

HOUSE BILL REPORT

SHB 1793

As Passed House:
March 5, 2015

Title: An act relating to working within the existing in-stream flow rules adopted by the department of ecology to provide a suite of tools, applicable to property owners located in areas with limited access to legal new water withdrawals, for alternative water procurement that does not result in a net loss to area surface waters.

Brief Description: Working within the existing in-stream flow rules adopted by the department of ecology to provide a suite of tools, applicable to property owners located in areas with limited access to legal new water withdrawals, for alternative water procurement that does not result in a net loss to area surface waters.

Sponsors: House Committee on Agriculture & Natural Resources (originally sponsored by Representatives Lytton, Stanford, Fitzgibbon, Tharinger and Morris).

Brief History:

Committee Activity:

Agriculture & Natural Resources: 2/3/15, 2/12/15 [DPS];

Capital Budget: 2/17/15, 2/23/15 [DPS(AGNR)].

Floor Activity:

Passed House: 3/5/15, 53-45.

Brief Summary of Substitute Bill

- Requires counties and cities to adopt ordinances that outline when and how alternative water supplies may be used to satisfy the potable water requirements for new construction if the city or county has, as part of its jurisdiction, a property which is not eligible to be served by a water purveyor and for which new, unmitigated surface or groundwater withdrawals are not legally available on a year-round basis.
- Requires the Department of Ecology to coordinate with local government entities and utility districts to identify possible capital projects that may assist in providing water to remedy any possible violations of a Supreme Court ruling.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Blake, Chair; Lytton, Vice Chair; Dent, Assistant Ranking Minority Member; Dunshee, Hurst, Kretz, Pettigrew, Stanford and Van De Wege.

Minority Report: Do not pass. Signed by 4 members: Representatives Buys, Ranking Minority Member; Chandler, Orcutt and Schmick.

Staff: Jason Callahan (786-7117).

HOUSE COMMITTEE ON CAPITAL BUDGET

Majority Report: The substitute bill by Committee on Agriculture & Natural Resources be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Dunshee, Chair; Stanford, Vice Chair; Kilduff, Peterson and Riccelli.

Minority Report: Do not pass. Signed by 2 members: Representatives DeBolt, Ranking Minority Member; Kochmar.

Minority Report: Without recommendation. Signed by 2 members: Representatives Smith, Assistant Ranking Minority Member; Walsh.

Staff: Meg VanSchoorl (786-7105).

Background:

Instream Flows.

The Department of Ecology (Department) has the authority to adopt rules establishing a minimum water flow for streams, lakes, or other public water bodies for the purposes of protecting fish, game, birds, and the recreational and aesthetic values of the waterways. These levels, commonly called "instream flows," essentially function as water rights with a priority date set at the adoption date of the corresponding rule.

Per statute, the instream flow cannot affect an existing water right with a senior time priority date. The Department may not allow any subsequent water withdrawals with a junior priority date to the instream flow that conflicts with the established flow level unless the withdrawals clearly serve to satisfy an overriding consideration of the public interest. In 2013 the state Supreme Court found that the exemption for withdrawals that effect an instream flow to address an overriding considerations of the public interest is narrow and requires extraordinary circumstances before the minimum flow water right can be impaired.

As of today, there is an instream flow rule in place for almost half of the state's 64 identified watersheds.

Groundwater Exempt Wells.

All groundwater withdrawals require an application and permit from the Department. However, there is a class of lawful, unpermitted wells, often referred to as "permit exempt

wells," which may be constructed and used without first obtaining a permit from the Department.

Exemptions from the permitting requirement include any withdrawal of public groundwater for stock-watering purposes, or for watering a lawn or a noncommercial garden less than one-half acre. Single or group domestic uses or industrial purposes in an amount not exceeding 5,000 gallons a day are also included in the class of permit exempt wells.

The Department has exercised authority in certain regions of the state to limit the availability of new permit exempt wells. This includes agency rules applicable to portions of Skagit, Kittitas, Clallam, and Jefferson counties.

State Building Code and Potable Water.

The State Building Code requires that all building permit applicants must provide evidence that an adequate supply of potable water will be available for the building being proposed. Adequate evidence of a potable water supply can include possession of a water right or a letter from a water purveyor stating the ability to provide water to the building. All public water systems must provide an adequate quantity and quality of water in a reliable manner at all times.

In most cases, adequate and reliable potable water is supplied either from a source located off of the property by an approved water purveyor or a permit exempt well located on the property. Certain counties do allow building permits to be issued when the potable water supply is to be provided from a source other than a traditional, piped water purveyor or a permit exempt well. These alternative sources include rainwater collection and on-site cisterns filled with water delivered by a truck. The counties that allow some form of alternative water supply to satisfy the potable water condition of a building permit include Kittitas, San Juan, King, and Jefferson.

Recent Judicial Developments.

The Department adopted specific rules related to water withdraws in the Skagit River basin in 2001. These rules included a determination by the Department that new water is not available in the Skagit River basin for year-round consumptive appropriation. The Department, in the rule, set aside a limited amount of surface water for future out-of-stream uses in the Skagit River basin; however, with some exceptions, the basin was to be closed to future appropriation once those set asides were allocated. These reservations provided uninterrupted water supplies for new agricultural, residential, commercial or industrial, and livestock uses across 25 sub-basins of the Skagit River.

In October 2013 the Washington Supreme Court invalidated a portion of the Department rules (*Swinomish Indian Tribal Community v. Washington State Department of Ecology*). The Supreme Court held that the Department could not set aside water reservations through water management rules where it had previously set aside water to support stream flows for fish.

Summary of Substitute Bill:

Certain counties and cities are required to adopt ordinances that outline when and how alternative water supplies may be used to satisfy the potable water requirements for new construction. These ordinances must be developed by any city or county that has, as part of its jurisdiction, a property which is not eligible to be served by a water purveyor and for which new, unmitigated surface or groundwater withdrawals are not legally available on a year-round basis.

Cities and counties required to adopt alternative water supply ordinances must adopt an ordinance allowing, but addressing the appropriate limits and conditions of, alternative water supplies based on trucked delivery of water. The local ordinances may also allow and address other alternative systems such as rainwater collection and treatment systems.

The local ordinances relating to alternative water supplies may not require any landowner to use the allowed alternative water supplies or override any health and safety duties of the local government.

The Department must make information available to landowners who qualify for an alternative water supply relating to alternative water and mitigation options in their area. When appropriate, this information must be distributed in cooperation with any affected counties. The Department must also coordinate with local government entities and utility districts to identify possible capital projects that may assist in providing water to remedy any possible violations of the Supreme Court's ruling in *Swinomish Indian Tribal Community v. Washington State Department of Ecology*.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony (Agriculture & Natural Resources):

(In support) There have been decades of legal battles over water in certain basins in the state. It is important to pursue new approaches to helping landowners access water that does not result in more conflict and expensive litigation. One of those approaches is to understand that one solution will not fit all and to look at the county level and the suite of local tools available to bring potable water to potential home builders in areas with instream flow restrictions. Alternative water supplies are appropriate when traditional water supplies are not available and can be part of a suite of options available in any given watershed. They are the future of water management in the state and allows a balanced approach to new salmon-friendly development.

The problem being addressed is not rules by the Department but the lack of water in the environment. There are solutions in the works with broad support to address that problem. There are multiple solutions available within the existing law, including the extension of water-pipe infrastructure, trucked water, and mitigation that is in kind, in season, and in

place. Trucked water, in particular, allows for immediate, proven, and inexpensive water access.

(With concerns) There are alternative water supplies envisioned in the bill that may not result in a no new loss of water. Rainwater collection can have affects in local watersheds and are very site specific with potential seasonal concerns. Non-essential water uses could be encouraged with some alternative water supplies. The triggers of when local governments must act are unclear. Basing action on new, unmitigated water withdrawal limits is not specific enough. Actions should be limited to areas with a total closure set by the Department. Clarity is also needed to ensure that all landowners will not always have to provide mitigation in every instance.

The counties should not be required to bear the burden of acting, especially when there is uncertainty as to the health standards of the proposed alternative systems. The solutions should be found by the Department within their existing rules.

(Opposed) The role of providing water has always belonged to the Department, and should stay there. However, there has been a transition of this responsibility away from the Department and to local governments. The problem of water shortages is created through unbalanced rules adopted by the Department. This is a problem created by the Department, and it should not be up to local governments to address the results of the problem. The Department should fix the problem through new rules or reinterpretation of existing rules. The tools in the bill can all be done under existing law. However, there are public health concerns with the reliability of trucked water.

Staff Summary of Public Testimony (Capital Budget):

(In support) The goal of this bill is to have a menu of possible options for landowners in areas where water supply is very limited. One size does not fit all; so, local governments are encouraged to think outside the box. Options include trucking, physical mitigation projects that can be scaled to size in different sub-basins, and piping extensions. In the Skagit County area, 475 homeowners followed the rules but then the rules changed. The state has some responsibility to help fix the problem. Stakeholders and members are continuing to work on this bill. The Department is developing lists of projects that will lead to cost-effective solutions. The bill includes a range of techniques that are being used successfully in other areas of the state and country. The Swinomish Tribe is committed to work to find solutions within existing law that balance in-stream and out-of-stream uses.

(Opposed) The bill is both too simplistic and too complicated. The remedies proposed are fiscally burdensome and, in the case of trucking, against health codes. The bill does not define who will bear the costs. The Skagit in-stream flow rule has been inadequate, too harsh, and has resulted in lengthy, costly lawsuits, but it will not be remedied by this bill.

(Other) The Yakama Nation supports the efforts of the Swinomish Tribe and others who are trying to find solutions for potable water. If the bill relates to Skagit County only, we are in support. If it applies to basins statewide, we request amendments assuring that movement of water is water budget neutral and that in-stream flows set by the Yakima Basin adjudication and of senior water rights holders are protected.

Persons Testifying (Agriculture & Natural Resources): (In support) Representative Lytton, prime sponsor; Dave Christensen, Washington Department of Ecology; and Bruce Wishart, Sierra Club and Center for Environmental Policy & Law.

(With concerns) Dawn Vyvyan, Yakama Nation; Kathleen Collins, Washington Water Policy Alliance; Evan Sheffels, Washington Farm Bureau; and Davar Ojurasic, Swinomish Tribe.

(Opposed) Bill Clarke, Washington Realtors and Planned Unit Development Association.

Persons Testifying (Capital Budget): (In support) Representative Stanford; David Christensen, Department of Ecology; Bruce Wishart, Sierra Club and Center for Environmental Law and Policy; and Davor Gjurasic, Swinomish Tribe.

(Opposed) Cindy Alia, Citizens' Alliance for Property Rights.

(Other) Dawn Vyvyan, Yakama Nation.

Persons Signed In To Testify But Not Testifying (Agriculture & Natural Resources): None.

Persons Signed In To Testify But Not Testifying (Capital Budget): Kathleen Collins.