

HOUSE BILL REPORT

SSB 5965

As Reported by House Committee On: Agriculture & Natural Resources

Title: An act relating to evaluating mitigation options for impacts to base flows and minimum instream flows.

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 History:

Committee Activity:

Agriculture & Natural Resources: 3/26/15, 4/1/15 [DPA].

Brief Summary of Substitute Bill (As Amended by Committee)

- 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 instream flows.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: Do pass as amended. Signed by 8 members: Representatives Blake, Chair; Lytton, Vice Chair; Buys, Ranking Minority Member; Dunshee, Hurst, Pettigrew, Stanford and Van De Wege.

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

Staff: Jason Callahan (786-7117).

Background:

Instream Flows.

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. In turn, 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 Washington State Supreme Court (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 withdrawals 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 Court invalidated a portion of the Department rules (*Swinomish Indian Tribal Community v. Washington State Department of Ecology*). The 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 Amended 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 instream flows. The mitigation techniques that must be evaluated include both water demand management strategies and supply side strategies.

The report must include a number of elements, including an examination of the scientific methods for establishing base flows, an analysis of the cumulative impacts of groundwater withdrawals on instream flows, 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, an analysis of mitigation sequencing approaches, 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 be coordinated with an existing, standing water resource stakeholder group assembled by the Department and contain recommendations for legislative action to ensure reasonable mitigation options. The report must be delivered to the Legislature by December 1, 2015. A draft version of the required report must be available on the Department's website at least 30 days before the Department completes the report to provide time for public input.

Amended Bill Compared to Substitute Bill:

The amended bill to the intent section removes language related to rural economic development being threatened by a lack of access to uninterrupted water, removes language related to state agencies failing to provide mitigation options, removes language related to it not being acceptable policy to inhibit rural economic development, and adds language recognizing that senior water rights and instream rules make access to water not unlimited and that clarity regarding available mitigation would be helpful.

The amended bill to the substantive portions of the bill specifically include the demand side and supply side management strategies in the mitigation options that must be included in the report, requires coordination with the Water Resources Advisory Committee on the production of the report, changes the examination of scientific "methodologies" to scientific "methods," changes references to "base flow and instream flows" to "instream flows" throughout, adds the Department of Fish and Wildlife into the section discussing the scientific methods of setting instream flows, removes specific references to the meaning of the term "out-of-kind" mitigation and the specific direction to report on the location, cost, and authority for out-of-kind mitigation projects, changes the analyses of whether mitigation for groundwater withdrawals affect instream flows to the effect on instream flows of groundwater withdrawals, requires an evaluation of how mitigation sequencing approaches may be utilized to encourage avoidance of impacts, requires specific details regarding the analyses around specific mitigation techniques, changes the report due date from November 1 to December 1, and provides an expiration date.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In Support) There has been an ongoing debate between out-of-stream uses and in-stream values. Water shortages in the Skagit River Basin have had significant effects on people's lives, but those effects are not just limited to Skagit County. Other areas of the state have seen, and will see, negative effects as additional restrictions on the use of water are implemented. The increase in rural populations makes groundwater mitigation a large part of Washington's future and it is important to seek more standardized, science-based mitigation options that leads to more certainty for landowners.

This study would support ongoing efforts at the Department to identify options when water-for-water in kind and in place mitigation is simply not available. It pulls in all of the issues at the heart of other bills before the Legislature into one important study. It is useful for the Legislature to know which options are available, and preferably, before the start of the next legislative session. The more flexibility the Department has, the more options for water use and mitigation remain on the table. The Department always appreciates legislative direction and the bill represents good government. This bill won't create any immediate solutions, but will continue the important conversations and may lead to future solutions.

It is important to review the science that goes into setting instream flows. It is likewise important to review out-of-kind mitigation. Out-of-kind mitigation often has a negative reputation, but it can be a very useful tool when done correctly.

The Growth Management Act has done some very good things for the state. It has ensured that lots and new buildings are happening in areas set aside for them and where they are intended. However, without water, the vision of the local comprehensive plans cannot be carried out.

Some changes in the intent section would make this a better bill, but the addition of the Attorney General's review will help avoid litigation. Allowing public access to a draft report is also a wise addition, as is the challenge of the November deadline. The Department has indicated that they can do this study within available funds.

(In support with concerns) It is important to look at new solutions to water shortage issues; however, the intent section raises some concerns that may warrant suggested changes, as does the heavy emphasis on out-of-kind mitigation. Out-of-kind mitigation has a place, but it should be part of a full range of options.

(Opposed) None.

Persons Testifying: (In support) Senator Warnick, prime sponsor; Glen Smith, Washington State Groundwater Association; Tom Loring, Washington Department of Ecology; Cindy Alia, Citizens Alliance for Property Rights; Jan Himebaugh, Building Industry Association of Washington; Kathleen Collins, Washington Water Policy Alliance; and Louie Requa.

(In support with concerns) Bruce Wishart, Sierra Club and Center for Environmental Law & Policy; Dave Mastin, Muckleshoot Tribe.

Persons Signed In To Testify But Not Testifying: None.