

HOUSE BILL REPORT

HB 1394

As Reported by House Committee On:
Agriculture & Natural Resources

Title: An act relating to WAC 173-563-020(4) and 173-531A-060 regarding the processing of applications for Columbia river water right permits to clarify legislative intent to ensure that the rules can be implemented as written.

Brief Description: Concerning WAC 173-563-020(4) and 173-531A-060 regarding the processing of applications for Columbia river water right permits to clarify legislative intent to ensure that the rules can be implemented as written.

Sponsors: Representatives Chandler, Blake, Dent, Lytton and Dye; by request of Department of Ecology.

Brief History:

Committee Activity:

Agriculture & Natural Resources: 1/31/17, 2/7/17, 2/16/17 [DP].

Brief Summary of Bill

- States that certain agency rules governing instream flows and the water resources program for the Columbia River Basin are consistent with legislative intent.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: Do pass. Signed by 9 members: Representatives Blake, Chair; Buys, Ranking Minority Member; Dent, Assistant Ranking Minority Member; Chandler, Kretz, Orcutt, Schmick, Springer and J. Walsh.

Minority Report: Do not pass. Signed by 5 members: Representatives Fitzgibbon, Lytton, Pettigrew, Robinson and Stanford.

Minority Report: Without recommendation. Signed by 1 member: Representative Chapman, Vice Chair.

Staff: Rebecca Lewis (786-7339).

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.

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. An instream flow may not affect an existing water right with a senior priority date. Likewise, 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 Department has used the administrative rule-making process to identify specific instances when a defined amount of water may be reserved in specific basins for future domestic uses. The water reserved for future uses may be used regardless of that water use's effect on established instream flows. The Department has found, in rule, that the reservation of water for future uses is necessary to satisfy overriding considerations of public interest.

Water Resource Inventory Areas.

A Water Resource Inventory Area (WRIA) is, generally speaking, an area determined to be a distinct watershed within which are sub basins. Each WRIA is identified by a number and may contain a local watershed planning group with an identified lead entity.

Columbia River Basin Water Supply.

At the direction of the Legislature, the Department adopted instream flow rules and a water resources program for the Columbia River Basin in 1997. The rules apply to the John Day and McNary Pools of the Columbia River and the Lower Snake River, including WRIA 31 and parts of WRIsAs 32, 33, 36, and 37, all in south central Washington. By rule, any water right application considered for approval is evaluated for possible impacts on fish and existing water rights by the Department and in consultation with applicable local, state, and federal agencies and Indian tribes. Approved permits are subject to instream flow protection or mitigation conditions on a case-by-case basis.

In 2006 the Department was directed to aggressively pursue the development of water supplies using tools such as storage, conservation, and voluntary regional water management agreements to benefit both instream and out-of-stream uses. The Department established the Office of the Columbia River, composed of representatives from federal, state, local, and tribal governments, business and environmental groups, and water users, to develop new water supplies.

Summary of Bill:

Department rules governing instream flows and the water resources program for the Columbia River Basin are considered to be consistent with legislative intent and are specifically authorized to be maintained and implemented by the Department. The

Department may act on water right applications that conform with the process and requirements in the Columbia River Basin rules even if they are not associated with the development of new water supplies.

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:

(In support) This bill enables the Department of Ecology to continue to issue permits out of main stem of Columbia River. Recent Supreme Court decisions have caused uncertainty for the ability to issue water right permits because rules lack specific legislative authority. The rules have been around for more than 20 years and were adopted after thorough public review as directed by Legislature in 1997. The state Supreme Court recently held that no impairment is permissible regardless of stakeholder intent, but through the Columbia River rules impairment is allowed after consulting with applicable agencies and tribes to identify potential impacts.

The Office of the Columbia River (OCR) partners with the Department of Fish and Wildlife on activities related to agriculture, water supply and conservation, fish recovery, and nontribal commercial and recreational fisheries. The OCR has also contributed to local, federal, and state salmon and steelhead recovery efforts. Funding and flexibility offered by the rules have been vital to the success of the OCR, and maintaining that flexibility will help ensure the OCR's success continues into the future.

(Opposed) The rule was adopted shortly after the listing of fish species in the Columbia River under the Endangered Species Act (ESA). At the time there was concern about whether the instream flow rule would protect the fish that had just been listed. Initially there was a moratorium on new permits. The rule was intended to allow a higher level of protection under the instream flow rule. Now the Department is interpreting the rule to allow it to issue new permits that would not comply with the minimum flows established before the ESA listing. The bill should be opposed because it is bad for fish and wildlife, could continue to reduce instream flows, and could put the state out of compliance with the ESA. It could also affect out-of-stream senior water right holders. Senior water right holders could be shut off once minimum flows are met. New permits issued under the bill would not be required to be shut off.

Persons Testifying: (In support) Tom Tebb, Department of Ecology; and Michael Garrity, Department of Fish and Wildlife.

(Opposed) David Monthie, Center for Environmental Law and Policy.

Persons Signed In To Testify But Not Testifying: None.