

SENATE BILL REPORT

SB 5250

As of February 4, 2003

Title: An act relating to instream flows.

Brief Description: Changing instream flow provisions.

Sponsors: Senators Regala, Jacobsen, Fraser, Kohl-Welles and Kline.

Brief History:

Committee Activity: Natural Resources, Energy & Water: 2/7/03.

SENATE COMMITTEE ON NATURAL RESOURCES, ENERGY & WATER

Staff: Sam Thompson (786-7413)

Background: The state Department of Ecology (DOE) has the authority to establish, by administrative rule, minimum instream flows and levels for rivers, streams, and lakes. Minimum flows and levels are intended to protect fish and other wildlife resources, recreational or aesthetic values, and water quality. Water use that would conflict with the policy of maintaining minimum flows and levels is permitted only if the use would serve overriding public interest considerations.

Minimum flows and levels are water rights, and their priority date is the effective date of the adoption of the administrative rule establishing the flow or level.

DOE, which must consult with the Department of Fish and Wildlife (DFW) before approving applications for water rights, has discretion to condition water rights to protect instream flows.

Summary of Bill: Cooperating with DFW, DOE must establish, by administrative rule, instream flows for all mainstem rivers and primary tributaries of the state by 2010. DOE must give priority to several specified water resource inventory areas (WRIAs) throughout the state.

In consultation with DFW, affected tribal governments, local WRIA planning units, and local governments, DOE must:

- Publish, by December 2003, a work plan identifying where and when it will develop and adopt instream flow rules; the plan must define tributary areas where flows should be addressed, provide a schedule for prioritizing, recommending, and setting flows, and be updated annually.
- Develop and publish strategies for achieving flow requirements of instream flow rules.

Instream flows must protect several interests, including fish and wildlife habitat, water quality, navigation, and scenic, aesthetic, and environmental quality values, based upon state and federal laws and federal treaties. Established instream flows should be achievable most of the time, recognizing seasonal variation, when based upon natural flow records. DOE may establish a higher instream flow where it is recommended by an approved watershed plan or other comprehensive planning process.

Where consistent with other requirements, instream flow rules must incorporate conditions established by certain federally-issued hydroelectric power generating facility licenses, certain habitat conservation plans approved under the federal Endangered Species Act, and the federal Yakima River Basin Water Enhancement Project, pursuant to federal law.

In establishing instream flows, DOE must use the best available scientific information. When adequate information is not available, DOE must establish an instream flow that is least likely to jeopardize instream values, and review and potentially revise the instream flow when adequate information becomes available. In developing and selecting methods for establishing flows for the recovery of fish populations, and in developing criteria to select methods to apply in each situation, DOE must consult with DFW, Indian tribes, and the state independent science panel reviewing salmon recovery plans.

Following its adoption of instream flow rules, DOE must apply a scientific-based adaptive management process.

Water use and management principles are revised to expressly include protection of fish and wildlife habitat, water quality, navigation, and scenic, aesthetic, and environmental quality values. Temporary exceptions to these principles are authorized only when necessary to meet emergency public health or safety requirements, or emergency regionwide economic needs where mitigation is provided for the survival of critical or depressed fish populations.

Within one year of adopting an instream flow rule, DOE must adopt an implementation plan describing actions needed to protect flows subject to the rule, including necessary measuring methods, its responsibilities and those of DFW in protecting or restoring flows, enforcement of flows against unauthorized withdrawals, and performance measures to assist with periodic reviews.

Priority dates for reservations of water set aside for instream flows or future beneficial use for agriculture, hydroelectric energy, municipal, industrial, and other uses is the date of filing of notice of rule-making rather than the effective dates of the establishment of the reservations by rule. By October 1, 2003, DOE must adopt a protocol for processing applications for new water withdrawals and for changes or transfers, considering the impact of proposed changes or transfers upon instream flows during the time between establishment of a priority date and adoption of a final instream flow rule.

In addition to notice of applications for permits to divert or store water, DOE must provide DFW with notice of applications for change or transfer of a water right. DOE and DFW must jointly develop an interagency consultation agreement on filings concerning water bodies providing habitat for critical or depressed fish stocks, including provisions allowing DFW review and comment upon DOE's proposed decisions on applications that may adversely

affect water bodies whose flows are a limiting factor in the recovery of certain endangered fish species.

DOE may deny a water right application when the water source is a stream or lake for which the best available measuring records or other information indicates that, during most of the time on a seasonal basis over the previous ten years, stream flows or lake levels have been lower than established instream flows or a flow adopted for purposes of review of the application.

Whenever it determines that flows have been lower than established instream flows or levels most of the time on a seasonal basis over the previous ten years, or that authorizing additional water appropriations may adversely affect achieving established flows, DOE must adopt a rule withdrawing an affected water body from additional appropriation. The rule must remain in effect until repealed by DOE based upon a determination that flow protection measures, reduced withdrawals, or other actions indicate that additional appropriations may be authorized without adversely affecting established instream flows or levels.

Appropriation: None.

Fiscal Note: Requested on February 3, 2003.

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