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**HOUSE BILL 2721**

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**State of Washington 64th Legislature 2016 Regular Session**

**By** Representatives Scott, Taylor, Schmick, Dent, Van Werven, Buys, Griffey, McCaslin, Holy, Manweller, Wilson, and Shea

AN ACT Relating to ensuring that a new federal government definition of the term "waters of the United States" has no applicability to the regulation of water quality in the state of Washington; amending RCW 90.48.010, 90.48.020, 90.48.030, 90.48.035, 90.48.153, and 90.48.260; adding a new section to chapter 90.48 RCW; and creating a new section.

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

NEW SECTION. **Sec.**  (1) The legislature finds that the ninth and tenth amendments to the United States Constitution guarantee to the states and their people all powers and rights not granted to the federal government elsewhere in the Constitution and reserve to the state and people of Washington certain powers and rights as they were understood at the time that Washington was admitted to statehood in 1889. The regulation of intrastate commerce, including the natural environment as affected by intrastate business, is vested in the states under the tenth amendment to the United States Constitution and is specifically retained by the people and property owners of the state of Washington.

(2) The legislature further finds that the United States environmental protection agency and the United States army corps of engineers, acting under the color of the authority of congress to regulate interstate commerce, recently proposed a new administrative rule that defines the use of the term "waters of the United States" as it appears in the federal clean water act. This proposed rule purports to be reflective of statutory language, science, public comment, agency expertise, and specific holdings of the United States supreme court.

(3) The legislature further finds that contents of the proposed rule fails to fulfill its own identified justifications and exceeds the authority given to the agencies by the United States congress in the federal clean water act and to congress itself by the United States Constitution. However, regardless of justification or scope of delegation or authority, neither the United States environmental protection agency nor the United States army corps of engineers possess the authority to apply, administer, or enforce the proposed rule within the state of Washington.

(4) The legislature further finds that section 101(g) of the clean water act expressly states that "the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this act." Therefore, it is the duty of the legislature to adopt any and all measures as may be necessary to prevent the proposed rule described in this section, and its effect on the allocation of waters and the resulting impact on the property rights of the citizens of the state of Washington, from taking effect in Washington.

(5) The legislature further finds that although the existing provisions of chapter 90.48 RCW may minimize any effect that changes to the definition of "waters of the United States" have within the state of Washington, it is still incumbent upon the legislature to ensure that changes to the definition on the federal level do not create any threats to private property rights in Washington or an expectation that water quality will be managed and regulated in any manner that impacts private property rights even more than the current implementation of chapter 90.48 RCW.

NEW SECTION. **Sec.**  A new section is added to chapter 90.48 RCW to read as follows:

Since neither the United States environmental protection agency or the United States army corps of engineers possess the authority to apply, administer, or enforce within the state of Washington the proposed amendments to the rules developed under the federal clean water act, 33 U.S.C. Sec. 1251 et seq., described in the notice of proposed rule published in the Federal Register entitled "Definition of 'Waters of the United States' under the Clean Water Act" (79 Fed. Reg. 22188 (April 21, 2014)), the rule shall have no effect in the state of Washington and neither the department nor any state officer or employee may attempt to enforce an order, law, statute, rule, or regulation of the United States government that is based on it.

**Sec.**  RCW 90.48.010 and 1973 c 155 s 1 are each amended to read as follows:

(1) It is declared to be the public policy of the state of Washington to maintain the highest possible standards to ((~~insure~~)) ensure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state.

(2) The state of Washington in recognition of the federal government's interest in the quality of the navigable waters of the United States, of which certain portions thereof are within the jurisdictional limits of this state, proclaims a public policy of working cooperatively with the federal government, consistent with section 2 of this act, in a joint effort to extinguish the sources of water quality degradation, while at the same time preserving and vigorously exercising state powers to ((~~insure~~)) ensure that present and future standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington.

**Sec.**  RCW 90.48.020 and 2002 c 161 s 4 are each amended to read as follows:

(1) Whenever the word "person" is used in this chapter, it shall be construed to include any political subdivision, government agency, municipality, industry, public or private corporation, copartnership, association, firm, individual or any other entity whatsoever.

(2) Wherever the words "waters of the state" shall be used in this chapter, they shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington. However, the words "waters of the state" may not be interpreted in any manner that is inconsistent with section 2 of this act.

(3) Whenever the word "pollution" is used in this chapter, it shall be construed to mean such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

(4) Wherever the word "department" is used in this chapter it shall mean the department of ecology.

(5) Whenever the word "director" is used in this chapter it shall mean the director of ecology.

(6) Whenever the words "aquatic noxious weed" are used in this chapter, they have the meaning prescribed under RCW 17.26.020.

(7) Whenever the words "general sewer plan" are used in this chapter they shall be construed to include all sewerage general plans, sewer general comprehensive plans, plans for a system of sewerage, and other plans for sewer systems adopted by a local government entity including but not limited to cities, towns, public utility districts, and water-sewer districts.

**Sec.**  RCW 90.48.030 and 1987 c 109 s 123 are each amended to read as follows:

The department shall have the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington. However, the authority provided in this section may not be construed in any manner that leads to a result that is inconsistent with section 2 of this act.

**Sec.**  RCW 90.48.035 and 1987 c 109 s 124 are each amended to read as follows:

The department, consistent with section 2 of this act, shall have the authority to, and shall ((~~promulgate~~)) adopt, amend, or rescind, such rules ((~~and regulations~~)) as it shall deem necessary to carry out the provisions of this chapter, including but not limited to rules ((~~and regulations~~)) relating to standards of quality for waters of the state and for substances discharged therein in order to maintain the highest possible standards of all waters of the state in accordance with the public policy as declared in RCW 90.48.010.

**Sec.**  RCW 90.48.153 and 1987 c 109 s 133 are each amended to read as follows:

The department is authorized to cooperate, consistent with section 2 of this act, with the federal government and to accept grants of federal funds for carrying out the purposes of this chapter. The department is empowered to make any application or report required by an agency of the federal government as an incident to receiving such grants.

**Sec.**  RCW 90.48.260 and 2012 1st sp.s. c 1 s 313 are each amended to read as follows:

(1)(a) The department of ecology is hereby designated as the state water pollution control agency for all purposes of the federal clean water act as it exists on February 4, 1987, and is hereby authorized to participate fully in the programs of the act as well as to take all action necessary to secure to the state the benefits and to meet the requirements of that act as long as any act of participation does not violate section 2 of this act.

(b) With regard to the national estuary program established by section 320 of that act, the department shall exercise its responsibility jointly with the Puget Sound partnership, created in RCW 90.71.210. The department of ecology may delegate its authority under this chapter, including its national pollutant discharge elimination permit system authority and duties regarding animal feeding operations and concentrated animal feeding operations, to the department of agriculture through a memorandum of understanding. Until any such delegation receives federal approval, the department of agriculture's adoption or issuance of animal feeding operation and concentrated animal feeding operation rules, permits, programs, and directives pertaining to water quality shall be accomplished after reaching agreement with the director of the department of ecology. Adoption or issuance and implementation shall be accomplished so that compliance with such animal feeding operation and concentrated animal feeding operation rules, permits, programs, and directives will achieve compliance with all federal and state water pollution control laws.

(2) The powers granted herein include, among others, and notwithstanding any other provisions of this chapter or otherwise, the following:

(a) Complete authority to establish and administer a comprehensive state point source waste discharge or pollution discharge elimination permit program which will enable the department to qualify for full participation in any national waste discharge or pollution discharge elimination permit system and will allow the department to be the sole agency issuing permits required by such national system operating in the state of Washington subject to the provisions of RCW 90.48.262(2) and section 2 of this act. Program elements authorized herein may include, but are not limited to: (i) Effluent treatment and limitation requirements together with timing requirements related thereto; (ii) applicable receiving water quality standards requirements; (iii) requirements of standards of performance for new sources; (iv) pretreatment requirements; (v) termination and modification of permits for cause; (vi) requirements for public notices and opportunities for public hearings; (vii) appropriate relationships with the secretary of the army in the administration of his or her responsibilities which relate to anchorage and navigation, with the administrator of the environmental protection agency in the performance of his or her duties, and with other governmental officials under the federal clean water act; (viii) requirements for inspection, monitoring, entry, and reporting; (ix) enforcement of the program through penalties, emergency powers, and criminal sanctions; (x) a continuing planning process; and (xi) user charges.

(b) The power to establish and administer state programs in a manner which will ensure the procurement of moneys, whether in the form of grants, loans, or otherwise; to assist in the construction, operation, and maintenance of various water pollution control facilities and works; and the administering of various state water pollution control management, regulatory, and enforcement programs.

(c) The power to develop and implement appropriate programs pertaining to continuing planning processes, area-wide waste treatment management plans, and basin planning.

((~~(2)~~)) (3) The governor shall have authority to perform those actions that are not precluded under section 2 of this act and that are required of ((~~him or her~~)) the governor by the federal clean water act.

((~~(3)~~)) (4) By July 31, 2012, the department shall:

(a) Reissue without modification and for a term of one year any national pollutant discharge elimination system municipal storm water general permit applicable to western Washington municipalities first issued on January 17, 2007; and

(b) Issue an updated national pollutant discharge elimination system municipal storm water general permit applicable to western Washington municipalities for any permit first issued on January 17, 2007. An updated permit issued under this subsection shall become effective beginning August 1, 2013.

(i) Provisions of the updated permit issued under (b) of this subsection relating to new requirements for low-impact development and review and revision of local development codes, rules, standards, or other enforceable documents to incorporate low-impact development principles must be implemented simultaneously. These requirements may go into effect no earlier than December 31, 2016, or the time of the scheduled update under RCW 36.70A.130(5), as existing on July 10, 2012, whichever is later.

(ii) Provisions of the updated permit issued under (b) of this subsection related to increased catch basin inspection and illicit discharge detection frequencies and application of new storm water controls to projects smaller than one acre may go into effect no earlier than December 31, 2016, or the time of the scheduled update under RCW 36.70A.130(5), as existing on July 10, 2012, whichever is later.

((~~(4)~~)) (5) By July 31, 2012, the department shall:

(a) Reissue without modification and for a term of two years any national pollutant discharge elimination system municipal storm water general permit applicable to eastern Washington municipalities first issued on January 17, 2007; and

(b) Issue an updated national pollutant discharge elimination system municipal storm water general permit for any permit first issued on January 17, 2007, applicable to eastern Washington municipalities. An updated permit issued under this subsection becomes effective August 1, 2014.

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