
**Agriculture & Natural Resources
Committee**

HB 2393

Brief Description: Providing for the protection of the health of watersheds.

Sponsors: Representatives Hunt, McDermott, Rockefeller, Cooper, Simpson, G., Upthegrove, Dickerson, Lantz, Romero, Chase, Miloscia, Dunshee, Wood, McIntire, Moeller and Wallace.

Brief Summary of Bill

- Requires an Instream Flow Committee to be established to provide guidance regarding instream flows and programs and to conduct certain reviews.
- Provides standards for instream flows and requires implementing rules.
- Requires the Department of Ecology (DOE) to establish instream flows by rule for all mainstem streams and their key tributaries in the state and establishes deadlines for doing so.
- Provides criteria for and requires the DOE to adopt rules establishing requirements for Streamflow Implementation Performance Programs (SIPPs).
- Requires SIPPs for all of the watersheds of the state and establishes deadlines for doing so.
- Requires the DOE and the Department of Fish and Wildlife (DFW) to approve or disapprove SIPPs and provides for appeals.
- Prohibits new water right permits to be issued in a watershed until a SIPP has been approved for the watershed.
- Requires the DOE to establish certain state-wide programs for supporting the implementation of SIPPs.
- Requires reviews of the implementation of SIPPs and, with limited exceptions, requires instream flows in a watershed to be achieved within six years after the approval of a SIPP for the watershed.

- Authorizes certain citizen suits.
- Establishes a fee on certain water right holders and on entities receiving water from federal reclamation projects, creates an appropriated account for the deposit of revenues from the fee and dedicates the use of the revenues to DOE's administration of SIPPs.
- Authorizes the Governor to proclaim a state of emergency caused by insufficient water supplies and to order the DOE to regulate water users to alleviate the emergency.
- Identifies the authority of the DOE to regulate water rights, or request a court order regulating water rights, to protect other water rights, trust water rights, or instream flows from impairment.

Hearing Date:

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 1960's or base flows under the Water Resources Act of 1971. (RCW 90.22.010 and 90.54..020 & .040.) Once established, such a flow is a water right with a date of priority that is the date the rule establishing it becomes effective. (RCW 90.03.345.) 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. (RCW 90.82.080.) 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 approved 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. (RCW 90.82.080(1)(c).) 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. (RCW 90.38.020 and 90.42.080.)

In a December 12, 2002, document entitled "Work Plan for Instream Flow Setting Through 2010," the DOE divided the state's water resource inventory areas (WRIA's) into four tiers. It identified a schedule for adopting instream flows for the twenty-three WRIA's in tiers 1 and 2 before 2010 and for making recommendations for instream flows for the eleven WRIA's 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. (RCW 77.85.040.)

Summary of Bill:

Declaration of Policy. The Legislature declares that: the common interest of the people as the owners of the waters of the state is paramount in the management of water. In the implementation of this policy, the public's opportunity to enjoy the physical and aesthetic qualities of the waters of the state must be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end, uses must be preferred that are consistent with water resource sustainability, control of pollution, and prevention of damage to the natural environment. (Section 1.)

Instream Flow Committee. An instream flow committee must be established consisting of five individuals with expertise in hydrology, fluvial geomorphology, fisheries biology, aquatic ecology, or a similar scientific discipline that confers expertise in instream flow and in instream flow assessment methodologies. The committee is to provide recommendations on the state's program to establish and achieve instream flows to ensure that the program relies on generally accepted, peer-reviewed methods; appropriate applications are identified; and policies are scientifically defensible and credible. The committee will review instream flow rules before they are adopted and any instream flow rules and streamflow implementation performance programs that are appealed. Regarding the latter, its review is part of the formal record of a program or rule. (Section 2.)

Instream Flow Standards. By December 2007, the DOE must adopt by rule instream flow standards that must be used in developing or modifying instream flows. In developing the standards, the DOE must consult with the Department of Fish and Wildlife (DFW). Instream flow rules must establish flow requirements for normal, low, and high water years that achieve hydrologic integrity, considering both the biology and hydrology of the watershed. Once guidance has been provided by the Instream Flow Committee, the standards must be consistent with that guidance and subsequently must be updated to be consistent with any further guidance from the committee. Until the standards are adopted, the DOE must use the policies provided in its published instream flow guidance document regarding instream flows. (Section 3.)

Setting Instream Flows. Once the standards adopted, the DOE must review all minimum water flows or base flows previously set by rule to determine whether they are consistent with the standards and, by 2009, must modify any that are inconsistent with the standards to make them consistent. By the end of 2010, the DOE must establish by rule instream flows under the standards for all mainstems and key tributaries of the streams in the state. The key tributaries must be identified by the DFW, in consultation with tribes, and must include streams important to the protection of fish and other environmental values.

The order of priority for doing so is the schedule for setting instream flows contained in DOE's 2002 document entitled "Work Plan for Instream Flow Setting Through 2010" for the streams scheduled in the work plan. For mainstem streams and key tributaries for which flows are not scheduled to be developed in the work plan or under the state's watershed planning laws, the DOE must set the order of priority. The watershed planning laws are amended to require, rather than authorize, the DOE to set flows if the deadlines for setting them through the watershed planning process are not met. After 2011, the instream flows rules must be reviewed at least every seven years and updated as necessary to be consistent with any further guidance provided by the Instream Flow Committee. (Sections 4 and 18.)

Streamflow Implementation Performance Programs (SIPPs). By December 2007, the DOE must adopt rules for SIPPS which ensure that they will be adequate to achieve designated instream flows by the deadlines established by this bill. The Instream Flow Committee must evaluate the draft rules. The DOE and DFW must formally respond to the findings and recommendations of the committee. As a minimum, each SIPP must contain: actions to be taken to achieve instream flows, and the schedule for those actions; the estimated quantity of streamflows to result from each action; actions that will improve instream flows upon approval of the SIPP; the roles and responsibilities for each action, and the funding amount and source; performance benchmarks to be achieved over time, the monitoring of performance, and periodic reporting; provisions for review and change; provisions for collecting and reporting information on streamflow and water use measurement, including a description of how the information will be made accessible to the public; a summary of current information and an analysis of the effect of land use on streamflows, an identification of gaps in information, and an assessment program to fill those data gaps (the analysis must focus on whether and to what extent urbanization and development in urban and urbanizing counties and forest practices, development, and agricultural practices in rural counties affect streamflows); a summary of existing and planned water use conservation and efficiency programs and projects, and a program for determining the conservation potential within the watershed; supplemental actions to be taken if planned actions do not meet the identified benchmarks; and water use compliance requirements consistent with state-wide compliance programs. SIPP actions that are consistent with natural hydrologic conditions and minimize disruption of those conditions are preferred over those that do not. SIPPs must describe the obligations and agreements necessary to achieve and protect instream flows. (Section 6(1)&(3).)

At a minimum, the SIPP must consist of a state rule detailing the state's responsibilities, authorities, and actions needed to achieve the instream flow. A SIPP may optionally contain elements for: acquiring water rights, pro rata water use reduction agreements, and storage projects. (Section 6(2)&(3).)

SIPP Required; Deadline. A SIPP must be developed for each watershed in the state. It may be developed by a planning unit or by a locally based entity requested by the DOE to advise it under the Water Resources Act. If a SIPP is not developed by such a planning unit or locally based entity, it must be developed by the DOE. Each plan must satisfy the requirements the DOE's rules adopted by providing implementation, maintenance, and assurance measures to achieve the instream flows. A SIPP must be developed for each watershed within one year of the adoption of a new or amended instream flow rule. (Section 5.) However, if a SIPP is disapproved by the DOE on upon appeal, the DOE must develop a SIPP for the watershed within one year of the date of the disapproval or finding. (Sections 8(1) and 17.)

The processing of new water rights applications must be held in abeyance in a watershed until a SIPP has been approved by the state for the watershed. (Section 8(1).)

State-Wide Implementation Programs. By 2006, the DOE must implement the following programs on a state-wide basis to support the implementation of SIPPs: publicly accessible information (including website access) providing data on streamflows and water use; water rights acquisition; water conservation funding; changes in water conveyance to benefit instream flows; drought response; a water code compliance program that regulates illegal and wasteful water use (in consultation with the Department of Health regarding municipal water suppliers); and a

mediation program and other means to facilitate voluntary shared use agreements and other cooperative mechanisms to achieve instream flows.

If SIPPs do not achieve instream flows or if, during the two or four-year reviews of the programs, the DOE finds that the timelines and benchmarks in a program are not met, the DOE and DFW must take actions that will satisfy the timelines and benchmarks to achieve and protect such flows through the use of any and all tools available under law. These tools include 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. (Section 7 (1)&(2).)

Citizen Suits. Any person may file an action in Thurston County Superior Court or the superior court for the county in which the affected watershed exists to compel any agency action by these provisions regarding instream flows and SIPPs. (Section 7(3).)

SIPP Approval and Appeal. Each SIPP must be reviewed for approval by the DOE with the concurrence of the DFW. The departments must approve, conditionally approve, or disapprove such a program based on its compliance with the DOE's rules. Their action is subject to appeal to the Pollution Control Hearings Board (PCHB). A plan cannot be approved that is not consistent with DOE's rules.

SIPPs that are appealed to the PCHB on technical merits or methods must be reviewed by the Instream Flow Committee. The purpose of the committee's review is to determine if the proposed program is technically sound and whether the proposed actions are likely to achieve the instream flows set by rule. The PCHB's review is de novo and the committee's findings and recommendations must be considered by the PCHB during the appeal. The DOE and DFW must formally respond in writing to the committee's findings and recommendations. (Sections 8(1) and 17.)

SIPP Review; Deadlines for Achieving Flows. The DOE must review each approved or conditionally approved streamflow implementation performance program every two years to assess progress in complying with its requirements and timelines. The DOE must classify watersheds and their subbasins as making or failing to make reasonable progress in achieving the instream flows adopted for the streams in the watersheds or subbasins. In watersheds currently meeting required instream flows, the SIPP must describe actions that will be taken to ensure that the required instream flow will continue to be met. In watersheds not currently meeting required instream flows, SIPPs must achieve instream flows as soon as practicable, but no later than six years from state approval, unless this deadline is extended. Reasonable progress means: 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; at year four of implementation, 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 (if the actions are not likely to achieve the instream flows, supplemental actions must be identified to achieve the instream flows); and at year six of the program, instream flows have been achieved. (Section 8(2)&(3).)

Extension of Six-year Deadline; Updates. Extensions to the six-year deadline for achieving instream flows 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 or aquatic species are listed under the federal Endangered Species Act or are listed on the State Salmon and Stock Inventory as critical or depressed. It must be also demonstrated at the time of initial approval by the state, and at the required two and four-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. (Section 8(4).)

Six years after the approval or conditional approval of a SIPP or on its extended deadline, the DOE must declare whether the instream flows of the streams governed by the program satisfy the instream flow rules adopted for them. The DOE's declaration is subject to appeal to the PCHB. Once streamflows are achieved, and by 2017, review and updates to SIPPs must occur in concert with land use plan updates. (Sections 8(5)&(6) and 17).

Water Fee. An annual fee is imposed on: the diversion or withdrawal of water by a water right holder; and on the receipt of water from a federal reclamation project for distribution to water users or consumers. The fee is to provide funding to the DOE to provide for the long-term health of watersheds through the administration and enforcement of SIPPs for establishing and achieving instream flows. (Section 12(1).) The fee does not apply to a person with a right to withdraw water from an exempt well established by the effective date of this bill. (Section 11(3).)

For diversions or withdrawals by a water right holder, the fee is in the amount of __cents for each cubic foot of water diverted or withdrawn by the water right holder in a calendar year and is the financial responsibility of the water right holder. For persons or entities receiving water from a federal reclamation project for distribution to water users or consumers, the fee is in the amount of __cents for each cubic foot of water received in a calendar year for such distribution from the project and is the financial responsibility of the person or entity receiving the water for distribution. (Section 12(2).)

The Department of Revenue must collect these fees and deposit them, less collection costs, in the Streamflow Implementation Performance Account, which is created in the State Treasury. The Account is subject to appropriation. Expenditures from the Account may be used only to provide funding to the DOE for administering the SIPPs. The provisions of state law that apply generally to the administration of excise taxes apply to the fee, except that the fee is to be collected annually. (Section 12(3) and 13.)

Gubernatorial Proclamation of Emergency - Powers. If the Governor proclaims a state of emergency in response to an imminent danger to the public health or the environment caused by insufficient water supplies, the Governor must order the DOE to issue orders regulating water users as is necessary to alleviate the danger. (Section 15.)

Authority of the DOE to Regulate to Prevent Impairment. Certain powers of the DOE are delineated that apply whether or not a general adjudication relating to the water rights involved has been conducted. They must be exercised based on the examination and determination by the DOE or the court, as applicable, of the various water rights involved according to the DOE's records and other records and pertinent facts.

The DOE may regulate a water right or rights under either its current general authorities or the authorities granted by this bill in a regulatory situation: where a water right or all water rights

proposed for regulation, as well as any right of a senior priority that the proposed regulation is designed to protect, is or are represented by a water right certificate or permit or a trust water right; where an instream flow has been established by rule; or where it appears to the DOE that public waters are being withdrawn without any right or authority whatsoever.

The DOE may bring an appropriate action at law or in equity, including seeking injunctive relief, as it may deem necessary in a regulatory situation: where one or more of the water rights proposed for regulation by the DOE, as well as any right or rights of a senior priority that the proposed regulation is designed to protect, is not or are not embodied in a water right certificate or permit, a trust water right, or an instream flow established by rule. Where actions are brought in a state court, they must be initiated in the local superior court. The superior court must make findings and a determination of the validity and priority of the water rights held by the parties to resolve the regulatory situation. It must issue any implementing orders, including injunctive relief, that it determines is necessary to regulate among the water rights. (Section 16.)

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed, except for section 15, regarding gubernatorial declarations of emergency, which takes effect on 7/1/04.