

SENATE BILL REPORT

ESSB 5028

As Passed Senate, June 5, 2003

Title: An act relating to water pollution.

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).

Brief History:

Committee Activity: Natural Resources, Energy & Water: 1/21/03, 2/6/03 [DPS, DNPS].
Passed Senate: 3/13/03, 26-23.

First Special Session: Passed Senate: 6/5/03, 26-22.

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: Evan Sheffels (786-7486)

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 bypass 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, through an enforcement order, impose similar restrictions upon a water right based upon a claim that a water right holder's water diversion violated state water pollution control law by causing insufficient instream flows and increased water temperatures.

Summary of Bill: 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 of causation of 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.

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).