

SSB 5028 - H AMD 540

By Representative Linville

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** A new section is added to chapter 90.48 RCW
4 to read as follows:

5 (1) The legislature finds that the courts have rendered decisions
6 in Elkhorn (*Public Utility District No. 1 v. Washington Department of*
7 *Ecology*, 511 U.S. 700, 114 S. Ct. 1900, 128 L.Ed. 2d 716 (1994)) and
8 Sullivan Creek (*Public Utility District No. 1 of Pend Oreille County v.*
9 *Washington Department of Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002))
10 related to water quality certifications issued under section 401 of the
11 clean water act, 33 U.S.C. 1251 et seq. Enactment of this legislation
12 does not expand or contract the legal holdings of these decisions and
13 does not affect in any way the application of these holdings to any
14 future case or fact pattern related to water quality certifications
15 issued for federally licensed hydropower facilities under section 401
16 of the clean water act, 33 U.S.C. 1251 et seq.

17 (2) When a water quality standard cannot be reasonably met through
18 the issuance of permits or regulatory orders issued under the authority
19 of this chapter, the department may use voluntary, incentive-based
20 methods including funding of water conservation projects, lease and
21 purchase of water rights, development of new storage projects, or
22 habitat restoration projects in an attempt to meet water quality
23 standards.

24 (3) The department may not abrogate, supersede, impair, or
25 condition the ability of a water right holder to fully divert or
26 withdraw water under a water right permit, certificate, statutory
27 exemption, or claim granted or recognized under chapter 90.03, 90.14,
28 or 90.44 RCW through the authority granted to the department in this
29 chapter. However, nothing in this act shall be construed to affect the
30 department's authority related to the issuance of certifications under

1 section 401 of the federal clean water act, 33 U.S.C. 1251 et seq.,
2 with respect to the application of federally authorized water quality
3 standards, for federal energy regulatory commission licensed hydropower
4 projects as provided under this chapter and chapter 90.74 RCW. With
5 respect to federal energy regulatory commission licensed hydropower
6 projects, the department may only require a person to mitigate or
7 remedy a water quality violation or problem to the extent there is
8 substantial evidence such person has caused such violation or problem.

9 **Sec. 2.** RCW 90.03.400 and 2003 c 53 s 418 are each amended to read
10 as follows:

11 (1)(a) The unauthorized use of water to which another person is
12 entitled or the willful or negligent waste of water to the detriment of
13 another, is a misdemeanor.

14 (b) For instances of the waste of water under this subsection, the
15 department may alternatively follow the sequence of enforcement actions
16 as provided in RCW 90.03.605.

17 (2) The possession or use of water without legal right shall be
18 prima facie evidence of the guilt of the person using it.

19 (3) It is also a misdemeanor to use, store, or divert any water
20 until after the issuance of permit to appropriate such water.

21 **Sec. 3.** RCW 90.03.600 and 1995 c 403 s 635 are each amended to
22 read as follows:

23 In determining the amount of a penalty to be levied, the department
24 shall consider the seriousness of the violation, whether the violation
25 is repeated or continuous after notice of the violation is given, and
26 whether any damage has occurred to the health or property of other
27 persons. Except as provided in RCW 43.05.060 through 43.05.080 and
28 43.05.150, (~~the power is granted to~~) the department of ecology (~~to~~)
29 may levy civil penalties (~~of up to~~) ranging from one hundred dollars
30 to five thousand dollars per day for violation of any of the provisions
31 of this chapter and chapters 43.83B, 90.22, and 90.44 RCW, and rules,
32 permits, and similar documents and regulatory orders of the department
33 of ecology adopted or issued pursuant to such chapters. The procedures
34 of RCW 90.48.144 shall be applicable to all phases of the levying of a
35 penalty as well as review and appeal of the same."

EFFECT: (1) Includes legislative findings regarding previous court decisions related to water quality certifications and a provision specifying these provisions do not affect the application of the court decisions to future cases involving water quality certifications for federally licensed hydropower facilities. (2) Allows the Department of Ecology (DOE), when a water quality standard cannot reasonably be met by issuing water quality permits or regulatory orders, to use voluntary, incentive-based methods to attempt to meet water quality standards. (3) Prohibits the DOE from abrogating, superseding, impairing, or conditioning through water quality authority the full exercise of a water right permit, certificate, statutory exemption, or claim. (4) Specifies these provisions may not be construed to affect the DOE's authority regarding water quality certifications for federally licensed hydropower projects. (5) Specifies with respect to a federally licensed hydropower project the DOE may only require a person to mitigate or remedy a water quality violation or problem to the extent substantial evidence exists that the person caused the violation or problem. (6) Allows the DOE to follow the water code's sequence of enforcement actions for circumstances of water waste. (7) Requires the DOE to consider specified factors when levying civil penalties under the water code. (8) Changes the water code's civil penalties from up to \$100 per day to a range from \$100 to \$5,000 per day.

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