

# HOUSE BILL REPORT

## HB 2396

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**As Reported by House Committee On:**  
Agriculture & Natural Resources

**Title:** An act relating to instream flow.

**Brief Description:** Concerning instream flows.

**Sponsors:** Representatives Linville, Kirby, Rockefeller, Lantz, Clibborn, Hunt, Quall, Wallace, Haigh, Miloscia, Wood and Moeller; by request of Governor Locke.

**Brief History:**

**Committee Activity:**

Agriculture & Natural Resources: 1/27/04, 2/3/04 [DPS].

### Brief Summary of Substitute Bill

- Requires the Independent Science Panel (Panel) to provide guidance regarding instream flows and programs and to conduct certain reviews and requires the membership of the panel to be expanded for this purpose.
- Establishes standards for instream flows, requires implementing rules for such standards, and establishes deadlines for adopting rules setting instream flows and reviewing existing flow requirements for all of the mainstem rivers and their key tributaries in the state
- Establishes standards for instream flow implementation programs, requires implementing rules for the standards, requires the development of such programs for each watershed, sets deadlines for doing so, and requires the Department of Ecology (DOE) and the Department of Fish and Wildlife (DFW) jointly to approve the programs.
- Once a list of mainstem rivers and key tributaries is adopted by rule, prohibits (with certain exceptions) the issuance of new water right permits for water from a listed stream until an instream flow program is approved for its watershed.
- Requires instream flows in a watershed to be achieved within eight years after the approval of an instream flow program for the watershed, with certain limited exceptions.

- Requires reviews of the implementation of instream flow programs and directs the DOE and DFW to take certain actions to achieve instream flow requirements.
  - Authorizes the DOE to take other actions to implement and assist in the implementation of the programs and authorizes the DOE to redirect or prioritize certain monies appropriated to it to establish instream flows or develop or approve instream flow programs.
  - Authorizes certain citizen lawsuits.
  - Authorizes the DOE to bring an action in superior court to prevent or remedy the impairment of an instream flow or trust water right.
  - Requires the mitigation provided by the Department of Transportation for its projects in a watershed to provide the mitigation in a manner that assists in implementing an instream flow program that has been approved for the watershed.
  - Removes a limitation on the authority of certain local governments to expend their water-related revenues.
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- Requires certain studies and reports.

## HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Linville, Chair; Rockefeller, Vice Chair; Eickmeyer, Grant, Hunt, McDermott and Quall.

**Minority Report:** Do not pass. Signed by 6 members: Representatives Schoesler, Ranking Minority Member; Holmquist, Assistant Ranking Minority Member; Kristiansen, Assistant Ranking Minority Member; Chandler, Orcutt and Sump.

**Staff:** Kenneth Hirst (786-7105).

### Background:

The DOE may establish instream flow requirements by rule. It may establish minimum instream flows under laws enacted in the late 1960s or base flows under the Water Resources Act of 1971. Once established, such a flow is a water right with a date of priority that is the date the rule establishing it becomes effective. The DOE may also establish instream flows in cooperation with local planning units as part of watershed planning under procedures provided by the state's watershed planning laws. If these procedures are used in a watershed, instream flows must be established within four years of the date the planning unit first receives funding from the DOE to do so. If they are not established by the four-year deadline, the DOE is authorized to initiate rule-making immediately to do so and is given two additional years to adopt rules establishing the

flows. A water right acquired by the state that is expressly conditioned to limit its use to instream purposes must be administered as a trust water right in compliance with that condition.

In a December 12, 2002, document entitled "Work Plan for Instream Flow Setting Through 2010," the DOE divided the state's watersheds into four tiers. It identified a schedule for adopting instream flows for the 23 watersheds in tiers 1 and 2 before 2010 and for making recommendations for instream flows for the 11 watersheds in tier 3 by 2010.

An Independent Science Panel has been created as authorized by state law. Its membership is appointed by the Governor from a list of nominated scientists. The Speaker of the House of Representatives and the Majority Leader of the Senate may remove names from the list. The panel provides certain guidance and contract services regarding salmon recovery.

The Department of Transportation (DOT) is authorized to acquire and develop "advanced environmental mitigation" sites to mitigate adverse impacts of transportation projects before they are designed and constructed. This activity may be conducted in partnership with other entities with the transfer of the title of the site authorized from one party to another.

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### **Summary of Substitute Bill:**

Independent Science Panel. The Independent Science Panel must provide guidance to the DOE regarding rules establishing detailed policies for setting instream flows and rules identifying the required contents of instream flow programs to meet those flow requirements. The panel must also: review the instream flows that are set after the effective date of this bill but before the DOE's rules for such flows are adopted; and provide analyses as part of the record regarding the consistency of any instream flow that is appealed or any implementing instream flow program with the rules adopted by the DOE setting standards for them. The Administrative Procedure Act is amended to allow the analyses regarding instream flow rules to be part of the DOE's rule-making file.

For providing this guidance and these reviews and analyses, the membership of the panel must be expanded. The panel may recommend a list of up to six candidates. Each must possess expertise in hydrology, fluvial geomorphology, fisheries biology, aquatic ecology, or a similar scientific discipline that confers expertise on instream flow. Among the candidates must be scientists who have expertise in instream flow assessment methodologies. The Speaker of the House of Representatives and the Senate Majority Leader may each remove one name from the list. The Governor must consult with tribal representatives and must appoint two scientists from the remaining names on the list. If the panel is expanded in this way, the membership of the panel includes these new

members only with regard to the newly required guidance.

Setting Instream Flows. In general, by 2010, the DOE must set instream flows by rule for all mainstem rivers and their key tributaries in the state and must review for possible revision existing flows set by rule. However, if a planning unit has already received funding assistance from the DOE for the establishment of instream flows for a mainstem river or key tributary under the state's watershed planning laws, the flows must be established by the deadlines provided in those laws. Those laws require (rather than authorize) the DOE to set flows within two years if the deadlines for setting them through the watershed planning process are not met. If minimum instream flows or base flows are already in effect for a stream, their revision is not automatically required. However, once the DOE has adopted rules establishing the standards for instream flows, it must review each of the existing minimum instream flow or base flow rules to determine whether the stream flow requirements of those rules satisfy the new standards and must revise the rules as necessary.

Flow Standards. By December 2006, the DOE must adopt by rule the standards that must be used in establishing instream flow rules. From now on, any instream flows it adopts must establish flow requirements for normal, low, and high water years that achieve hydrologic integrity, considering both the biology and hydrology of the watershed. Such hydrologic integrity is a stream flow that protects biologic, hydrologic, and ecological functions. In identifying the flows, the DOE must use generally accepted, peer-reviewed methodologies. The instream flows must incorporate the current requirements regarding instream flows of: a habitat conservation plan (HCP) approved under the federal Endangered Species Act (ESA); or a federal license for a hydroelectric power project within the watershed. For any revision to such an HCP or reissuance of such a license, the flows must incorporate those requirements, to the extent they are not inconsistent with the requirements of this bill.

The DOE must submit the instream flow rules it intends to propose to the Independent Science Panel for guidance. If the DOE and the panel disagree as to the rules that should be proposed, the DOE must submit the disagreement to mediation. The rules formally proposed by the DOE for adoption must be consistent with the outcome of the mediation.

List of Streams. By July 2005, the DOE must adopt by rule a list of the mainstem rivers and their key tributaries for which instream flows must be adopted. The key tributaries for the mainstem rivers include those important to the protection of fish and other instream environmental values. The Department of Fish and Wildlife (DFW) must develop a list of the key tributaries to the mainstem rivers and provide the list to the DOE for its rule making. It must do so in consultation with affected Indian tribes, watershed planning units, and local groups conducting planning for the DOE under the Water Resources Act.

Moratorium. Following the adoption of the list and until an instream flow program is

approved for the watershed containing a stream on the list, no water right permits may be issued by the DOE for new withdrawals of water from such a stream except permits: required for the public health or safety, or that benefit stream flows or have no net effect on stream flows.

Instream Flow Programs. An instream flow program must be prepared, approved, and implemented for each watershed in the state. The DOE must adopt rules establishing minimum requirements for these programs. Each instream flow program must specify: the actions to be taken to achieve the instream flows in the watershed and the estimated amount of water to be provided to stream flows from each such action; timelines for taking the actions and for achieving the flows; the entities responsible for taking each action; benchmarks to be used to measure the progress in achieving the instream flows; actions that will be taken in the near term and actions that will be taken to make ongoing improvements to secure progress over time; monitoring that will be conducted to measure progress; actions to be taken any time a drought order is issued for the watershed; funding required to implement the program and the sources of the funding; contingency actions that are to be taken if the timelines and benchmarks are not met; how certain required benchmarks and the deadline for achieving flows will be met; and how the program will be reviewed and altered as a part of adaptive management as necessary. The DFW must recommend priority watersheds, tributaries, and stream reaches that need early attention in the program.

Each program must incorporate the current requirements regarding instream flows of any HCP approved under the federal ESA or of a federal license for a hydroelectric power project within the watershed. For any revision to such an HCP or reissuance of such a license, the program must incorporate those requirements, to the extent they are not inconsistent with the requirements of this bill. Each program must also contain: a summary of current information and an analysis of the effect of land use on stream flows, an identification of gaps in the information, and an assessment program to fill those gaps; a summary of existing and planned water use conservation and efficiency programs and projects; and a program for determining the water conservation potential.

State Environmental Policy Act (SEPA). The DOE and DFW must jointly develop a programmatic environmental impact statement for these rules under SEPA. The DOE and DFW are designated as co-lead agencies for conducting environmental review of proposed instream flow programs under SEPA.

Reporting and Assistance. The DOE must identify how progress in achieving the instream flows for a stream is to be reported to it. Beginning in 2008, the DOE must report to the Governor and Legislature biennially on the progress made in achieving and maintaining instream flows in the watersheds. If timelines and benchmarks are not being met, the report must identify the actions that will be taken to meet them.

Programs - Approval; Approval Deadlines. An instream flow program must be approved

for a watershed within one year of the date instream flows are established by rule. For a watershed in which flows had previously been adopted, the program for the watershed must be developed within one year of the date new rules for establishing instream flows are adopted under this bill. However, if those instream flows are to be revised, the program must be approved within one year of the date they are revised.

Each instream flow program must be submitted to the DOE and DFW. The departments must jointly approve, conditionally approve, or disapprove such a program based on its compliance with the DOE's rules. The failure of the departments to take such an action jointly within 90 days of the date a program is submitted constitutes a disapproval of the program. Each approval, conditional approval, or disapproval is subject to appeal to the Pollution Control Hearings Board.

As part of their review for approving a program, the departments must: prefer activities and actions that are consistent with natural hydraulic conditions and that minimize the disruption of those conditions over those that do not; and, following public notice, jointly conduct a public hearing on the program. Notice must be sent to the affected tribes. When approving or conditionally approving a program, the departments must identify the activities and actions specific to the watershed that the departments will take to assist in the implementation of the program.

Programs - Who Develops. A planning unit that has conducted planning in a watershed may choose to develop an instream flow program for the watershed jointly with the DOE. The planning unit must notify the DOE of its intention to do so within three months of the date instream flows are established by rule for a mainstem river or its key tributaries in the watershed.

If a program is not to be developed jointly with a planning unit, the program must be developed for the watershed as a segment of a comprehensive state water resources program. It must be developed by the DOE jointly with or through the advice of a local group of citizens. The DOE may select such a local group from among the groups that have petitioned it to do so within three months of the date instream flows are established by rule for a mainstem river and its key tributaries in the watershed. If no qualifying local group so petitions for a watershed, the DOE must develop the instream flow program and must appoint such a local group to advise the department.

If a program was to have been developed jointly with the DOE but a program that satisfies the requirements is not submitted to the DOE and DFW by the deadline, the DOE must develop an instream flow program for the watershed with the advice of a local group of citizens within the following year. Each instream flow program must be reviewed and modified as needed every six years after it is initially approved. Beginning in 2017, reviews and updates of programs must be done in concert with land use plan updates in a watershed.

Deadlines for Meeting Benchmarks and Achieving Flows. The DOE, in consultation with the DFW, must review each instream flow program every two years after its approval to assess whether there is reasonable progress in complying with the requirements of the program. In watersheds that satisfy the instream flow requirements, the program must describe the actions that will be taken to ensure that the required flows will continue to be met.

In watersheds not meeting the instream flow requirements, the instream flows must be achieved as soon as practicable, but no later than eight years after the approval of the instream flow program for the watershed, unless this deadline is extended. Reasonable progress in achieving instream flows is demonstrated by the following benchmarks:

- At year two of implementation, scheduled actions have been taken, pending actions are on schedule for implementation, and initial improvement to instream flows has occurred; and
- At years four and six, significant progress in achieving and protecting instream flows has occurred, and it is determined that current and planned actions are likely to achieve the instream flows established by rule within the established timeline.

Extensions to the eight-year deadline may be granted by the DOE, but are not favored and may be granted only under extraordinary circumstances. Extensions may not be granted where watershed or stream conditions are poor, which includes situations where water quality standards are not being met, aquatic species are listed under the federal ESA, or aquatic species are listed on the state salmon and stock inventory as critical or depressed. Further, it must be demonstrated at the time of initial approval by the state, and at the required two, four, and six-year reviews, that there is a high likelihood that the proposed actions being relied on to achieve instream flows will be fully funded and effective.

Achieving Flows. If the instream flow program for a watershed does not achieve the instream flows established by rule for the watershed by the deadline or if, during the two, four, or six-year review of the program, the DOE finds that the timelines and benchmarks in the program are not met, the DOE and DFW must take such supplementary actions as are needed to satisfy the timelines and benchmarks to achieve and protect such flows through the use of any and all tools available under law. Included are those under: the state's surface and ground water codes, Water Resources Act of 1971, water registration and relinquishment laws, the State Environmental Policy Act, the general authorities of the DOE, and state laws on minimum water flows and levels, water pollution control, growth management, and shoreline management.

By 2006, the DOE must implement the following programs on a state-wide basis to support the implementation of instream flow programs: a water code compliance program; publicly accessible information (including website access) providing data on streamflows and water use; water rights acquisition, conservation funding and changes in

water conveyances; drought response; and a mediation program and other means to facilitate voluntary shared use agreements and other cooperative mechanisms to achieve instream flows. If the DOE finds that interim timelines and benchmarks are not being met in a watershed, it must, as its initial response, prepare and distribute certain technical assistance and educational information in the watershed.

To achieve instream flows or otherwise implement an instream flow program, the DOE may: provide departmental resources for and adopt rules facilitating certain voluntary agreements for sharing the use of water; expend funds to purchase or lease water rights or to secure low water easements or other interests in water rights; provide financial assistance for water conservation projects, placing the water savings derived from the DOE funded portions in the trust water program and dedicated it to instream flows for the life of the project; provide funding for water conveyance infrastructure projects that benefit instream flows, including projects that substitute one source of water for another or provide for the conjunctive use of water rights; and provide funding for multipurpose water storage projects.

The DOE may redirect or prioritize the use of any capital or operating moneys appropriated to it for administrative purposes or for its water resources program (excluding water quality programs) to use for establishing instream flows or developing or approving instream flow programs. A provision of the state-wide trust water laws is repealed that prohibits the purchase of rights for the trust water system unless the monies are specifically appropriated for this purpose. The DOE may also prioritize its compliance activity regarding water rights and the unauthorized use of water to emphasize compliance in areas governed by a drought emergency order or in a watershed for which instream flows are required but have not yet been established by rule.

The DOE must, in determining where to concentrate its resources for processing applications for new water right permits, give priority to watersheds for which an instream flow program has been approved and in which the timelines and milestones are being met.

Once the instream flows set for a watershed have been achieved for five years, the DOE must review the flow requirements to determine whether the hydrologic integrity sought in establishing them has also been achieved. If it has not, the rules must be revised. After this initial review, the DOE must review all such flows for possible revision every 10 years.

DOE's Authority Regarding Water Right Claims. To prevent or remedy the impairment of instream flow water right or a state trust water right, the DOE may bring an appropriate action at law or in equity, including seeking injunctive relief, in the local superior court. This authority supplements any existing authority of the DOE. The court must make findings and a determination of the validity and priority of the water rights as needed to address any impairment. It must issue any necessary orders, including

injunctive relief, that it determines is necessary to regulate among the water rights.

Citizen Suits. Any person may file an action in Thurston County Superior Court or the local superior court against the DOE or DFW or both for the department's alleged failure to: meet the deadlines for establishing instream flows by rule; meet the deadline for approving or developing an instream flow program for a watershed; implement the department's responsibilities specified in such an approved program; implement the required state-wide support program; and take the supplementary actions required of the department if the timelines and benchmarks required at the two-year review intervals or required for achieving instream flows are not met.

Department of Transportation - Mitigation. If an instream flow program has been approved for a watershed and the DOT is to provide mitigation for a project in the watershed, the DOT must provide it in a manner that assists in implementing the instream flow program. If the project is located in more than one watershed, the DOT must, to the maximum extent possible, concentrate its mitigation efforts by providing mitigation that assists in implementing any instream flow program that has been approved for the project's watersheds. The advanced environmental mitigation that the DOT may conduct in any watershed includes developing or acquiring water management programs. Water rights secured for such mitigation must be placed in the trust water right system and dedicated to instream flows.

Local Authorities. Repealed is a provision of law enacted in 2003 that restricts (with certain exceptions) cities, counties, and certain special purpose districts to spending not more than 10 percent of their water-related revenues to implement projects or activities (that are outside of their existing services or activities) in a watershed management plan.

Studies. A task force must conduct a study of the feasibility and practical effects of storing storm water on farm lands and of designating areas into which flood waters may be diverted or allowed access for both aquifer recharge and flood control purposes. It is to be composed of representatives of the DOE, the Department of Community, Trade, and Economic Development, and the Conservation Commission. Any findings, recommendations, and proposed legislation must be submitted to the Governor and the Legislature by December 31, 2005.

The DOE must convene a water resources administration and funding task force. The task force must review the administrative organization, activities, and authorities of the DOE and DFW regarding water resources. Based on its review, the task force must: identify administrative policies and structure that would provide an efficient and effective water resources program under current law; and develop proposals and recommend several options for funding the state's water resource programs. It must report its findings and its recommendations to the Governor and the Legislature by September 15, 2004. The task force is to consist of representatives of certain specified interests, cities, counties, tribes, and the state's executive branch. A representative of the U. S. Bureau

of Reclamation must be invited to participate as a member of the task force.

By December 1, 2004, the DOE must recommend to the Legislature and the Governor tax incentives for water conservation projects or activities.

**Substitute Bill Compared to Original Bill:**

The substitute bill: (1) requires, rather than authorizes, the membership of the independent science panel to be expanded, alters the expertise required of candidates for the expanded membership, allows its list of candidates to contain up to six names, alters the guidance and reviews that must be conducted by the panel, and requires analyses to be provided by the panel as part of the record when certain appeals are filed; (2) alters the statutory standards for instream flows and requires the implementing rules to be adopted by December 2006; (3) requires instream flow requirements to incorporate requirements regarding such flows that are in existing, approved habitat conservation plans and existing hydropower licenses; (4) removes a requirement that instream flows be consistent with approved watershed plans; (5) requires existing instream flow rules to be reviewed for possible revision by the DOE by 2010; (6) alters the required content of an instream flow program for a watershed, including the informational requirements regarding land use effects on stream flows; (7) requires instream flows that have been achieved to be reviewed for possible revision as to whether the objectives of the flows are being met; (8) further describes the actions in a proposed instream flow program that are to be preferred; (9) requires the departments, when approving a program, to identify the actions they will take to assist in implementing the program; (10) requires the DOE to take certain actions state-wide in support of instream flow programs; (11) establishes benchmarks that must be met in years two, four, and six in implementing an instream flow program, and requires instream flows to be achieved within eight years, with limited exceptions; (12) if those benchmarks are not met, requires the DOE and DFW to take all supplementary actions available under law that are needed to meet the benchmarks; (13) alters citizen law suit provisions; and (14) alters the intent section.

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**Appropriation:** None.

**Fiscal Note:** Available for original bill. Requested for substitute bill on February 3, 2004.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Testimony For:** (Original bill) (1) A state initiative on instream flows is needed. It must be based on sound science and it needs clear time-lines, adequate funding, and certainty. (2) The bill builds on the watershed planning process; it helps to identify how watershed plans are going to be implemented. (3) A deadline for setting flow is needed;

the bill provides one. (4) The bill neither changes the priority or extent of existing water rights nor grants new enforcement powers to the state agencies. It does not provide for Fifth Amendment takings of property. It does make instream flows a state responsibility and requires an identification of what all parties can do. (5) As recognized in the bill and exemplified in the Seattle and Tacoma agreements, different flows are needed in different years and seasons. Nature does not always provide the water needed. (6) Two issues need to be addressed as a package this year, instream flows and relinquishment.

(In support with concerns) There is a need for practical reality; unless the bill recognizes that water is also needed for people, the program will not work. The bill should recognize more fully the requirements of current HCP and hydropower licenses for instream flows. The bill should identify the powers the DFW is expected to exercise for instream flow programs. Citizen suit authority is not needed. The deadlines established by the bill will be difficult to meet.

(Comments): (1) The citizen suit provisions of the bill will have a substantial fiscal impact on the superior courts. (2) Seattle has HCP and hydropower license agreements that establish requirements beyond those just for instream flows. The agreements should be adopted by the state. (3) A package combining instream flow legislation and relinquishment legislation could damage support of instream flows. Preferred uses of water should be consistent with instream flows. (4) The state is already half way through its 2010 plan for setting the flows identified in its work plan and is making progress on other streams. (5) Funding is required to make the instream flow program work; the \$10 fee for a new water right permit and \$2 fee for filing a water right claim are not actually funding sources. (6) Instream flow requirements should be hydrologically achievable and should be identified through the local watershed planning process. (7) We are all in this together. The use of water for instream flows is a public purpose.

**Testimony Against:** (Original bill) (1) The deadlines established by the bill are unrealistic; when these are coupled with the citizen lawsuit provisions, the bill creates an affirmative action to sue. It is an engine for litigation. (2) It is not clear whether the citizen lawsuit provisions allow citizens to sue only the state and not other parties. (3) The bill changes the rules on what instream flows must accomplish, after much work has been done in the watersheds working with current policies. The bill upsets the balance of planning for instream and out-of-stream uses done in watershed planning; it promotes only instream flows. (4) The bill seems to be based on a shoreline management model, which is inappropriate for this purpose. (5) The bill would establish state requirements that are greater than federal requirements. (6) The bill elevates the status of the independent science panel above the watershed planning units. (7) It is not clear what the bill requires of local governments. (8) The bill may allow the establishment of water duty standards. (9) The bill gives too much flexibility to reduce flow requirements in drought years. The deadlines provided by the bill should be shorter to provide greater certainty for the flows. (10) A moratorium should not be placed on issuing new water right permits until instream flow programs are approved.

**Persons Testifying:** (In support of original bill): Jeremy Brown, Washington Trollers Association; and Jim Waldo, Governor's Water Policy Adviser.

(In support with concerns): John Kirner, City of Tacoma Water Department.

(Comments): Martha Harden, Superior Court Judges Association; Paul Parker, Washington State Association of Counties; and Randy Scott, Quinault Nation and the Colville Tribes.

(Opposed) Kathleen Collins, Washington Water Policy Alliance; Kristin Sawin, Association of Washington Business; Dawn Vyvyan, Yakama Nation, Puyallup Tribe, and Northwest Indian Fisheries Commission; and Hertha Lund, Washington State Farm Bureau.

**Persons Signed In To Testify But Not Testifying:** None.