for cost-reimbursement work.

Ecology must consider the use of new analytical or numerical models in the groundwater application process under the rule. Before Ecology uses an existing regional groundwater model for predicting the effects of a proposed groundwater withdrawal on surface water flows and levels, it shall review the model and determine that the model's:

- boundaries, vertical and horizontal discretization, scope, and purpose are suitable for determining the effects of the proposed withdrawal on surface water flows and levels; and
- accuracy for its intended use, which may be defined as the model's margin of error, is clearly identified by the model creator or a licensed hydrogeologist familiar with the model.

Ecology's determination of model suitability must be included in any preliminary permit issued under the water code and must reflect any model revisions proposed on behalf of the applicant by a licensed hydrogeologist in order to make an existing regional groundwater model perform in a scientifically suitable manner for evaluation of the proposed withdrawals.

A modeled effect on surface water shall not be considered an impairment of a minimum instream flow set by rule or an adverse impact to a surface water source closed to further appropriation if the modeled effect is within the model's uncertainty or margin of error.

Municipal Water Suppliers. For a water right applicant that is a municipal water supplier

seeking to use the mitigation sequence, DOH must review and determine whether the water system for which additional water rights are being sought is in compliance with or is exercising appropriate effort to meet the water conservation requirements and rules. Such a review and determination must be provided to the applicant and Ecology. If DOH determines the municipal water supplier is not in compliance with water conservation requirements and rules, it must identify any actions that must be taken by the municipal water supplier to achieve compliance.

Withdrawal. Withdrawal means the appropriation of water for beneficial use through withdrawal of groundwater or diversion of surface water. A withdrawal may be either temporary or permanent. Permanent or temporary appropriations of water that would have adverse impacts on instream values protected by instream flow rules may be authorized only with appropriate mitigation, or where it is clear that overriding considerations of the public interest will be served.

This act applies to applications for withdrawals of groundwater filed both before and after the effective date of this section. To this extent, this act applies retroactively, but in all other respects it applies prospectively.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:** PRO: This bill establishes that, as the Court held in the *Postema* decision, groundwater applications that have an adverse effect on surface water can be denied. Washington is the only state that specifically characterizes impairment of regulatory flows to include de minimis impairment, has a regulatory affirmative law requiring mitigation to be in-kind, in-time, and in-place, and where their state regulatory agency does not have any discretion to determine what kind of mitigation can be used. Cities will not be able to provide water for 1 million new homes only through conservation and it is impossible for cities to secure new water rights, so this bill provides a path forward for cities to acquire new water. Models are good tools, as they are based on the best available data, but they need to be implemented with professional judgment. The bill restores Ecology's ability to have discretion where public interest is best served by allowing mitigation and providing a sequence to ensure that mitigation is done appropriately. The *Foster* decision considered withdrawal to be temporary and the bill addresses that. This bill is essential for a properly functioning groundwater permit system that protects in-stream flows without sacrificing water supply availability. Some cities do not have enough water despite their conservation efforts and robust pipe leakage preventive programs and have had to curtail development in their urban growth area because they cannot provide water.

Without this bill, cities will be unable to comply with the Growth Management Act. This bill will help counties maintain rural character, reduce sprawl, and help utilize water banking as a water management tool. This bill will allow for clarity and consistency around how groundwater modeling is used around the state. The *Foster* decision jeopardizes public health by requiring perfect mitigation and prevents water purveyors from using smart mitigation to protect public and fish habitat and this bill addresses that issue.

CON: The mitigation sequence in this bill is ill defined around what is and is not reasonable to mitigate and will be very difficult to apply. There are a small number of places that will need water for growth and the state should do specific things for those areas that can be fully mitigated without relying on out of kind, out of time, or out of place mitigation. Agricultural, municipal, and fish water interests need to move together and this bill moves municipal water interests forward, but leaves fish behind. This legislation reverses 20 years of Supreme Court decisions protecting instream flows. The state should focus on conservation, demand management, and groundwater waste from pipe leaks. This bill eliminates protections for treaty water rights and will harm statewide salmon restoration efforts. The bill does not promote the best science by requiring Ecology to conduct rulemaking on groundwater modeling that strips away the accuracy of modeling. The bill prioritizes out of stream uses over the protection of instream water rights, ultimately harming flows for salmon, instream water rights, and downstream senior water right holders. The bill allows out of kind mitigation for instream flow water rights while requiring full water for water mitigation for out of stream uses such as agriculture, municipal, and industrial water rights. The bill allows for the issuance of permanent water rights using OCPI after the Foster court held that OCPI is only suitable for temporary water supply. Opportunities exist to increase municipal water availability through water reuse, increasing conservation, and aquifer storage and recovery.

OTHER: This bill attempts to provide pathways to meet water demands for the state's growing population but does not adequately balance the needs for out of stream uses with the protections needed for instream resources.

**Persons Testifying:** PRO: Senator Judy Warnick, Prime Sponsor; Thomas Pors, Law Office of Thomas M. Pors; Carl Schroeder, Association of Washington Cities; Bill Clarke, WA PUD Association; Rob McFarland, Mayor, City of North Bend; Randy Black, Lakewood Water District, General Manager; Paul Jewell, Washington State Association of Counties; Josh Weiss, City of Port Orchard; Peter Godlewski, Association of Washington Business; Kathleen Collins, Washington Water Policy Alliance.

CON: Trish Rolfe, CELP; Alexei Calambokidis, Trout Unlimited; Bruce Wishart, Sierra Club; Jim Hedrick, Muckleshoot Tribe; Danielle Squeochs, Yakama Nation; Anne Savery, Tulalip Tribes; Megan Kernan, WDFW.

OTHER: Dave Christensen, Department of Ecology.

**Persons Signed In To Testify But Not Testifying:** No one.