
SENATE BILL 5250

State of Washington

58th Legislature

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By Senators Regala, Jacobsen, Fraser, Kohl-Welles and Kline

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1 AN ACT Relating to instream flows; amending RCW 90.22.060,
2 90.22.010, 90.54.020, 90.03.345, 77.55.050, and 90.03.290; reenacting
3 and amending RCW 90.54.050; and adding a new section to chapter 90.22
4 RCW.

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

6 **Sec. 1.** RCW 90.22.060 and 1998 c 245 s 172 are each amended to
7 read as follows:

8 ~~((By December 31, 1993, the department of ecology shall, in
9 cooperation with the Indian tribes, and the department of fish and
10 wildlife, establish a statewide list of priorities for evaluation of
11 instream flows. In establishing these priorities, the department shall
12 consider the achievement of wild salmonid production as its primary
13 goal.))~~ (1) The purpose of this section is to specify the priorities to
14 be used in establishing instream flows under RCW 90.22.010 and
15 90.54.020. Instream flows shall be established in rule for all
16 mainstem rivers and primary tributaries of the state by the year 2010.
17 The department of ecology, in close cooperation with the department of
18 fish and wildlife, must pursue achievement of this goal as a matter of

1 high priority. In developing and implementing the work plan required
2 under subsection (2) of this section, priority shall be given to
3 establishing instream flow rules in:

4 (a) Water resource inventory areas numbers 1, 5, 7, 8, 9, 10, 12,
5 17, 18, 32, 35, 37, 38, 39, 45, 48, and 49 as those areas are
6 established in chapter 173-500 WAC as it exists on the effective date
7 of this section; and

8 (b) Water resource inventory areas that are conducting planning
9 under chapter 90.82 RCW as of the effective date of this section.

10 (2) By December 2003, the department, in consultation with the
11 department of fish and wildlife and with affected tribal governments,
12 planning units under chapter 90.82 RCW, and local governments, shall
13 publish a work plan that identifies where and when instream flows will
14 be developed and adopted by rule in order to achieve the goals in this
15 section. The work plan must also define tributary areas where flows
16 should be addressed and provide a schedule for prioritizing,
17 recommending, and setting flows in these areas, as appropriate. This
18 work plan must be updated annually. By December 31st of each odd-
19 numbered year, the department shall prepare a report on progress in
20 implementing the work plan for the previous biennium.

21 The department, in consultation with the department of fish and
22 wildlife and with affected tribal governments, planning units under
23 chapter 90.82 RCW, and local governments, shall develop and publish
24 strategies for achieving flows that satisfy the flow requirements of
25 the instream flow rules including, but not limited to, an
26 identification of priorities for the use of state resources to achieve
27 the flows. The strategies shall identify means of measuring whether
28 progress toward achieving instream flow requirements and overcoming
29 other limiting factors identified for streams is being made, and the
30 actions that will be taken if such progress is not being made for a
31 stream. For a water resource inventory area in which watershed
32 planning is conducted under chapter 90.82 RCW and for which the
33 planning unit has elected to recommend instream flows, the strategies
34 shall be those contained in the plan developed under chapter 90.82 RCW.

35 **Sec. 2.** RCW 90.22.010 and 1997 c 32 s 4 are each amended to read
36 as follows:

37 (1) The department of ecology ((may)) shall establish ((minimum))

1 instream water flows or levels for the state's major rivers, streams,
2 lakes, or other public waters (~~(for the purposes of protecting fish,~~
3 ~~game, birds or other wildlife resources, or recreational or aesthetic~~
4 ~~values of said public waters whenever it appears to be in the public~~
5 ~~interest to establish the same. In addition, the department of ecology~~
6 ~~shall, when requested by the department of fish and wildlife to protect~~
7 ~~fish, game or other wildlife resources under the jurisdiction of the~~
8 ~~requesting state agency, or if the department of ecology finds it~~
9 ~~necessary to preserve water quality, establish such minimum flows or~~
10 ~~levels as are required to protect the resource or preserve the water~~
11 ~~quality described in the request or determination. Any request~~
12 ~~submitted by the department of fish and wildlife shall include a~~
13 ~~statement setting forth the need for establishing a minimum flow or~~
14 ~~level. When the department acts to preserve water quality, it shall~~
15 ~~include a similar statement with the proposed rule filed with the code~~
16 ~~reviser. This section shall not apply to waters artificially stored in~~
17 ~~reservoirs, provided that in the granting of storage permits by the~~
18 ~~department of ecology in the future, full recognition shall be given to~~
19 ~~downstream minimum flows, if any there may be, which have theretofore~~
20 ~~been established hereunder)) consistent with the standards and
21 procedures of this section and RCW 90.54.020.~~

22 (2) Instream flows shall be established to protect the full range
23 of applicable instream interests and values, including fish and
24 wildlife habitat, water quality, navigation, and scenic, aesthetic, and
25 environmental quality values. In establishing instream flows, the
26 department shall seek to fulfill instream interests and values based
27 upon both state and federal laws and federal treaties. Instream flows
28 should be established with the objective of being achievable a majority
29 of the time, recognizing seasonal variation, when based upon
30 hydrological records of natural flow conditions. On streams or stream
31 reaches where fish populations are the predominant consideration,
32 instream flows shall be established sufficient to support the
33 biological needs of fish at all life stages with the objective of
34 achieving sustainable and harvestable levels of fish.

35 (3) A higher instream flow may be established where recommended by
36 an approved watershed plan under chapter 90.82 RCW or other similar
37 comprehensive planning process. In considering whether to adopt or
38 recommend a higher instream flow, the department and watershed planning

1 units shall be guided by the allocation policies declared in RCW
2 90.54.020, including application of the maximum net benefits standard
3 to alternative uses of water for instream and offstream purposes.

4 (4) Where consistent with the requirements of subsection (2) of
5 this section and RCW 90.54.020, instream flow rules must incorporate an
6 instream flow component established by:

7 (a) The conditions for a license issued by the federal energy
8 regulatory commission after May 1994, for a hydroelectric power
9 generating facility, where the department of ecology with the agreement
10 of the department of fish and wildlife has approved or otherwise
11 formally acknowledged the instream flow component on behalf of the
12 state;

13 (b) The conditions established under a habitat conservation plan
14 approved under the federal endangered species act, where the department
15 of ecology with the agreement of the department of fish and wildlife
16 has approved or otherwise formally acknowledged the instream flow
17 component on behalf of the state; and

18 (c) The federal Yakima river basin water enhancement project
19 pursuant to Public Law 103-434.

20 (5) In establishing instream flows, the department shall use the
21 best available scientific information. When adequate information is
22 not available for a lake, stream, or stream reach and may not be
23 obtainable in a timely manner, an instream flow shall be established
24 that places the least risk upon jeopardizing the protection of instream
25 values, with the objective of reviewing and potentially revising the
26 level when adequate information becomes available. In developing and
27 selecting methodologies for use in establishing flows or levels for the
28 recovery of fish populations, and in developing criteria to select
29 methods to apply in each situation, the department shall consult with
30 the department of fish and wildlife, Indian tribes, and the science
31 panel created under RCW 77.85.040, and shall consult periodically with
32 them in updating methodologies. The department may select from among
33 several acceptable methodologies for a specific stream or lake, based
34 upon considerations such as fish species of principal concern,
35 available funding and staffing, the depletion of stream flows, and the
36 safety of personnel conducting the evaluation.

37 (6) The department shall apply a scientific-based adaptive
38 management process following the adoption of instream flow rules. This

1 shall include periodic review of hydrological, biological, and other
2 information regarding the level of protection of instream resources and
3 values, regular monitoring, and assessment consistent with the rule
4 implementation plan required under section 4 of this act, a scientific
5 and peer review process, and revision of adopted rules based upon new
6 information and analysis when appropriate to better achieve the level
7 of protection required by this section and RCW 90.54.020.

8 (7) In establishing instream flows, the department shall accord
9 substantial weight to the recommendations of a planning unit making a
10 timely recommendation for that lake, stream, stream reach, or other
11 public body of water as part of an approved watershed plan under
12 chapter 90.82 RCW. Where fish populations are a principal instream
13 value in establishing the instream flow, the department shall accord
14 substantial weight to the recommendations of the department of fish and
15 wildlife and Indian tribes with a treaty-based fishery right in the
16 water body, and shall provide a written explanation of any departure
17 from such recommendations.

18 **Sec. 3.** RCW 90.54.020 and 1997 c 442 s 201 are each amended to
19 read as follows:

20 Utilization and management of the waters of the state shall be
21 guided by the following general declaration of fundamentals:

22 (1) Uses of water for domestic, stock watering, industrial,
23 commercial, agricultural, irrigation, hydroelectric power production,
24 mining, fish and wildlife maintenance and enhancement, recreational,
25 and thermal power production purposes, and preservation of
26 environmental and aesthetic values, and all other uses compatible with
27 the enjoyment of the public waters of the state, are declared to be
28 beneficial.

29 (2) Allocation of waters among potential uses and users shall be
30 based generally on the securing of the maximum net benefits for the
31 people of the state. Maximum net benefits shall constitute total
32 benefits less costs including opportunities lost.

33 (3) The quality of the natural environment shall be protected and,
34 where possible, enhanced as follows:

35 ~~(a) ((Perennial rivers and streams of the state shall be retained~~
36 ~~with base flows necessary to provide for preservation of wildlife,~~
37 ~~fish, scenic, aesthetic and other environmental values, and~~

1 ~~navigational values~~) Flows in the state's perennial rivers and streams
2 shall be managed to protect the full range of applicable instream
3 interests and values, including fish and wildlife habitat, water
4 quality, navigation, and scenic, aesthetic, and environmental quality
5 values. Regulatory instream flows shall be established pursuant to RCW
6 90.22.010. Lakes and ponds shall be retained substantially in their
7 natural condition. Withdrawals of water or the establishment of
8 regulatory instream flows which would conflict (~~(therewith)~~) with the
9 level of protection required by this subsection shall be authorized
10 only in those situations where (~~it is clear that overriding~~
11 ~~considerations of the public interest will be served~~):

12 (i) It is necessary to meet emergency public health or safety
13 needs; or

14 (ii) It is necessary to meet emergency economic needs that are
15 regionwide, where full mitigation is provided for lowering flows or
16 levels critical for the survival of critical or depressed fish
17 populations; and

18 (iii) The authorized uses or exceptions to established regulatory
19 flows are of limited duration.

20 (b) Waters of the state shall be of high quality. Regardless of
21 the quality of the waters of the state, all wastes and other materials
22 and substances proposed for entry into said waters shall be provided
23 with all known, available, and reasonable methods of treatment prior to
24 entry. Notwithstanding that standards of quality established for the
25 waters of the state would not be violated, wastes and other materials
26 and substances shall not be allowed to enter such waters which will
27 reduce the existing quality thereof, except in those situations where
28 it is clear that overriding considerations of the public interest will
29 be served. Technology-based effluent limitations or standards for
30 discharges for municipal water treatment plants located on the
31 Chehalis, Columbia, Cowlitz, Lewis, or Skagit river shall be adjusted
32 to reflect credit for substances removed from the plant intake water
33 if:

34 (i) The municipality demonstrates that the intake water is drawn
35 from the same body of water into which the discharge is made; and

36 (ii) The municipality demonstrates that no violation of receiving
37 water quality standards or appreciable environmental degradation will
38 result.

1 (4) The development of multipurpose water storage facilities shall
2 be a high priority for programs of water allocation, planning,
3 management, and efficiency. The department, other state agencies,
4 local governments, and planning units formed under section 107 or 108
5 (~~of this act~~), chapter 442, Laws of 1997 shall evaluate the potential
6 for the development of new storage projects and the benefits and
7 effects of storage in reducing damage to stream banks and property,
8 increasing the use of land, providing water for municipal, industrial,
9 agricultural, power generation, and other beneficial uses, and
10 improving stream flow regimes for fisheries and other instream uses.

11 (5) Adequate and safe supplies of water shall be preserved and
12 protected in potable condition to satisfy human domestic needs.

13 (6) Multiple-purpose impoundment structures are to be preferred
14 over single-purpose structures. Due regard shall be given to means and
15 methods for protection of fishery resources in the planning for and
16 construction of water impoundment structures and other artificial
17 obstructions.

18 (7) Federal, state, and local governments, individuals,
19 corporations, groups and other entities shall be encouraged to carry
20 out practices of conservation as they relate to the use of the waters
21 of the state. In addition to traditional development approaches,
22 improved water use efficiency and conservation shall be emphasized in
23 the management of the state's water resources and in some cases will be
24 a potential new source of water with which to meet future needs
25 throughout the state.

26 (8) Development of water supply systems, whether publicly or
27 privately owned, which provide water to the public generally in
28 regional areas within the state shall be encouraged. Development of
29 water supply systems for multiple domestic use which will not serve the
30 public generally shall be discouraged where water supplies are
31 available from water systems serving the public.

32 (9) Full recognition shall be given in the administration of water
33 allocation and use programs to the natural interrelationships of
34 surface and ground waters.

35 (10) Expressions of the public interest will be sought at all
36 stages of water planning and allocation discussions.

37 (11) Water management programs, including but not limited to, water

1 quality, flood control, drainage, erosion control and storm runoff are
2 deemed to be in the public interest.

3 NEW SECTION. **Sec. 4.** A new section is added to chapter 90.22 RCW
4 to read as follows:

5 Within one year of adopting an instream flow or level rule, the
6 department of ecology shall adopt an implementation plan describing
7 actions needed to protect flows or levels subject to the rule. The
8 plan provisions shall include but are not limited to:

9 (1) Needed flow gauges or other measuring methods on key stream
10 reaches;

11 (2) Roles and responsibilities of the department and the department
12 of fish and wildlife in protecting the flows or restoring flows;

13 (3) Enforcement of the flows against unauthorized withdrawals; and

14 (4) Performance measures and assessment of the level of protection
15 of instream resources and values, to assist with the periodic review
16 required by RCW 90.22.010.

17 **Sec. 5.** RCW 90.03.345 and 1979 ex.s. c 216 s 7 are each amended to
18 read as follows:

19 (1) The establishment of reservations of water for agriculture,
20 hydroelectric energy, municipal, industrial, and other beneficial uses
21 under RCW 90.54.050(1) or ((minimum)) instream flows or levels under
22 RCW 90.22.010 or 90.54.040 shall constitute appropriations within the
23 meaning of this chapter with priority dates as of the ((effective dates
24 of their establishment)) date of filing of notice of rule making under
25 RCW 34.05.320. Whenever an application for a permit to make beneficial
26 use of public waters embodied in a reservation, established after
27 September 1, 1979, is filed with the department of ecology after the
28 effective date of such reservation, the priority date for a permit
29 issued pursuant to an approval by the department of ecology of the
30 application shall be the effective date of the reservation.

31 (2) No later than October 1, 2003, the department shall adopt a
32 protocol applicable to the processing of applications for new water
33 withdrawals and applications for changes or transfers, for the
34 consideration of the impact of the proposed change or transfers upon
35 the flows subject to the instream flows during the period between the

1 establishment of a priority date as determined under RCW 90.82.080(2)
2 and the adoption of a final instream flow rule.

3 **Sec. 6.** RCW 77.55.050 and 1993 sp.s. c 2 s 29 are each amended to
4 read as follows:

5 It is the policy of this state that a flow of water sufficient to
6 support game fish and food fish populations be maintained at all times
7 in the streams of this state.

8 The director of ecology shall promptly give the director notice of
9 each filing application for a permit to divert or store water and of
10 each application for a change or transfer of a water right. The
11 director has thirty days after receiving the notice to state his or her
12 objections to the application and of any proposed conditions on
13 approval of the application for the protection of flows sufficient to
14 support fish populations. The permit shall not be issued until the
15 thirty-day period has elapsed. The directors of ecology and fish and
16 wildlife shall jointly develop an interagency agreement providing
17 procedures for consultation on filings regarding water bodies that
18 provide habitat for critical or depressed fish stocks, including
19 provisions allowing predecisional review and comment by the director of
20 the department of fish and wildlife upon the department of ecology's
21 proposed decisions on applications that may adversely affect water
22 bodies whose flows or levels are a limiting factor in the recovery of
23 fish species listed or proposed for listing under the federal
24 endangered species act or determined by the department of fish and
25 wildlife to be depressed or critical.

26 The director of ecology may refuse to issue a permit if, in the
27 opinion of the director, issuing the permit might result in lowering
28 the flow of water in a stream below the flow (~~necessary to~~
29 ~~adequately~~) sufficient to support food fish and game fish populations
30 in the stream.

31 The provisions of this section shall in no way affect existing
32 water rights.

33 **Sec. 7.** RCW 90.03.290 and 2001 c 239 s 1 are each amended to read
34 as follows:

35 (1) When an application complying with the provisions of this
36 chapter and with the rules of the department has been filed, the same

1 shall be placed on record with the department, and it shall be its duty
2 to investigate the application, and determine what water, if any, is
3 available for appropriation, and find and determine to what beneficial
4 use or uses it can be applied. If it is proposed to appropriate water
5 for irrigation purposes, the department shall investigate, determine
6 and find what lands are capable of irrigation by means of water found
7 available for appropriation. If it is proposed to appropriate water
8 for the purpose of power development, the department shall investigate,
9 determine and find whether the proposed development is likely to prove
10 detrimental to the public interest, having in mind the highest feasible
11 use of the waters belonging to the public.

12 (2)(a) If the application does not contain, and the applicant does
13 not promptly furnish sufficient information on which to base such
14 findings, the department may issue a preliminary permit, for a period
15 of not to exceed three years, requiring the applicant to make such
16 surveys, investigations, studies, and progress reports, as in the
17 opinion of the department may be necessary. If the applicant fails to
18 comply with the conditions of the preliminary permit, it and the
19 application or applications on which it is based shall be automatically
20 canceled and the applicant so notified. If the holder of a preliminary
21 permit shall, before its expiration, file with the department a
22 verified report of expenditures made and work done under the
23 preliminary permit, which, in the opinion of the department,
24 establishes the good faith, intent, and ability of the applicant to
25 carry on the proposed development, the preliminary permit may, with the
26 approval of the governor, be extended, but not to exceed a maximum
27 period of five years from the date of the issuance of the preliminary
28 permit.

29 (b) For any application for which a preliminary permit was issued
30 and for which the availability of water was directly affected by a
31 moratorium on further diversions from the Columbia river during the
32 years from 1990 to 1998, the preliminary permit is extended through
33 June 30, 2002. If such an application and preliminary permit were
34 canceled during the moratorium, the application and preliminary permit
35 shall be reinstated until June 30, 2002, if the application and permit:
36 (i) Are for providing regional water supplies in more than one urban
37 growth area designated under chapter 36.70A RCW and in one or more
38 areas near such urban growth areas, or the application and permit are

1 modified for providing such supplies, and (ii) provide or are modified
2 to provide such regional supplies through the use of existing intake or
3 diversion structures. The authority to modify such a canceled
4 application and permit to accomplish the objectives of (b)(i) and (ii)
5 of this subsection is hereby granted.

6 (3) The department shall make and file as part of the record in the
7 matter, written findings of fact concerning all things investigated,
8 and if it shall find that there is water available for appropriation
9 for a beneficial use, and the appropriation thereof as proposed in the
10 application will not impair existing rights or be detrimental to the
11 public welfare, it shall issue a permit stating the amount of water to
12 which the applicant shall be entitled and the beneficial use or uses to
13 which it may be applied: PROVIDED, That where the water applied for is
14 to be used for irrigation purposes, it shall become appurtenant only to
15 such land as may be reclaimed thereby to the full extent of the soil
16 for agricultural purposes. But where:

17 (a) There is no unappropriated water in the proposed source of
18 supply((τ))i or ((where))

19 (b) The water source is a stream or lake for which the best
20 available measuring records or other information indicates that during
21 a majority of the time on a seasonal basis over the previous ten years
22 the stream flows or lake levels have been lower than established
23 instream flows or a flow or level adopted for purposes of review of the
24 application in the absence of an established instream flow rule; or

25 (c) The proposed use conflicts with existing rights((τ))i or

26 (d) The proposed use threatens to prove detrimental to the public
27 interest, having due regard to the highest feasible development of the
28 use of the waters belonging to the public, it shall be duty of the
29 department to reject such application and to refuse to issue the permit
30 asked for.

31 (4) If the permit is refused because of conflict with existing
32 rights and such applicant shall acquire same by purchase or
33 condemnation under RCW 90.03.040, the department may thereupon grant
34 such permit. Any application may be approved for a less amount of
35 water than that applied for, if there exists substantial reason
36 therefor, and in any event shall not be approved for more water than
37 can be applied to beneficial use for the purposes named in the
38 application. In determining whether or not a permit shall issue upon

1 any application, it shall be the duty of the department to investigate
2 all facts relevant and material to the application. After the
3 department approves said application in whole or in part and before any
4 permit shall be issued thereon to the applicant, such applicant shall
5 pay the fee provided in RCW 90.03.470: PROVIDED FURTHER, That in the
6 event a permit is issued by the department upon any application, it
7 shall be its duty to notify the director of fish and wildlife of such
8 issuance.

9 **Sec. 8.** RCW 90.54.050 and 1997 c 439 s 2 and 1997 c 32 s 3 are
10 each reenacted and amended to read as follows:

11 (1) In conjunction with the programs provided for in RCW
12 90.54.040(1), whenever it appears necessary to the director in carrying
13 out the policy of this chapter, the department may by rule adopted
14 pursuant to chapter 34.05 RCW(+

15 ~~(1)~~) reserve and set aside waters for beneficial utilization in
16 the future(~~(, and)~~).

17 (2) When sufficient information and data are lacking to allow for
18 the making of sound decisions, the department may withdraw various
19 waters of the state from additional appropriations until such data and
20 information are available. Before proposing the adoption of rules to
21 withdraw waters of the state from additional appropriation under this
22 subsection, the department shall consult with the standing committees
23 of the house of representatives and the senate having jurisdiction over
24 water resource management issues.

25 (3) Whenever the department determines based upon measuring records
26 or other information that flows or levels have been lower than
27 established instream flows or levels adopted under chapter 90.22 RCW a
28 majority of the time on a seasonal basis over the previous ten years,
29 or that authorizing additional appropriations may adversely affect
30 achieving such flows or levels, the department shall adopt a rule
31 withdrawing the water body from additional appropriation. Such a rule
32 shall remain in effect until repealed by the department based upon a
33 determination that flow protection measures, reduced withdrawals, or
34 other actions indicate that additional appropriations may be authorized
35 without adversely affecting established instream flows or levels.

36 (4) Prior to the adoption of a rule under this section, the
37 department shall conduct a public hearing in each county in which

1 waters relating to the rule are located. The public hearing shall be
2 preceded by a notice placed in a newspaper of general circulation
3 published within each of said counties. Rules adopted hereunder shall
4 be subject to review in accordance with the provisions of RCW
5 34.05.240.

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