
**Agriculture & Ecology
Committee**

HB 2993

Brief Description: Modifying water provisions.

Sponsors: Representatives Linville and Kirby.

Brief Summary of Bill

- Establishes criteria for setting minimum or base flows for fish and prohibits flows set for any other purpose from being less than these flows.
- Requires instream flows to be set by December 31, 2010, in 16 watersheds and in basins for which instream flows are to be set as part of planning under the state's watershed planning law.
- Requires the development of strategies for establishing instream flow requirements, and strategies for achieving instream flows and for overcoming other limiting factors identified for streams, including means of measuring progress and the identification of actions to be taken if the progress is not made.
- Establishes administrative requirements for achieving compliance with the water laws.
- Revises provisions regarding the number of service connections that may be served by a public water system, and identifies a place of use for the system's water right, and allows certain use of a system's inchoate right but provides a disclaimer regarding legislative intent.
- Establishes conservation planning requirements for water systems and allows the development of draft efficiency performance measures regarding uses of water from public water systems.
- Authorizes reclaimed water permits for industrial re-use water and requires consideration of conservation and re-use in plans for water and waste water systems.
- Allows certain changes of use within the general category of an agricultural use of water, some of which require the notification of DOE, some of which do not, and some of which require the approval of the DOE.

- Allows expedited permit processing for the conjunctive use of two or more water rights in certain instances.
- Expands exemptions from the requirement that water rights be relinquished for non-use and expands the authority to donate water temporarily or permanently to the state's trust water right systems.
- Provides expedited processing of certain applications for reservoir and secondary use permits and provides exemptions from permit requirements.
- Establishes a preference for the source of water for residential use and provides for the consolidation of an undeveloped right to a well with a public water system's water right in certain instances.
- Clarifies the application of the exempt well statutes to stock watering and provides certain restrictions.

Hearing Date: 2/28/02

Staff: Kenneth Hirst (786-7105).

Background:

Watershed Planning. State law establishes procedures and policies for initiating watershed planning at the local level. If certain local governments choose to initiate the planning for one or more Water Resource Inventory Areas or watersheds, they appoint a planning unit to do the planning. The planning unit must address water quantity issues in the watershed. The initiating governments may choose to add other components to the planning process. These may include instream flows, water quality, and fish habitat.

Modifying Existing Water Rights. There are several fundamental elements of a water right. One is its priority (or seniority). Other elements include: the amount of water that may be withdrawn from a particular water source under the right, the time of year and point from which the water may be withdrawn, the type of water use authorized under the right (such as an agricultural or municipal use), and the place that the water may be used. Certain of these elements of a water right may be modified with the approval of the DOE if the modification would not impair other existing water rights.

Issuing Water Right Certificates. If a water right permit is issued by the DOE, the permit holder may develop water use under the terms of the permit. Upon a showing that the appropriation of water has been "perfected" as required by the Surface Water Code or a showing of certain evidence of completed construction under the Ground Water Code, the DOE is to issue the permit holder a water right certificate. The application, permit, or certificate for the water right of a public water system or supporting documents may indicate the number of service connections available under the right or the population to be served under the right. The place of use of the right for the system may be specific or may be stated generally.

Reclaimed Water. A permit may be secured for the use of reclaimed water by the generator of the reclaimed water. The generator of the reclaimed water may distribute the water according to the terms of the permit. The permit governs the location, rate, water quality, and purpose of use of the reclaimed water.

Trust Water Rights. A water right may be donated to or acquired by the state for management as a trust water right. The laws governing the state's trust water right system are divided into two parts: one for the Yakima River Basin; and the other for the rest of the state. In 2001, an expedited process was established for donating water rights to either system. This process applies if: (1) an aquatic species is listed as threatened, endangered, or depressed under state or federal law; and (2) the holder of a right to water from the body of water chooses to donate all or a portion of the person's water right to the trust water system to assist in providing instream flows on a temporary or permanent basis.

Relinquishment. In general, if a person abandons his or her water right or voluntarily fails to use the right for five successive years, the person relinquishes the right or the portion of the right abandoned or not used. However, exemptions from this requirement are provided. For example, these relinquishment requirements do not apply to trust water rights.

Summary of Bill:

Instream Flows. Criteria are established for establishing base flows or minimum instream flows for fish. These flows must be: achievable by taking into account the natural hydrology of a stream, including variations in conditions throughout the length of the stream and variations between seasons and years; sufficient to support the varying life stages of fish in those stream segments at the time of year the fish are or were present, with a priority for providing for healthy populations of salmonids; and developed using scientifically based methods. If planning under the state's watershed planning act contains an instream flow component, the minimum instream flows established must satisfy these criteria. Flows set for purposes other than for fish must not be less than those set for fish. In developing instream flow rules for watersheds for which the flows are not developed under the state's watershed planning act, the DOE must conduct its analysis of stream flow data and develop proposals for flows in close consultation with appropriate local governments, tribal governments, and representatives of affected parties. The general principle of the Water Resources Act (WRA) that waters are to be allocated among potential uses based on securing the maximum net benefits for the people of the state does not apply to setting flows for fish. (Sec. 2, 3, 5 and 6.)

Instream flows rules must incorporate the instream flow components of the following where they are consistent with the flow criteria: the conditions of a Federal Energy Regulatory Commission license issued after May 1994 for a hydroelectric power generating facility or of a habitat conservation plan approved under the federal Endangered Species Act (if the DOE has approved or otherwise formally acknowledged the instream flow component on behalf of the state); a comprehensive irrigation district management plan that meets the requirements in the plan manual approved in May 2001; and the federal Yakima River Basin Water Enhancement Project. (Sec. 4.)

Priority is to be given to establishing instream flow rules in 16 critical basins and in water

resource inventory areas that are currently conducting planning under the state's watershed planning act. For these priority areas, instream flow rules must be established by December 31, 2010. Instream flow rules are to be established in all other areas as funding becomes available. (Sec. 2 and 3.)

By December 2002, the DOE, in consultation with the Department of Fish and Wildlife (F&W) and with affected tribal governments, watershed planning units and local governments, must publish a work plan that identifies where and when instream flows will be developed and adopted in order to achieve these goals. The work plan must be updated annually. The DOE in consultation with F&W and these affected entities must develop and publish strategies for achieving these flows. The strategies must identify means of measuring whether progress toward achieving instream flow requirements and overcoming other limiting factors identified for streams is being made, and the actions that will be taken if such progress is not being made for a stream. Where watershed planning is conducted under the state's watershed planning act, the strategies are must be developed by the planning units as part of the water quantity components of their plans and, if they are conducting habitat planning, as part of the habitat components of their plans. (Sec. 2(5) and 3.)

Compliance. The DOE must, through a network of water masters, stream patrollers, and other compliance staff, achieve compliance with the state's water laws and rules. A sequence is established for providing compliance which ranges from providing technical and educational information to issuing orders for violations. To the maximum extent practicable, the DOE is to station its compliance personnel in the watershed communities they serve. (Sec. 7.)

Public Water Systems. For a public water system, the maximum number of service connections or maximum population specified on its water right application, permit, certificate, or claim does not limit the water right. However, if a water system plan is required to be approved for the system, these may be expanded only when the system is in compliance with the requirements of its approved water system plan and any conservation required of the system by this bill. (Sec. 8(2).) A change in the place of use of the system's right within its approved water system plan does not require the approval of the DOE. With regard to these provisions, the Legislature does not intend to alter any judicial interpretation of the law of municipal water rights that is not expressly addressed. (Sec. 8(3) and 20(4)(a).) The inchoate portion of a public water system's water right may be transferred or changed for use: to resolve a public health emergency caused by a water system that is failing and is currently providing potable water to users; or to benefit environmental resources. Criteria are established for using inchoate water for such a failing water system. The transfers and changes require the approval of the DOE. This authority to transfer or change the inchoate right apply to the extent the right exists under the law before the effective date of this bill. (Sec 20(4).)

A water right held for municipal water supply purposes includes, but is not limited to, using the water right to assist in providing instream flows. (Sec. 20(10).) For this purpose and for the purposes of the exemption from relinquishment currently provided such water rights, a water right held for "municipal water supply purposes" is one held by a governmental entity for the purpose of supplying, as a minimum, residential use or held for future residential use. (Sec 24(2)(d).)

Interties may now be used to benefit environmental resources. Use of an intertie must not impair existing water rights or lower stream flows below the flows necessary to support adequately food fish and game fish populations. (Sec. 9.)

Conservation & Reuse. The Department of Health (DOH) must develop comprehensive water conservation planning requirements for public water systems, based upon system size, to be included in water system plans. The DOH must review and approve water conservation plans, monitor plan implementation to ensure compliance with the conservation planning requirements, provide certain advice and technical assistance, and develop and maintain a statewide water consumption data base for the purpose of maintaining state records on water system source production and water consumption. Implementing rules must be adopted by December 31, 2003. By that date, the DOH must also prepare draft rules that would establish water use efficiency performance measures for various water uses supplied by public water systems. The draft rules must be prepared using negotiated rule-making and must be delivered to the Legislature during the 2004 legislative session. The draft rules must include criteria for identifying which measures apply to particular water systems as part of their approved water system plans and must take into consideration the level of conservation and efficiency present in the use of the system's water and the degree to which requiring additional conservation and efficiency remains cost-effective. The criteria must be sufficiently detailed to ensure that their application is reasonably predictable. (Sec. 10 and 11.)

Sewer plans that propose new or expanded treatment capacity must evaluate conservation as an alternative. Sewerage plans must contain certified statements that re-use elements have been considered and accounted for with regard to future distribution of reclaimed water. Water system plans for systems with 1000 or more service connections must ensure that opportunities for reclaiming water have been evaluated. (Sec. 12, 13 and 14.)

The state's reclaimed water laws are amended. Permits for the use of "industrial reuse water" are authorized. Such a permit is issued by the DOE under the water pollution control laws to the owner of a plant that is the source of the water who may then distribute the water. The owner has the exclusive right to the use of the reclaimed water; however, use of the water must not impair existing water rights or, if the source of the water is surface water, rights that are downstream from the plant's current discharge point. (Sec 15, 18 and 19.) The advisory committee for reclaimed water is to be reconvened to provide additional review of aspects of reclaiming water and to provide technical assistance in updating the standards for such water. The DOH may implement its permit requirements through an agreement with the DOE. (Sec. 16 and 17.)

Agricultural Use of Water. A right to use surface or ground water that has been applied to any beneficial use within the general category of an agricultural use may be changed to another agricultural use within the other limitations of the water right and under certain conditions. The general category of an agricultural use of water is composed of, but not limited to, the beneficial uses of water for agricultural irrigation, frost protection, dust suppression, cleaning of agricultural animals, equipment, and facilities, and processing agricultural commodities.

A change in the type of crop irrigated under the right may be made without providing notice

to the DOE and does not constitute a change in the purpose of use of the right. A change that does not involve a change in the season of use of the water may be made after notification to, but without the approval of, the DOE.

A change that involves a change in the season of use may be made after giving the DOE an opportunity to review the proposal. For these, the water right holder must give the DOE written notice describing the proposed change and providing evidence of the beneficial use of the right. The water right holder may proceed with the change unless he or she is notified by the DOE within 45 days that the proposed change raises concerns regarding potential impairment to other water rights. The director may extend the 45 day period by an additional 30 days. The DOE must operate under a rebuttable presumption of no impairment of other water rights if the season of use is proposed to be changed from a period that is more critical for other water rights and stream flows to a period that is less critical. If the DOE determines that the proposed change raises concerns regarding potential impairment to other water rights, the proposed change may not proceed under these special procedures, but the water right holder may apply for the change under the normal transfer and change procedures. The DOE's decision is not appealable. (Sec 20(5) and 23.)

Conjunctive Use. The DOE may provide expedited processing for an application for a new ground or surface water right or for modifying an existing surface or ground water right that facilitates the conjunctive use of water rights by a water right holder. The expedited processing may be provided if the conjunctive use: does not impair water rights existing at the time the conjunctive use is initiated; and would change the season that all or a portion of an existing right is used so that there would be less competing demand for water from a surface water source during a season when water supply for stream flows is more critical. Such a modification of an existing right may be provided without loss of priority. (Sec 20(9), 21, and 22.)

Relinquishment. Existing exemptions from relinquishment for the non-use of a water right are expanded. The exemption for non-use resulting from conservation measures under the Yakima River Basin Water Enhancement Project now applies to non-use resulting from any water conservation measures; the exemption for reduced water need resulting from varying weather conditions is no longer restricted to "temporary" reductions; and the exemption for non-use resulting from temporary changes in crops now applies to short-term or long-term changes in crops. Added to the "sufficient causes" that exempt the non-use of a water right from relinquishment is the processing of applications for a water right change, transfer, or amendment. Foreclosure and bankruptcy proceedings are added as examples of the type of legal proceedings which, if they cause a non-use, provide an exemption from relinquishment.

Trust Water Rights. The expedited procedures provided by the trust water laws for donating water rights to the trust water rights systems where aquatic species have been listed as threatened or endangered are broadened. They now apply to a donation of any water right to assist in providing instream flows on a temporary or permanent basis. (Sec 25 and 26.)

Reservoir and Secondary Permits. State laws are altered which require reservoir permits for storing water and secondary permits for using stored water. The DOE may authorize reservoirs to be filled more than once per year or season under certain circumstances.

Expedited processing is to be provided for: developing storage facilities that will not require a new water right for diversion or withdrawal of the water to be stored; adding or changing one or more purposes of use of stored water; or adding to the storage capacity of an existing storage facility. The expedited processing is also to be afforded applications for secondary permits to secure use from existing storage facilities.

The following types of storage facilities are expressly exempted from reservoir and secondary permit requirements if they do not impair any water right or diminish stream flows: storm water management facilities; rain barrels, cisterns, and other facilities for capturing runoff from hard surfaces in certain instances, if the total amount of storage does not exceed 10,000 gallons and the water stored is intended to be put to beneficial use; certain facilities to recapture and reuse return flow from irrigation operations; certain off-stream ponds and certain excavated ponds intercepting the water table that do not exceeding 10 acre-feet; and excavated municipal water reservoirs, water towers and other similar facilities that are integral to a water supply system's distribution system. However, a secondary water use permit is required for the consumptive use of water, other than direct stock drinking, from the excavated ponds that are exempted from permitting but are not the municipal or irrigation return flow ponds. (Sec. 27.)

Residential Water. The first choice of water supply for a new residential use of water is water service from a public water system serving 15 or more residential hookups. To be the first choice, however, the water service must be available in a timely and cost-effective manner, criteria for which are provided. If the water is provided by the public water system, the system must notify the DOE which must enlarge the place of use of the water right for the system by adding the place of the residential use.

If the water is provided by the system and the source of water for one or more of the public water system's water rights is the ground water that would be a source of supply for the residence under an exempt well, the service by the public water system constitutes a consolidation of the water right of the system with the undeveloped right otherwise available for the well. In such a case, the public water system must notify the DOE which must enlarge the water right for the system from that water source by 800 gallons of water per day. The priority date for the added portion of the consolidated right is the date water service was first provided for the residential use. When water is provided for the residential use by the system, the exemption from permitting for a well for the residence is not available. (Sec. 28.)

Exempt Wells for Stock Watering. The legislature acknowledges that the exemption from permitting provided for exempt wells for stock watering before the effective date of this clarification was not limited to 5000 gallons of water per day. However, this acknowledgment applies to the use of ground water provided directly or indirectly by the U.S. Bureau of Reclamation as part of a federal reclamation project only if the use of the water is also authorized by the Bureau through a permit or license issued by the Bureau or by the DOE through an agreement with the Bureau.

On and after the effective date of this clarification, the exemption from permitting provided for a new water right for stock watering is limited to 5000 gallons of water per day. The quantity of water withdrawn under an existing water right established without a permit for

stock watering must not be increased, unless the effect of the increase is to withdraw a total quantity of water under the right that is no greater than 5000 gallons a day. (Sec. 29.)

Water Availability for Approving Applications. In considering an application for a new water right permit or for modifying an existing water right, the DOE must consider any instream flow requirements that have been established. However, it may approve the application if, in addition to other requirements of law, water would be available at times of the year and over several years to satisfy the purpose or purposes of water use under the application. (Sec. 30.)

Other. The calculation in statute of the "annual consumptive quantity" of water that may be spread under a water right does not define the extent of the right. (Sec 20(1).) A person may apply for a reservoir permit and a secondary permit in one application. (Sec. 27.) Although a planning unit is authorized to examine potential storage sites under the state's watershed planning act, it is no longer required to evaluate potential storage under the WRA. (Sec. 5.)

Appropriation: None.

Fiscal Note: Requested on February 27, 2002.

Effective Date: Section 29 regarding exempt well provisions for stock watering takes effect immediately. The remainder of the bill takes effect ninety days after adjournment of session in which bill is passed.