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**Agriculture & Natural Resources  
Committee**

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**SSB 5965**

**Brief Description:** Evaluating mitigation options for impacts to base flows and minimum instream flows.

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

**Brief Summary of Substitute Bill**

- Requires the Department of Ecology to complete a report, in consultation with the Office of the Attorney General, evaluating options for mitigating the effects of permit-exempt groundwater withdrawals on base flows and minimum instream flows.

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

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

**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. The state Supreme

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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.*

Court has 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.

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 Bill:**

The Department is required to complete a report, in consultation with the Office of the Attorney General, evaluating options for mitigating the effects of permit-exempt groundwater withdrawals on base flows and minimum instream flows. The report must include a number of elements, including an examination of the scientific methodology for establishing base flows, an analysis of whether mitigation for new permit exempt wells results in satisfying base flow requirements, a description of in-kind and out-of-kind mitigation techniques employed by the Department over the past decade, a survey of in-kind streamflow enhancement strategies other than the regulation of permit exempt wells, and an assessment of the effectiveness of various mitigation techniques. The report must also include an evaluation of all mitigation options that may be available for permit-exempt groundwater withdrawals in areas of the state covered by the instream flow rules

applicable to the Skagit River Basin. This element of the report must include a discussion of the advantages and disadvantages of employing each type of mitigation technique.

The report must contain recommendations for legislative action to ensure reasonable mitigation options and must be delivered to the Legislature by November 1, 2015. A draft version of the required report must be available on the Department's website at least 21 days before the Department completes the report to provide time for public input.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.