

SENATE BILL REPORT

SB 6267

As Reported by Senate Committee On:
Environment, Water & Energy, February 5, 2010
Ways & Means, February 9, 2010

Title: An act relating to water right processing improvements.

Brief Description: Regarding water right processing improvements.

Sponsors: Senators Rockefeller and Honeyford; by request of Department of Ecology.

Brief History:

Committee Activity: Environment, Water & Energy: 1/15/10, 2/05/10 [DPS-WM, DNP].
Ways & Means: 2/08/10, 2/09/10 [DP2S, DNP, w/oRec].

SENATE COMMITTEE ON ENVIRONMENT, WATER & ENERGY

Majority Report: That Substitute Senate Bill No. 6267 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Rockefeller, Chair; Pridemore, Vice Chair; Fraser, Marr, Oemig and Ranker.

Minority Report: Do not pass.

Signed by Senators Honeyford, Ranking Minority Member; Delvin and Morton.

Staff: Karen Epps (786-7424)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 6267 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Prentice, Chair; Fraser, Vice Chair, Capital Budget Chair; Tom, Vice Chair, Operating Budget; Fairley, Hobbs, Keiser, Kline, Kohl-Welles, McDermott, Murray, Pridemore, Regala and Rockefeller.

Minority Report: Do not pass.

Signed by Senators Honeyford and Schoesler.

Minority Report: That it be referred without recommendation.

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.

Signed by Senators Zarelli, Ranking Minority Member; Brandland, Carrell, Hewitt, Parlette and Pflug.

Staff: Maria Hovde (786-7710)

Background: In 2000 the Legislature authorized the departments of Ecology (Ecology), Natural Resources, Health, and Fish and Wildlife, and local air pollution control authorities to use voluntary cost-reimbursement agreements for complex projects, meaning those that require an environmental impact statement. The agreements are intended to help assure that complex projects are handled appropriately, without diverting resources away from smaller projects.

An applicant for a water right pending before the Ecology may enter into a cost-reimbursement agreement to expedite review of their water right application. The applicant must agree to pay for, or as part of a cooperative effort agree to pay for, the cost of hiring a private consultant to evaluate their water right application plus any senior applications from the same water source.

The consultant conducts a site investigation, performs the environmental and hydrogeologic analyses, identifies whether the water is available or would impair other water users, prepares a report with his or her findings and a recommendation whether to approve or deny the application. Ecology renders a final decision.

An applicant may appeal a decision if he or she disagrees with Ecology's decision. In such cases, the applicant is responsible for paying for the legal costs of his or her own appeal. If a third party appeals a decision, the applicant may be responsible for reimbursing the state for the cost of defending the decision before the Pollution Control Hearings Board (PCHB). Ecology may negotiate further reimbursement if the decision is appealed beyond the PCHB.

Summary of Bill (Recommended Second Substitute): Cost Reimbursement. The requirement that an applicant pay for the costs of all other applications from the same water sources does not apply if the application is for a change, transfer, or amendment of a water right that would not diminish the water available to earlier pending applicants from the same water source. In pursuing a cost-reimbursement project, Ecology must determine the source of water, including the boundaries of the area that will be affected by the project. Additionally, Ecology must determine if any other water right permit applications are pending from the same source. A water source may include surface water, groundwater, or surface and groundwater together if Ecology believes they are hydraulically connected. Ecology must consider technical information from the applicant in making its determinations. Under a cost-reimbursement agreement for new applications, changes, transfers, or amendments of a water right, each applicant is responsible for any appeal costs related to the processing of his or her application.

Expedited Processing. Ecology may expedite processing of applications within the same surface water or groundwater source on its own volition, upon receipt of written requests from at least half the applicants with an application pending in the water source, upon receipt of a written request or recommendation from a watershed planning unit, or upon receipt of a resolution from a county or city legislative authority with jurisdiction over the area. If

Ecology determines it is in the public interest to expedite applications in a water source, Ecology must notify everyone with a pending application that expedited processing is being initiated, provide an estimate of factors affecting whether the application as filed will be approved or denied, provide the estimated cost, provide an estimate of how long the expedited process will take, and provide at least 60 days for applicants to respond to Ecology.

Ecology must determine the full costs to process applications on an expedited basis and recover those costs. Additionally, Ecology must calculate the estimated cost to the applicant based on the quantity of water requested by the applicant. No expedited processing fee may be more than \$25,000. Ecology must collect the expedited processing fee prior to the expedited processing of an application. The expedited processing fees must be deposited into the water rights processing account. An applicant who does not pay the expedited processing fee will have their application put into dormant status. An applicant may request that the expedited processing fee be waived for good cause shown.

Certified Water Right Examiners. Ecology must establish and maintain a list of certified water right examiners. Certified water right examiners are eligible to perform final proof examinations of permitted water uses leading to the issuance of a water right certificate. In order to qualify as a certified water right examiner, an individual must be registered in Washington as a professional engineer, professional land surveyor, or registered hydrogeologist or demonstrate at least five years of applicable experience or be a conservancy board member in order to be eligible to become a certified water right examiner. Additionally, qualified individuals must also pass a written examination and demonstrate knowledge and competency regarding Washington water law; measurement of water through open channels and enclosed pipes; water use and water level reporting; estimation of capacity of reservoirs and ponds; irrigation crop water requirements; aerial photo interpretation; location of land and water infrastructure through maps and global positioning; proper construction and sealing of well bores; and other topics related to the preparation and certification of water rights in Washington.

Each certified water right examiner must complete eight hours annually of qualifying continuing education in the water resources field and be bonded for at least \$50,000. Ecology must establish and collect fees for the examination, certification, and renewal of certification of water right examiners. Additionally, Ecology may adopt rules concerning water right examiners.

In order to receive a final water right certificate, the permit holder must hire a certified water right examiner to perform a final examination of the project to verify its completion and to determine and document for the permit holder and Ecology: (1) the amount of water that has been appropriated for beneficial use; (2) the location of diversion or withdrawal and conveyance facilities; and (3) the actual place of use. Ecology may waive the requirement to secure the services of a certified water right examiner in situations in which Ecology deems it unnecessary for purposes of issuing a certificate of water right.

Application Status. Ecology must place pending applications into project-dependent status where a proposed water supply development project, or projects, could feasibly make water available for those applications. Ecology may make such determination: (1) on its own

volition; (2) upon receipt of a written request by an applicant; (3) upon receipt of a written request or recommendation from a watershed planning unit; or (4) upon receipt of a resolution of a county or city legislative authority with jurisdiction over the area in which the water source is located. Ecology cannot extend project-dependent status for an application by more than 20 years from the date the application was placed into project-dependent status.

Ecology must put an application from a municipal water applicant into municipal pending status at the request of the applicant when the municipal water applicant has an approved water system plan that outlines projected future water demand and how they intend to acquire the water to supply those demands. Ecology may make such determination: (1) on its own volition; (2) upon receipt of a written request by an applicant; (3) upon receipt of a written request or recommendation from a watershed planning unit; or (4) upon receipt of a resolution of a county or city legislative authority with jurisdiction over the area in which the water source is located.

Ecology must put pending applications for appropriation from a particular water source in dormant status when an applicant fails to pay the expedited processing fee under expedited processing. Each applicant retains his or her priority date while in dormant status. An applicant may later request in writing, upon paying the expedited processing fee, that Ecology process the application.

Limited Water Availability. If Ecology makes a final determination by the adoption of rules, order, or other appealable agency action that no surface water or groundwater remains available from a water source, Ecology may notify all persons holding pending applications to divert water from that water source. Such notice must be made by mail and publication in a newspaper in that area. Ecology must issue an order requiring an applicant to amend his or her application to include provisions for a water impoundment or other resource management technique within one year after the date of notification is mailed to the applicant. An applicant must amend his or her application to include provisions for a water impoundment or other resource management technique within three years after the date of the order issued by Ecology. For applications that do not submit an alternative proposal within the prescribed time, Ecology must issue an order denying the application. An applicant may submit a written request for a five-year extension for good cause shown, including demonstrated diligence in working to identify a water impoundment or resource management technique. A final determination made by Ecology is appealable to the Pollution Control Hearings Board. Ecology may provide a contact list of all other applicants who receive notification that no water remains available from a water source so that the applicants can coordinate with each other to develop plans for water impoundment or other resource management techniques.

EFFECT OF CHANGES MADE BY WAYS & MEANS COMMITTEE (Recommended Second Substitute): Makes technical changes to fix incorrect references within the bill and clarifies that the fees collected for administering the water right examiner certification program must be deposited into the Water Rights Processing Account as created in the bill.

EFFECT OF CHANGES MADE BY ENVIRONMENT, WATER & ENERGY COMMITTEE (Recommended First Substitute): Allows Ecology to expedite processing of applications within the same surface water or groundwater source on its own volition,

upon receipt of written requests from at least half the applicants with pending applications in the water source, upon receipt of a written request or recommendation from a watershed planning unit, or upon receipt of a resolution from a county or city legislative authority with jurisdiction over the area. If Ecology determines it is in the public interest to expedite applications in a water source, Ecology must notify everyone with a pending application that expedited processing is being initiated, provide an estimate of factors affecting whether the application as filed will be approved or denied, provide the estimated cost, provide an estimate of how long the expedited process will take, and provide at least 60 days for applicants to respond to Ecology.

Creates the water rights processing account and requires that the expedited processing fees must be deposited into this account. Requires that Ecology determine the full costs to process applications on an expedited basis and recover those costs. Requires Ecology to calculate the estimated cost based on the quantity of water requested by the applicant. Establishes that no expedited processing fee may be more than \$25,000. Requires Ecology to collect the expedited processing fee prior to the expedited processing of an application.

Allows an applicant who does not pay the expedited processing fee to have their application put into dormant status so that the applicant may retain his or her priority date until the applicant requests that it be processed and pays the expedited processing fee. Allows an applicant to request that the expedited processing fee be waived for good cause shown.

Allows an individual to demonstrate at least five years of applicable experience or be a conservancy board member in order to be eligible to become a certified water right examiner.

Allows Ecology to issue an order requiring an applicant to amend his or her application to include provisions for a water impoundment or other resource management technique within one year after the date notification that a water basin is closed is mailed to the applicant. Requires an applicant to amend his or her application to include provisions for a water impoundment or other resource management technique within three years after the date of the order issued by Ecology. For applications that do not submit an alternative proposal within the prescribed time, Ecology must issue an order denying the application. Allows for a five-year extension, instead of a two-year extension.

Allows Ecology to put an application from a municipal water applicant into municipal pending status at the request of the applicant when the municipal water applicant has an approved water system plan that outlines projected future water demand and how they intend to acquire the water to supply those demands.

Appropriation: None.

Fiscal Note: Requested on January 6, 2010.
[OFM requested ten-year cost projection pursuant to I-960.]

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony on Original Bill (Environment, Water & Energy):

PRO: This is a critical issue for the state as people will continue to seek water. The backlog in water right application processing will continue to grow because of budget cuts. Ecology is trying to come up with a creative way to get at the back log. Ecology has had experience doing cost reimbursement projects and it currently provides a good alternative to waiting in the backlog. Ecology has had many applicants interested in cost reimbursement but do not want to cover everyone's costs and this bill will address that situation. This bill would effectively privatize Ecology's water right processing program.

CON: The cost reimbursement process adds another level of bureaucracy. Additionally, cost reimbursement will adversely effect Ecology staff getting their work done as they will now have to be also managing contractors. There are no provisions for setting costs and the applicant does not get to be involved in selecting the contractor. This bill takes the wrong approach to trying to solve the back log problem. Rather than adequately funding the water resources program, this bill relies on the private sector to attempt to solve the back log problem. The private sector charges more and often brings incomplete or flawed applications to Ecology. This causes further delays the processing of applications and burdens the staff. There is vigorous opposition to Ecology closing basins and denying applications. There is concern about where in the state Ecology might use this authority. Third party processing of water right applications removes the government to government relationship between the Tribes and Ecology.

OTHER: The cost reimbursement approach provides a solution to the backlog problem. Allowing Ecology to close basins and require applicants to pursue mitigation within a three year window, even with a two year extension is too short. Additionally, the process under which Ecology would close basin and deny applications is not a very clear process and either needs to be modified or removed from the bill. Cost reimbursement helps remove the impediments to getting a person's application processed timely. It might make sense to add a sunset date or require a performance audit to see how cost reimbursements are being handled.

Persons Testifying (Environment, Water & Energy): PRO: Ken Slattery, Department of Ecology, Seth Ballhorn, Center for Environmental Law and Policy

CON: Don Smith, Klickitat Water Conservancy Board, Matt Zuvich, Washington Federation of State Employees, John Stuhlmiller, Washington Farm Bureau, Kathleen Collins, Washington Water Policy Alliance, and Miguel Perez Gibson, Colville Tribes.

OTHER: Doug Levy, Cities of Everett and Kent, Dawn Vyvyan, Puyallup Tribe and Yakama Nation.

Staff Summary of Public Testimony on Recommended First Substitute (Ways & Means): PRO: This bill will help to improve the administration of processing water rights which will help those waiting in line.

CON: The goal of this bill is to reduce the number of applicants waiting in line but we want to ensure that this is done fairly and efficiently. There are concerns with Ecology declaring an area short of water and the short timeframe given to develop a mitigation approach. This limited timeframe will be difficult for those who have more complicated applications.

Persons Testifying (Ways & Means): PRO: Senator Rockefeller, prime sponsor.

CON: Kathleen Collins, Washington Water Policy Alliance.