
**Agriculture and Natural Resources
Committee**

HB 2105

Brief Description: Ensuring the protection of instream resources in connection with the issuance of water right permits in water resource inventory areas in which minimum instream flows are not being met.

Sponsors: Representatives Fitzgibbon, Tharinger, Chapman, Doglio and Reeves.

Brief Summary of Bill

- Provides that the Department of Ecology (Ecology) may issue a water right permit in a water body closed to further appropriations only if certain specified criteria are met.
- Establishes criteria to govern the issuance of a water right permit in a water body closed to further appropriations, including that Ecology must have determined that there would not be a net detrimental impact to fish and related aquatic resources.

Hearing Date: 1/16/24

Staff: Robert Hatfield (786-7117).

Background:

Water Rights.

Washington operates under a water right permit system. With certain exceptions, new rights to use surface or groundwater must be established according to the permit system. Exemptions include any withdrawal of public groundwater for stock watering purposes, for watering a lawn, or for a noncommercial garden less than one-half acre. Single or group domestic uses or

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industrial purposes not exceeding 5,000 gallons a day are also exempt.

The Department of Ecology (Ecology) must consider a four-part test when deciding whether to issue a new water right, specifically whether:

- water is available;
- a beneficial use of water would be made;
- granting the right would impair existing rights; and
- the proposed use would detrimentally affect the public welfare.

If an application passes this test, Ecology issues a permit which establishes a timetable for constructing the infrastructure to access the water and for putting water to beneficial use. When the conditions of the permit are satisfied, Ecology issues a water right certificate.

Instream Flow Rules.

Ecology has the authority to adopt rules establishing a minimum water flow for streams, lakes, or other public water bodies for protecting fish, game, birds, and the recreational and aesthetic values of the waterways. Ecology must set minimum water flows to protect fish, game, or wildlife resources, when requested by the Department of Fish and Wildlife, or if Ecology finds it necessary to protect water quality.

These minimum water flow levels, commonly called instream flows, function as water rights with a priority date set at the adoption date of the corresponding rule. Instream flows have been set in 27 Water Resource Inventory Areas. The instream flow cannot affect an existing water right with a senior priority date. Similarly, Ecology may not allow any subsequent water withdrawals with a junior priority date to the instream flow that conflict with the established flow level unless the withdrawals clearly serve to satisfy an overriding consideration of the public interest (OCPI).

Foster Decision.

On October 5, 2015, the Washington State Supreme Court (Supreme Court) issued its ruling in *Foster v. Department of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015). The Supreme Court held that Ecology improperly used the OCPI exception to approve a water right permit application by the City of Yelm, reversing decisions of both the Thurston County Superior Court and the Pollution Control Hearings Board. According to the Supreme Court, the prior appropriation doctrine does not allow for any impairment, even de minimis impairment, of senior water rights, in accordance with the Court's earlier decision in *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 11 P.3d 726 (2000). Accordingly, out-of-kind mitigation may not be used to remedy impairments to senior water rights, and the OCPI exception may be used only to offset temporary impairment of minimum flows.

Summary of Bill:

Permanent withdrawals of water that would conflict with minimum river flows may be

authorized only if they are associated with an application to address a public health emergency due to either water quality contamination or a water supply interruption, or for water rights applications submitted and approved pursuant to the process described below.

Issuance of water rights permits in areas in which minimum instream flows are not being met or in water bodies closed to further appropriation.

The Department of Ecology (Ecology) may issue a surface water right or groundwater right permit in a water resource inventory area in which minimum instream flows are not being met, or in a water body closed to further appropriation, only if:

- Ecology determines that any adverse impact on minimum instream flows resulting from the issuance of the water right permit will be fully offset through the implementation of out-of-time water resource mitigation, out-of-place water resource mitigation, or both. Out-of-kind water resource mitigation may not be employed as a means to offset the impact of the issuance of a water right permit on minimum instream flows;
- Ecology, after carefully considering the recommendation of the Department of Fish and Wildlife, determines that there would be neither a net detrimental impact to fish and related aquatic resources nor a reduction of streamflow during periods of flow critical to the survival of fish and related aquatic resources; and
- Ecology has consulted with all federally recognized Indian tribes with treaty fishing rights at usual and accustomed places within the water resource inventory area.

The term "out-of-kind water resource mitigation" is defined to mean measures to offset the impacts of new water use, such as instream or out-of-stream measures that improve or enhance existing water quality, riparian habitat, or other instream functions and values, but that do not replace the total quantity of new water use.

Appropriation: None.

Fiscal Note: Requested on January 9, 2024.

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