
**Agriculture & Natural Resources
Committee**

HB 2396

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 Summary of Bill

- Requires the Independent Science Panel (Panel) to provide guidance to the Department of Ecology (DOE) regarding instream flows and permits the membership of the panel to be expanded for this purpose.
- Establishes standards for instream flows and requires implementing rules.
- Establishes deadlines for the DOE to adopt rules setting instream flows for all of the mainstem rivers and their key tributaries in the state and requires mediation between the DOE and the Panel in certain instances.
- Establishes standards for instream flow programs, requires implementing rules for the standards, requires the development of such programs for each of the mainstem rivers and key tributaries in the state, sets deadlines for doing so, and requires the 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 flow programs to be designed to achieve instream flows within 10 years of program approval and establishes review periods for monitoring the implementation of the programs.
- Authorizes the DOE and directs the DOE and DFW to take certain actions to implement and assist in the implementation of the programs. 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 law suits.
- 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 be provided 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.
- Requires certain studies and reports.

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.)

The Department of Transportation 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. (RCW 42.17.330.)

Summary of Bill:

Independent Science Panel. The Independent Science Panel must provide guidance to the DOE on: rules to be proposed by the DOE establishing detailed policies for setting instream flows; and peer-reviewed flow setting methodologies that would identify the flows satisfying the requirements of the proposed rules.

After that guidance has been provided, the panel is also to provide guidance to the DOE on: actions which would likely provide measurable progress in providing stream flows in a watershed; and evaluating the interim progress made in implementing approved instream flow programs and reviewing a program for possible revision at the end of six years.

If the panel believes that its membership should be expanded to add expertise to provide this guidance, the panel may recommend a list of six of the most qualified scientists as candidates to provide that expertise. Each candidate must have practical experience with stream flows, hydrology, or the evaluation of water requirements for fish. 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. (Section 2.)

Setting Instream Flows. In general, instream flows must be established by the DOE by rule for all mainstem rivers and their key tributaries in the state by 2010. However, if a planning unit has received funding assistance from the DOE by the effective date of this bill 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. (Section 4(1).) Those laws now 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. (Section 15.)

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: be hydrologically achievable under natural conditions and biologically defensible for each of the various periods of the year they apply; and provide variation to reflect changes in climate from wet to normal to drought years. 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, to the extent those requirements are not inconsistent with the requirements of this bill. (Section 4(2).) The variations in the flow level requirements that reflect seasonal and climatic variations must be used by the DOE in processing applications for new water use permits or for modifications of existing water rights. (Section 9(2).)

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 implementing this subsection that are

formally proposed by the DOE for adoption must be consistent with the outcome of the mediation. (Section 4(1).)

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.

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. (Section 4(3).)

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. (Section 4(4).)

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 (when instream flows are not achieved, priority must be given to actions that place the most water in the stream in the near term); 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; and how the program will be reviewed and altered as a part of adaptive management as necessary. (Section 5(1)&(2).) The DFW must recommend priority watersheds, tributaries, and stream reaches that need early attention in the program. (Section 13.)

Instream flow programs must be designed to achieve instream flows within 10 years of program approval. (Section 5(5).) 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 to the extent those requirements are not inconsistent with the provisions this bill. (Section 5(3).) Each program must also contain: A description of how land use practices in the watershed affect stream flows; a summary of existing and planned water use conservation and efficiency programs and projects; and a program for determining the water conservation potential. (Section 5(4).) If a watershed plan is in effect under the state's watershed planning laws for a watershed, the instream flow program for the watershed must be based on the watershed plan. (Section 5(8).)

State Environmental Policy Act (SEPA). The DOE and DFW must jointly develop a programmatic environmental impact statement for these rules under SEPA. (Section 5(9).) The DOE and DFW are designated as co-lead agencies for conducting environmental review of proposed instream flow programs under SEPA. (Section 6(1)(d).)

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. (Section 5(6).) 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. (Section 5(7).)

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 the mainstem rivers and their key tributaries in the watershed. 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. (Section 6(1)(a).)

Each instream flow program must be submitted to the DOE and DFW. The departments must review the programs for compliance with the requirements established by rule for the programs. The DOE and DFW 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. (Sections 6(1)(b) and 20.) As part of their review, the departments must consider the guidance provided by the independent science panel regarding actions that would likely provide measurable progress. Following public notice, they must jointly conduct a public hearing on the program. (Section 6(1)(b)&(c).) Notice must be sent to the affected tribes. (Section 12.)

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. (Section 6(2).)

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. (Section 6(3).) Each instream flow program must be reviewed and modified as needed every six years after it is initially approved. (Section 6(4).)

Achieving Flows. To achieve instream flows or otherwise implement the provisions of 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. (Section 8(1).)

DOE Implementation Duties/Authorities. 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. (Section 9(1).) 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. (Section 19.) 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. (Section 8(2)&(3).)

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. (Section 9(1).)

If, at the conclusion of the six-year review of an instream flow program, the program is not being implemented, instream flows have not been achieved, and the deadline for achieving instream flows approved as part of the program has passed, the DOE and DFW must take actions to achieve instream flows within the watershed, using any and all powers granted to the departments under current law as needed to achieve the instream flows. (Section 10.)

DOE 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. (Section 18.)

Citizen Suits. Any citizen of the state may commence a civil action in superior court against the Director of Ecology for the DOE'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 responsibilities of the DOE specified in such an approved program; and implement the actions the DOE must take following the six-year review of an unsuccessful program.

The court may issue a writ of mandamus to order the Director to perform the duty. Requirements are established for providing notice and providing copies of the complaint. The court may award costs of litigation, including reasonable attorneys' fees and expert witness fees, to a prevailing or substantially prevailing party. If a temporary restraining order or preliminary injunction is sought, the court may require the filing of a bond or equivalent security. (Section 11.)

Department of Transportation - Mitigation. If an instream flow program has been approved for a watershed and the Department of Transportation (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 that 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. (Section 17.) 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. (Section 16.)

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. (Section 21.)

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. (Section 22.)

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. (Section 23.)

By December 1, 2004, the DOE must recommend to the Legislature and the Governor tax incentives for water conservation projects or activities. (Section 8(4).)

Appropriation: None.

Fiscal Note: Not requested.

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