
SENATE BILL 5478

State of Washington

56th Legislature

1999 Regular Session

By Senators Fraser and Spanel

Read first time 01/25/1999. Referred to Committee on Environmental Quality & Water Resources.

1 AN ACT Relating to water flows; amending RCW 90.54.020, 90.22.010,
2 90.22.030, 90.03.345, 90.03.247, 75.20.050, 90.03.380, 90.42.080,
3 90.14.160, 90.14.170, and 90.14.180; adding new sections to chapter
4 90.03 RCW; creating a new section; and repealing RCW 90.22.060.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The legislature finds that adequate
7 streamflows and lake levels are necessary for protecting and recovering
8 salmon stocks and for achieving the state's high standards for
9 protecting perennial water systems declared in the 1971 water resource
10 fundamentals. To achieve adequate flows requires as a predicate that
11 flow levels be expeditiously adopted and be based upon the best
12 available science. The establishment of these levels should occur as
13 early as possible in streams and rivers in which salmon populations are
14 in danger of extinction. Once levels are established, measures should
15 be implemented to ensure that existing flows are not diminished below
16 these levels, and that further measures are taken to restore
17 streamflows currently experiencing seasonal or periodic levels below
18 these established levels. It is therefore the purpose of this act to
19 provide additional authority in the state's water code to undertake

1 these measures and to provide guidance to administering agencies in
2 establishing priorities to address critical needs such as restoration
3 of depressed salmon stocks.

4 **Sec. 2.** RCW 90.54.020 and 1997 c 442 s 201 are each amended to
5 read as follows:

6 Utilization and management of the waters of the state shall be
7 guided by the following general declaration of fundamentals:

8 (1) Uses of water for domestic, stock watering, industrial,
9 commercial, agricultural, irrigation, hydroelectric power production,
10 mining, fish and wildlife maintenance and enhancement, recreational,
11 and thermal power production purposes, and preservation of
12 environmental and aesthetic values, and all other uses compatible with
13 the enjoyment of the public waters of the state, are declared to be
14 beneficial.

15 (2) Allocation of waters among potential uses and users shall be
16 based generally on the securing of the maximum net benefits for the
17 people of the state. Maximum net benefits shall constitute total
18 benefits less costs including opportunities lost.

19 (3) The quality of the natural environment shall be protected and,
20 where possible, enhanced as follows:

21 (a) Perennial rivers and streams of the state shall be retained
22 with ((base)) flows ((necessary to provide for preservation of))
23 adequate to support wildlife, fish, scenic, aesthetic and other
24 environmental values, and navigational values. Lakes and ponds shall
25 be retained substantially in their natural condition. Withdrawals of
26 water which would conflict therewith shall be authorized only in those
27 situations where it is clear that overriding considerations of the
28 public interest will be served.

29 (b) Waters of the state shall be of high quality. Regardless of
30 the quality of the waters of the state, all wastes and other materials
31 and substances proposed for entry into said waters shall be provided
32 with all known, available, and reasonable methods of treatment prior to
33 entry. Notwithstanding that standards of quality established for the
34 waters of the state would not be violated, wastes and other materials
35 and substances shall not be allowed to enter such waters which will
36 reduce the existing quality thereof, except in those situations where
37 it is clear that overriding considerations of the public interest will
38 be served. Technology-based effluent limitations or standards for

1 discharges for municipal water treatment plants located on the
2 Chehalis, Columbia, Cowlitz, Lewis, or Skagit river shall be adjusted
3 to reflect credit for substances removed from the plant intake water
4 if:

5 (i) The municipality demonstrates that the intake water is drawn
6 from the same body of water into which the discharge is made; and

7 (ii) The municipality demonstrates that no violation of receiving
8 water quality standards or appreciable environmental degradation will
9 result.

10 (c) Protection and restoration of streamflows adequate to support
11 sustainable populations of salmon and trout stocks shall be a high
12 priority in the planning and management of the state's water resources.

13 (4) The development of multipurpose water storage facilities shall
14 be a high priority for programs of water allocation, planning,
15 management, and efficiency. The department, other state agencies,
16 local governments, and planning units formed under section 107 or 108
17 of this act shall evaluate the potential for the development of new
18 storage projects and the benefits and effects of storage in reducing
19 damage to stream banks and property, increasing the use of land,
20 providing water for municipal, industrial, agricultural, power
21 generation, and other beneficial uses, and improving streamflow regimes
22 for fisheries and other instream uses.

23 (5) Adequate and safe supplies of water shall be preserved and
24 protected in potable condition to satisfy human domestic needs.

25 (6) Multiple-purpose impoundment structures are to be preferred
26 over single-purpose structures. Due regard shall be given to means and
27 methods for protection of fishery resources in the planning for and
28 construction of water impoundment structures and other artificial
29 obstructions.

30 (7) Federal, state, and local governments, individuals,
31 corporations, groups and other entities shall be encouraged to carry
32 out practices of conservation as they relate to the use of the waters
33 of the state. In addition to traditional development approaches,
34 improved water use efficiency and conservation shall be emphasized in
35 the management of the state's water resources and in some cases will be
36 a potential new source of water with which to meet future needs
37 throughout the state.

38 (8) Development of water supply systems, whether publicly or
39 privately owned, which provide water to the public generally in

1 regional areas within the state shall be encouraged. Development of
2 water supply systems for multiple domestic use which will not serve the
3 public generally shall be discouraged where water supplies are
4 available from water systems serving the public.

5 (9) Full recognition shall be given in the administration of water
6 allocation and use programs to the natural interrelationships of
7 surface and ground waters.

8 (10) Expressions of the public interest will be sought at all
9 stages of water planning and allocation discussions.

10 (11) Water management programs, including but not limited to, water
11 quality, flood control, drainage, erosion control and storm runoff are
12 deemed to be in the public interest.

13 **Sec. 3.** RCW 90.22.010 and 1997 c 32 s 4 are each amended to read
14 as follows:

15 (1) The department of ecology (~~may~~) shall establish (~~minimum~~)
16 water flows or levels for streams, lakes or other public waters (~~for~~
17 ~~the purposes of protecting~~) adequate to support fish, game, birds or
18 other wildlife resources, or recreational or aesthetic values of said
19 public waters whenever it appears to be in the public interest to
20 establish the same. In addition, the department of ecology shall, when
21 requested by the department of fish and wildlife to protect fish, game
22 or other wildlife resources under the jurisdiction of the requesting
23 state agency, or if the department of ecology finds it necessary to
24 preserve water quality, establish such (~~minimum~~) flows or levels as
25 are (~~required~~) adequate to protect the resource or preserve the water
26 quality described in the request or determination. Any request
27 submitted by the department of fish and wildlife shall include a
28 statement setting forth the need for establishing a (~~minimum~~) flow or
29 level. When the department acts to preserve water quality, it shall
30 include a similar statement with the proposed rule filed with the code
31 reviser. This section shall not apply to waters artificially stored in
32 reservoirs, provided that in the granting of storage permits by the
33 department of ecology in the future, full recognition shall be given to
34 downstream (~~minimum~~) flows, if any there may be, which have
35 theretofore been established hereunder.

36 (2) The department of ecology shall incorporate the best available
37 science in establishing flows or levels under this section. In
38 developing methodologies for establishing flows or levels adequate to

1 support the recovery of salmon and trout populations, the department
2 shall consult with the department of fish and wildlife and the science
3 panel created under RCW 75.46.050. The department shall periodically
4 consult with the department of fish and wildlife and the science panel
5 to ensure an ongoing application of best available science in its
6 exercise of authority under this section. The review of existing
7 methodologies or consideration of proposed revisions shall not be the
8 basis for delay in proceeding to comply with the priority establishment
9 of flows or levels under subsection (3) of this section.

10 (3) For the period beginning July 1, 1999, through June 30, 2003,
11 the department of ecology shall place the highest priority in
12 exercising the authority under this section upon the adoption of flows
13 or levels for the recovery of depressed salmon and trout populations.
14 To this end and in consultation with the salmon recovery office and
15 with Indian tribes, the department shall establish a schedule for
16 initiating and completing the establishment of flows or levels for
17 state waters that support salmon and trout populations listed or
18 candidates for listing under the federal endangered species act. The
19 schedule shall be consistent with the state's salmon recovery strategy
20 and shall establish a priority for early action on water bodies in
21 which listed or candidate salmon or trout populations are dependent and
22 in which inadequate flows or levels have been identified as a limiting
23 factor on recovery. The schedule shall include the review and revision
24 of existing flows or levels when determined by the department to fail
25 to meet the standards of this section. The schedule shall adopt as a
26 goal the establishment or revision of flows or levels by June 30, 2001,
27 for all waters of the state that support salmon or trout populations
28 that as of July 1, 1999, are listed or proposed for listing under the
29 federal endangered species act, and for which flows or levels in such
30 waters have been identified as a limiting factor on recovery.

31 **Sec. 4.** RCW 90.22.030 and 1988 c 127 s 81 are each amended to read
32 as follows:

33 Except as provided in RCW 90.03.345, the establishment of levels
34 and flows pursuant to RCW 90.22.010 shall in no way affect existing
35 water and storage rights and the use thereof, including but not limited
36 to rights relating to the operation of any hydroelectric or water
37 storage reservoir or related facility. No right to divert or store
38 public waters shall be granted by the department of ecology which shall

1 conflict with regulations adopted pursuant to RCW 90.22.010 and
2 90.22.020 establishing flows or levels. All regulations establishing
3 flows or levels shall be filed in a "Minimum Water Level and Flow
4 Register" of the department of ecology.

5 **Sec. 5.** RCW 90.03.345 and 1979 ex.s. c 216 s 7 are each amended to
6 read as follows:

7 (1) Except as provided in subsection (2) of this section, the
8 establishment of reservations of water for agriculture, hydroelectric
9 energy, municipal, industrial, and other beneficial uses under RCW
10 90.54.050(1) or ((minimum)) flows or levels under RCW 90.22.010 or
11 90.54.040 adopted before January 1, 1999, shall constitute
12 appropriations within the meaning of this chapter with priority dates
13 as of the effective dates of their establishment. Flows or levels
14 adopted after January 1, 1999, shall have a priority date as of the
15 date of the issuance of notice of rule making, or the effective date of
16 an emergency rule establishing the flow or level. Whenever an
17 application for a permit to make beneficial use of public waters
18 embodied in a reservation, established after September 1, 1979, is
19 filed with the department of ecology after the effective date of such
20 reservation, the priority date for a permit issued pursuant to an
21 approval by the department of ecology of the application shall be the
22 effective date of the reservation.

23 (2) The governor may assign an earlier priority date of a flow or
24 level adopted under subsection (1) of this section when necessary to
25 avoid the unlawful taking of a listed salmon or trout species under the
26 federal endangered species act. The governor's action shall be
27 designed solely to avoid such a taking and shall be designed to
28 minimize the impacts upon the exercise of water rights having an
29 earlier priority date than that of the flow or level in the absence of
30 the governor's action. The governor shall endeavor to provide prior
31 notice to water rights holders potentially impacted by action under
32 this section. The governor shall direct the department to schedule a
33 public hearing within the basin for which the action is proposed and
34 shall consider public comments received before taking the action. In
35 determining whether action may be necessary under this section, the
36 governor shall consult with entities charged with monitoring water
37 flows and levels, water usage, and fish habitat in the area. An action
38 by the governor may not extend more than one hundred eighty days but

1 may be renewed if necessary to avoid such a taking. When an action is
2 taken under this subsection in a basin in which watershed planning is
3 being conducted under chapter 90.82 RCW, the governor shall request the
4 planning unit to recommend measures to address streamflow requirements
5 for listed salmon or trout species that will make action under this
6 subsection unnecessary.

7 **Sec. 6.** RCW 90.03.247 and 1996 c 186 s 523 are each amended to
8 read as follows:

9 (1) Whenever an application for a permit to make beneficial use of
10 public waters is approved relating to a stream or other water body for
11 which ((minimum)) flows or levels have been adopted and are in effect
12 at the time of approval, the permit shall be conditioned to protect the
13 levels or flows. No agency may establish ((minimum)) flows and levels
14 or similar water flow or level restrictions for any stream or lake of
15 the state other than the department of ecology whose authority to
16 establish is exclusive, as provided in chapter 90.03 RCW and RCW
17 90.22.010 and 90.54.040. ((The provisions of other statutes, including
18 but not limited to RCW 75.20.100 and chapter 43.21C RCW, may not be
19 interpreted in a manner that is inconsistent with this section.)) In
20 establishing such ((minimum)) flows, levels, or similar restrictions
21 under authority provided in chapters 90.03, 90.22, and 90.54 RCW, the
22 department shall, during all stages of development by the department of
23 ecology of ((minimum)) flow proposals, consult with, and carefully
24 consider the recommendations of, the department of fish and wildlife,
25 the department of community, trade, and economic development, the
26 department of agriculture, and representatives of the affected Indian
27 tribes. Nothing herein shall preclude the department of fish and
28 wildlife, the department of community, trade, and economic development,
29 or the department of agriculture from presenting its views on
30 ((minimum)) flow needs at any public hearing or to any person or
31 agency, and the department of fish and wildlife, the department of
32 community, trade, and economic development, and the department of
33 agriculture are each empowered to participate in proceedings of the
34 federal energy regulatory commission and other agencies to present its
35 views on ((minimum)) flow needs.

36 (2) Before July 1, 2001, the department shall not issue additional
37 permits for the withdrawal of surface or ground waters from water
38 sources where:

1 (a) No flow or level has been adopted for the water source, or an
2 adopted flow or level is determined by the department to require
3 revision to meet the flow adoption standard under RCW 90.22.010;

4 (b) The water source is included within the designated habitat of
5 one or more fish stocks listed under the federal endangered species act
6 or are proposed for listing; and

7 (c) Adequate streamflows for fish are a limiting factor on recovery
8 of such fish stocks. Notwithstanding the limitations of this
9 subsection (2), the department may issue a temporary permit to address
10 a public health or safety emergency, where the permit conditions are
11 designed to minimize impacts on adequate streamflows for fish.

12 **Sec. 7.** RCW 75.20.050 and 1993 sp.s. c 2 s 29 are each amended to
13 read as follows:

14 It is the policy of this state that a flow of water (~~sufficient~~)
15 adequate to support game fish and food fish populations be maintained
16 at all times in the streams of this state.

17 The director of ecology shall give the director of fish and
18 wildlife notice of each application for a permit to divert or store
19 water or for approval of a change or transfer under RCW 90.03.380 or
20 90.44.100. The same notice shall be given to the director of the
21 office of salmon recovery when the application relates to a water
22 source included within the designated critical habitat of a fish stock
23 listed or proposed for listing under the federal endangered species
24 act. The directors (~~has~~) have thirty days after receiving the notice
25 to state his or her objections to the application. The permit shall
26 not be issued until the thirty-day period has elapsed.

27 The director of ecology may refuse to issue a permit if, in the
28 opinion of the director, issuing the permit might result in lowering
29 the flow of water in a stream below the flow necessary to adequately
30 support food fish and game fish populations in the stream.
31 Alternatively, the director of ecology may issue the permit with
32 conditions, including restrictions upon the season or quantity of use,
33 to prevent withdrawals under the permit from lowering the flow below
34 that flow necessary to adequately support food fish and game fish
35 populations in the stream.

36 The provisions of this section shall in no way affect existing
37 water rights.

1 NEW SECTION. **Sec. 8.** A new section is added to chapter 90.03 RCW
2 to read as follows:

3 A right to the beneficial use of water may be maintained and
4 established without a physical diversion of water and that right may be
5 held by any person or by a unit of state or local government.

6 NEW SECTION. **Sec. 9.** A new section is added to chapter 90.03 RCW
7 to read as follows:

8 (1) A person transferring a right to the beneficial use of water
9 for instream purposes shall file a notice of the transfer with the
10 department stating the name and address of the person or governmental
11 unit to whom the right has been transferred.

12 (2) Such a transfer for instream purposes may be permanent or
13 temporary. A temporary transfer may remain in effect for any length of
14 time as determined by the water right holder. The holder of the water
15 right temporarily transferred to instream purposes may transfer all or
16 part of the water right to the use for which the water right was
17 initially granted at any time the holder chooses.

18 **Sec. 10.** RCW 90.03.380 and 1997 c 442 s 801 are each amended to
19 read as follows:

20 (1) The right to the use of water which has been applied to a
21 beneficial use in the state shall be and remain appurtenant to the land
22 or place upon which the same is used: PROVIDED, HOWEVER, That the
23 right may be transferred to another or to others and become appurtenant
24 to any other land or place of use without loss of priority of right
25 theretofore established if such change can be made without detriment or
26 injury to existing rights. The point of diversion of water for
27 beneficial use or the purpose of use may be changed, if such change can
28 be made without detriment or injury to existing rights. A change in
29 the place of use, point of diversion, and/or purpose of use of a water
30 right to enable irrigation of additional acreage or the addition of new
31 uses may be permitted if such change results in no increase in the
32 annual consumptive quantity of water used under the water right. For
33 purposes of this section, "annual consumptive quantity" means the
34 estimated or actual annual amount of water diverted pursuant to the
35 water right, reduced by the estimated annual amount of return flows,
36 averaged over the most recent five-year period of continuous beneficial
37 use of the water right. Before any transfer of such right to use water

1 or change of the point of diversion of water or change of purpose of
2 use can be made, any person having an interest in the transfer or
3 change, shall file a written application therefor with the department,
4 and the application shall not be granted until notice of the
5 application is published as provided in RCW 90.03.280. If it shall
6 appear that such transfer or such change may be made without injury or
7 detriment to existing rights, the department shall issue to the
8 applicant a certificate in duplicate granting the right for such
9 transfer or for such change of point of diversion or of use. The
10 certificate so issued shall be filed and be made a record with the
11 department and the duplicate certificate issued to the applicant may be
12 filed with the county auditor in like manner and with the same effect
13 as provided in the original certificate or permit to divert water.

14 (2) An instream use right approved under this section receives the
15 same priority date as the water right from which it originated. The
16 department shall identify the stream reach or reaches to which the
17 right applies.

18 (3) If an application for change proposes to transfer water rights
19 from one irrigation district to another, the department shall, before
20 publication of notice, receive concurrence from each of the irrigation
21 districts that such transfer or change will not adversely affect the
22 ability to deliver water to other landowners or impair the financial
23 integrity of either of the districts.

24 (~~(3)~~) (4) A change in place of use by an individual water user or
25 users of water provided by an irrigation district need only receive
26 approval for the change from the board of directors of the district if
27 the use of water continues within the irrigation district, and when
28 water is provided by an irrigation entity that is a member of a board
29 of joint control created under chapter 87.80 RCW, approval need only be
30 received from the board of joint control if the use of water continues
31 within the area of jurisdiction of the joint board and the change can
32 be made without detriment or injury to existing rights.

33 (~~(4)~~) (5) This section shall not apply to trust water rights
34 acquired by the state through the funding of water conservation
35 projects under chapter 90.38 RCW or RCW 90.42.010 through 90.42.070.

36 **Sec. 11.** RCW 90.42.080 and 1993 c 98 s 4 are each amended to read
37 as follows:

1 (1) The state may acquire all or portions of existing water rights,
2 by purchase, gift, or other appropriate means other than by
3 condemnation, from any person or entity or combination of persons or
4 entities. Once acquired, such rights are trust water rights. A water
5 right acquired by the state that is expressly conditioned upon the use
6 being limited to instream purposes shall be administered as a trust
7 water right in compliance with that condition.

8 (2) The department may enter into leases, contracts, or such other
9 arrangements with other persons or entities as appropriate, to ensure
10 that trust water rights acquired in accordance with this chapter may be
11 exercised to the fullest possible extent.

12 (3) Trust water rights may be acquired by the state on a temporary
13 or permanent basis.

14 (4) The provisions of RCW 90.03.380 and 90.03.390 apply to
15 transfers of water rights under this section.

16 (5) No funds may be expended for the purchase of water rights by
17 the state pursuant to this section unless specifically appropriated for
18 this purpose by the legislature.

19 NEW SECTION. **Sec. 12.** A new section is added to chapter 90.03 RCW
20 to read as follows:

21 Using funds specifically appropriated for the purpose of the
22 acquisition of temporary or permanent rights to withdraw water, the
23 department may contract with any person for the acquisition of such
24 rights, if the contract provides that for the term of the acquisition
25 the right will be maintained for the benefit of the public for the
26 maintenance and augmentation of streamflows.

27 **Sec. 13.** RCW 90.14.160 and 1981 c 291 s 1 are each amended to read
28 as follows:

29 Any person entitled to divert or withdraw waters of the state
30 through any appropriation authorized by enactments of the legislature
31 prior to enactment of chapter 117, Laws of 1917, or by custom, or by
32 general adjudication, who abandons the same, or who voluntarily fails,
33 without sufficient cause, to beneficially use all or any part of said
34 right to divert or withdraw for any period of five successive years
35 after September 1, 1979, shall relinquish such right or portion
36 thereof, and said right or portion thereof shall revert to the state,
37 and the waters affected by said right shall become available for

1 appropriation in accordance with RCW 90.03.250. After June 30, 1999,
2 any water rights relinquished under this section as a result of failure
3 to use water beneficially shall be dedicated to and managed in
4 accordance with the trust water rights program established under
5 chapter 90.42 RCW if the relinquished water right is needed and can be
6 used to protect or restore streamflows.

7 **Sec. 14.** RCW 90.14.170 and 1967 c 233 s 17 are each amended to
8 read as follows:

9 Any person entitled to divert or withdraw waters of the state by
10 virtue of his ownership of land abutting a stream, lake, or
11 watercourse, who abandons the same, or who voluntarily fails, without
12 sufficient cause, to beneficially use all or any part of said right to
13 withdraw or divert said water for any period of five successive years
14 after July 1, 1967, shall relinquish such right or portion thereof, and
15 such right or portion thereof shall revert to the state, and the waters
16 affected by said right shall become available for appropriation in
17 accordance with the provisions of RCW 90.03.250. After June 30, 1999,
18 any water rights relinquished under this section as a result of failure
19 to use water beneficially shall be dedicated to and managed in
20 accordance with the trust water rights program established under
21 chapter 90.42 RCW if the relinquished water right is needed and can be
22 used to protect or restore streamflows.

23 **Sec. 15.** RCW 90.14.180 and 1987 c 109 s 101 are each amended to
24 read as follows:

25 Any person hereafter entitled to divert or withdraw waters of the
26 state through an appropriation authorized under RCW 90.03.330,
27 90.44.080, or 90.44.090 who abandons the same, or who voluntarily
28 fails, without sufficient cause, to beneficially use all or any part of
29 said right to withdraw for any period of five successive years shall
30 relinquish such right or portion thereof, and such right or portion
31 thereof shall revert to the state, and the waters affected by said
32 right shall become available for appropriation in accordance with RCW
33 90.03.250. After June 30, 1999, any water rights relinquished under
34 this section as a result of failure to use water beneficially shall be
35 dedicated to and managed in accordance with the trust water rights
36 program established under chapter 90.42 RCW if the relinquished water
37 right is needed and can be used to protect or restore streamflows. All

1 certificates hereafter issued by the department of ecology pursuant to
2 RCW 90.03.330 shall expressly incorporate this section by reference.

3 NEW SECTION. **Sec. 16.** A new section is added to chapter 90.03 RCW
4 to read as follows:

5 (1) Beginning in 2000, by September 30th of each year, the
6 department shall submit a report on the implementation of chapter
7 . . . , Laws of 1999 (this act) in the fiscal year completed the
8 previous June 30th to the appropriate standing committees of the house
9 of representatives and senate. The report shall describe activities
10 related to instream flow rules and permit actions in which streamflow
11 protection was a significant consideration.

12 (2) In the initial report submitted in 2000, the department shall
13 include a review of the trust water rights program under chapter 90.42
14 RCW and identify administrative and statutory barriers to obtaining
15 greater use of trust water rights to augment streamflows and to provide
16 a mechanism for meeting both offstream and instream water demands
17 identified in local watershed plans or other water resource management
18 plans. The report shall make recommendations for administrative and
19 statutory modifications to encourage greater use of the program, to
20 provide more timely review and approval of proposed trust water rights,
21 and to provide a greater range of circumstances in which the program
22 may be employed to meet identified instream and offstream water needs
23 consistent with applicable watershed plans.

24 (3) Beginning in 2005, a report need not be submitted annually but
25 the department may report periodically.

26 NEW SECTION. **Sec. 17.** RCW 90.22.060 and 1998 c 245 s 172 & 1993
27 sp.s. c 4 s 13 are each repealed.

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