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ENGROSSED SUBSTITUTE SENATE BILL 5028

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

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

18 (2) When a water quality standard cannot be reasonably met through  
19 the issuance of permits or regulatory orders issued under the authority

1 of this chapter, the department may use voluntary, incentive-based  
2 methods including funding of water conservation projects, lease and  
3 purchase of water rights, development of new storage projects, or  
4 habitat restoration projects in an attempt to meet water quality  
5 standards.

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

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

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

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

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

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

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

35 In determining the amount of a penalty to be levied, the department  
36 shall consider the seriousness of the violation, whether the violation

1 is repeated or continuous after notice of the violation is given, and  
2 whether any damage has occurred to the health or property of other  
3 persons. Except as provided in RCW 43.05.060 through 43.05.080 and  
4 43.05.150, (~~the power is granted to~~) the department of ecology (~~to~~)  
5 may levy civil penalties (~~of up to~~) ranging from one hundred dollars  
6 to five thousand dollars per day for violation of any of the provisions  
7 of this chapter and chapters 43.83B, 90.22, and 90.44 RCW, and rules,  
8 permits, and similar documents and regulatory orders of the department  
9 of ecology adopted or issued pursuant to such chapters. The procedures  
10 of RCW 90.48.144 shall be applicable to all phases of the levying of a  
11 penalty as well as review and appeal of the same.

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