
**Agriculture and Natural Resources
Committee**

HB 2187

Brief Description: Promoting access to water for family farms.

Sponsors: Representatives Dent, Chapman, Graham and Cheney.

Brief Summary of Bill

- Permits the Department of Ecology to authorize a permanent or temporary appropriation of water that would have adverse impacts on instream flows only with appropriate mitigation, or where it is clear that overriding considerations of the public interest will be served.
- Declares that family farms meeting specified criteria are in the public interest.

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 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

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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:

The Department of Ecology may authorize a permanent or temporary appropriation of water that would have adverse impacts on instream flows only with appropriate mitigation, or where it is clear that overriding considerations of the public interest will be served.

A family farm that is located fewer than 20 miles from a city with a population greater than

150,000, that has been in continuous operation for more than 100 years, and that produces fresh fruits and vegetables for urban residents, is deemed to be in the public interest.

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.