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**Agriculture & Natural Resources  
Committee**

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**ESSB 5407**

**Brief Description:** Concerning the effects of instream flow rules on water use.

**Sponsors:** Senate Committee on Agriculture, Water & Rural Economic Development (originally sponsored by Senators Pearson, Bailey and Benton).

**Brief Summary of Engrossed Substitute Bill**

- Provides express language to specify that permit exempt wells are in no way affected by the establishment of an instream flow by the Department of Ecology (Department) unless it can be demonstrated that the particular groundwater withdrawal from the specific permit exempt well at issue will in fact cause impairment to the levels or flows protected by the instream flow.
- Makes a legislative declaration that it serves the overriding consideration of the public interest to ensure that reservations of uninterrupted water for domestic uses are included in rules related to instream flows.
- Requires the Department to review the instream flow rule for the Skagit River Basin and determine whether the rule has set aside sufficient water reservations to satisfy year-round human domestic needs in the Upper and Lower Skagit River Sub-basins.
- Requires the Department to amend the instream flow rule for the Skagit River Basin if the Department determines that adequate reserves have not been made.

**Hearing Date:** 3/26/15

**Staff:** Jason Callahan (786-7117).

**Background:**

Instream Flows.

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*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.*

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.

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

#### Exempt Groundwater 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.

#### Skagit River Basin.

The Department adopted specific rules related to instream flows and interruptible water withdrawals in the Skagit River basin in 2001. In 2006, in response to a legal settlement, the Department amended these rules to assure that certain future withdrawals were uninterruptable. The rules included a determination by the Department that water is not available in the Skagit River basin for year-round consumptive appropriation. The Department's 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 uninterruptible water supplies for new agricultural, residential, commercial or industrial, and livestock uses across 25 subbasins 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 exception for withdrawals that effect an instream flow to address an overriding consideration of the public interest is narrow and requires extraordinary circumstances before the minimum flow water right can be impaired. The Court also found 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 Bill:**

### Nexus of Instream Flows and Permit Exempt Wells.

Express language is provided to specify that permit exempt wells are in no way affected by the establishment of an instream flow by the Department unless the Department can demonstrate that the particular groundwater withdrawal from the specific permit exempt well at issue will in fact cause impairment to the levels or flows protected by the instream flow. The analysis for the groundwater withdrawal must be limited to the permit exempt well by itself and not considered as part of aggregate groundwater withdrawals.

### The Overriding Consideration of Public Interest.

A legislative declaration is made that it serves the overriding consideration of the public interest to ensure that reservations of uninterrupted water for domestic uses are included in rules related to instream flows.

### Skagit River Basin Instream Flow Rule.

The Department must, in one year, review the instream flow rule for the Skagit River Basin and determine whether the rule has set aside sufficient water reservations to satisfy year-round human domestic needs in the Upper and Lower Skagit River Sub-basins. If the Department determines that adequate reserves have not been made, then the Department must take the appropriate action to amend the rule.

**Appropriation:** None.

**Fiscal Note:** Available.

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