

Filed  
JUN 24 2003  
Secretary of State

CERTIFICATION OF ENROLLMENT

**ENGROSSED SUBSTITUTE SENATE BILL 5028**

Chapter 15, Laws of 2003  
First Special Session

58th Legislature  
2003 1st Special Session

**REFERENDUM MEASURE 54**

EFFECTIVE DATE: September  
9, 2003

PORTION  
REFERRED  
IS ENCLOSED  
IN A BOX  
AND INITIALED  
BY THE  
SPONSOR

Passed by the Senate June 5, 2003  
YEAS 26 NAYS 22

BRAD OWEN

**President of the Senate**

Passed by the House June 10, 2003  
YEAS 61 NAYS 31

FRANK CHOPP

**Speaker of the House of Representatives**

CERTIFICATE

I, Milton H. Doumit, Jr., Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5028** as passed by the Senate and the House of Representatives on the dates hereon set forth.

MILTON H. DOUMIT, JR.

**Secretary**

Approved JUN 20 2003

GARY LOCKE

**Governor of the State of Washington**

FILED

**Secretary of State  
State of Washington**

JUN 20 2003  
Time 2:22 p.m.

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ENGROSSED SUBSTITUTE SENATE BILL 5028

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Passed Legislature - 2003 1st Special Session

State of Washington                      58th Legislature                      2003 Regular Session

By Senate Committee on Natural Resources, Energy & Water (originally sponsored by Senators Morton and Hale)

READ FIRST TIME 02/07/03.

1            AN ACT Relating to water pollution; amending RCW 90.03.400 and  
2 90.03.600; and adding a new section to chapter 90.48 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

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

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

1 under section 401 of the clean water act, 33 U.S.C. 1251 et seq.

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

9 (3) The department may not abrogate, supersede, impair, or  
10 condition the ability of a water right holder to fully divert or  
11 withdraw water under a water right permit, certificate, statutory  
12 exemption, or claim granted or recognized under chapter 90.03,  
13 90.14, or 90.44 RCW through the authority granted to the department  
14 in this chapter. However, nothing in this act shall be construed to  
15 affect the department's authority related to the issuance of  
16 certifications under section 401 of the federal clean water act, 33  
17 U.S.C. 1251 et seq., with respect to the application of federally  
18 authorized water quality standards, for federal energy regulatory  
19 commission licensed hydropower projects as provided under this  
20 chapter and chapter 90.74 RCW. With respect to federal energy  
21 regulatory commission licensed hydropower projects, the department  
22 may only require a person to mitigate or remedy a water quality  
23 violation or problem to the extent there is substantial evidence  
24 such person has caused such violation or problem. JWR

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

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

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

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

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

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

5 In determining the amount of a penalty to be levied, the  
6 department shall consider the seriousness of the violation, whether  
7 the violation is repeated or continuous after notice of the violation  
8 is given, and whether any damage has occurred to the health or  
9 property of other persons. Except as provided in RCW 43.05.060  
10 through 43.05.080 and 43.05.150, ~~((the power is granted to))~~ the  
11 department of ecology ~~((to))~~ may levy civil penalties ~~((of up to))~~  
12 ranging from one hundred dollars to five thousand dollars per day for  
13 violation of any of the provisions of this chapter and chapters  
14 43.83B, 90.22, and 90.44 RCW, and rules, permits, and similar  
15 documents and regulatory orders of the department of ecology adopted  
16 or issued pursuant to such chapters. The procedures of RCW 90.48.144  
17 shall be applicable to all phases of the levying of a penalty as well  
18 as review and appeal of the same.

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