

# SENATE BILL REPORT

## SB 5136

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As of January 29, 2015

**Title:** An act relating to repealing an instream flow rule and adopting a new instream flow rule.

**Brief Description:** Repealing an instream flow rule and adopting a new instream flow rule.

**Sponsors:** Senators Bailey, Pearson, Ericksen, Honeyford and Benton.

**Brief History:**

**Committee Activity:** Agriculture, Water & Rural Economic Development: 1/29/15.

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### SENATE COMMITTEE ON AGRICULTURE, WATER & RURAL ECONOMIC DEVELOPMENT

**Staff:** Bonnie Kim (786-7316)

**Background:** The Department of Ecology (Ecology) manages and plans state water resources to resolve conflicts between out-of-stream uses, e.g. domestic, commercial, and agricultural uses, and instream flows needed to preserve the natural environment. Generally Ecology must base water allocation among potential uses and users on the principle of securing maximum net benefits for the people of the state. Ecology must also, however, set minimum instream flows to protect instream resources, e.g. fish and wildlife habitat and water quality. Ecology establishes instream flow rules for the state's major river basins and typically bases rules on the stream flows needed to support healthy fish populations. Ecology may authorize withdrawals of water conflicting with base flows necessary to preserve instream values only in situations where it is clear that overriding considerations of the public interest will be served.

In April 2001, the Skagit River Basin Instream Resources Protection Program Rule (WAC 173-503) established minimum instream flows throughout the basin in water resource inventory areas 3 and 4. Eight businesses and 475 homes have relied on Skagit reservations (finite water amounts set aside for specific future uses) for their water supplies since 2001. In 2006 Ecology found that limited reservations would not substantially harm fish populations and amended the rule to establish reservations of surface and groundwater for future out-of-stream uses. The reservations provided uninterrupted (year-round) water supplies for new agricultural, residential, commercial or industrial, and livestock uses across 25 subbasins.

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In October 2013, the Washington Supreme Court invalidated the 2006 amendments, holding that Ecology could not set aside water reservations through water management rules where it had previously set aside water to support stream flows for fish. Since the court decision, Ecology has exercised its enforcement discretion not to curtail water use of homes and businesses that have relied on the 2006 reservations.

In November 2014, several of Washington real estate and building industry associations, the Washington State Farm Bureau, and the Just Water Alliance petitioned Ecology to repeal the rule or, in the alternative, to develop a new rule for the rural areas in the Skagit basin. On January 15, 2015, Ecology denied the petition, asserting, among other things, that (1) repeal without simultaneous replacement with a new rule would violate its statutory mandate to set minimum instream flows; and (2) current law constricted its ability to develop adequate rules protecting instream resources while making water available for new year-round consumptive uses in the Skagit basin.

**Summary of Bill:** Ecology must repeal the Skagit river basin instream flow rule in entirety. Ecology must then initiate rulemaking to adopt a new rule, ensuring ample opportunity for public input and thorough analysis of the economic costs of the new proposed rule. The priority date for the new rule may not be set earlier than the date of Ecology's adoption of the new final rule.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: People bought property in Skagit in good faith but do not have water anymore. Whatcom County has a case pending in court and we support Skagit owners getting their rights back. The current rule causes economic hardship and prevents homeowners from refinancing their homes. Our homes have half the market value because of an interruptible water source. Private landowners who applied for water before 2006 do not have a way to prove their rights. People need certainty. Ecology's report showed the new reservations in the 2006 amendment would not harm fish. People cannot sell or build on their own land. The rule is not based on science. The courts would take years to fix this problem. The chaos that we face applies to less than 1 percent of our state's water resources. This rule is based on laws passed 40 years ago; the Legislature could not have predicted these problems. I encourage the committee to focus on the Skagit River basin rather than trying to create a statewide holistic approach. The underlying dynamic creating this problem is a government system that allows unelected officials to make rules that are not reviewed by the elected officials. Rulemaking has resulted in an imbalance of uses. Some landowners are uninformed and do not know they are affected by this rule. People are our most important resource. The use of overriding considerations of the public interest in reviewing instream flow rules jeopardizes other rules.

CON: Water rules must protect both people and fish. There are other techniques available to landowners. These bills are a patchwork solution that fail to address the bigger problems of diminishing water supplies and other effects of climate change. These bills may potentially upset water right seniority and other established water law. A new instream flow rule will not provide a better balance between people and fish. Water rights are based on hierarchy. These bills would allow junior water rights to leapfrog above senior rights. These bills weaken protections established by instream flow rules. We are committed to working with Ecology and other stakeholders to find an alternative solution. Kittitas County has explored other options to preserve senior water rights.

OTHER: This bill would take us back to the 2006 amendments. Ecology supports this bill but we do not feel we have the necessary tools to complete rulemaking. Smaller tributaries of the Skagit must be protected because they are particularly vulnerable to flows and levels. We would like to work with all stakeholders to reach real solutions. Exempt wells can affect smaller tributaries.

**Persons Testifying:** PRO: Senator Bailey, prime sponsor; Zachary Barborinas, Paul Hagman, Just Water Alliance, Landowners; John Roozen, Just Water Alliance, WA Bulb Company, Landowner; Bill Clarke, WA Realtors; Glen Smith, WA State Ground Water Assn.; Evan Sheffels, WA Farm Bureau; Kathleen Collins, WA Water Policy Alliance; Richard Fox, Cidny Alia Alia, Gary Wray, citizens.

CON: Tom Loranger, Ecology; Davor Gjurasic, Swinomish Tribe, Nisqually Indian Tribe; Jeanne Cushman, Squaxin Island Tribe; David Monthie, Aqua Permanente; Bruce Wishart, Sierra Club; Trish Rolfe, Center for Environmental Law & Policy; Bryce Yadon, Futurewise; Dawn Vyvyan, Yakama Nation.

OTHER: Hal Beecher, Dept. of Fish and Wildlife.