

HOUSE BILL REPORT

ESHB 1791

As Passed House:

March 13, 1995

Title: An act relating to water resource management.

Brief Description: Revising water resource governance and planning.

Sponsors: By House Committee on Agriculture & Ecology (originally sponsored by Representatives Chandler, Mastin, McMorris, Sheldon, Delvin, Kremen, Clements, Chappell, Crouse, Scott, Costa, Horn, Robertson, Quall, Hankins, Skinner, Kessler, Schoesler, Grant, Sheahan, Brumsickle, Padden, Morris, Buck, Hatfield, Patterson, Cooke, Mulliken, Honeyford, Backlund and Basich).

Brief History:

Committee Activity:

Agriculture & Ecology: 2/13/95, 2/15/95, 2/16/95, 3/1/95 [DPS];

Appropriations: 3/4/95 [DPS(AG)].

Floor Activity:

Passed House: 3/13/95, 77-19.

HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Chandler, Chairman; Koster, Vice Chairman; McMorris, Vice Chairman; Mastin, Ranking Minority Member; Chappell, Assistant Ranking Minority Member; Boldt; Clements; Delvin; Honeyford; Johnson; Kremen; Robertson and Schoesler.

Minority Report: Do not pass. Signed by 4 members: Representatives R. Fisher; Poulsen; Regala and Rust.

Staff: Kenneth Hirst (786-7105).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Agriculture & Ecology be substituted therefor and the substitute bill do pass. Signed by 21 members: Representatives Silver, Chairman; Clements, Vice Chairman; Huff, Vice Chairman; Pelesky, Vice Chairman; Beeksma; Brumsickle; Carlson; Chappell; Cooke; Crouse; Foreman; Grant; Hargrove; Hickel; Lambert; Lisk; McMorris; Reams; Sehlin; Sheahan and Talcott.

Minority Report: Do not pass. Signed by 8 members: Representatives Sommers, Ranking Minority Member; Valle, Assistant Ranking Minority Member; G. Fisher; Jacobsen; Poulsen; Rust; Thibaudeau and Wolfe.

Staff: Nancy Stevenson (786-7137).

Background:

Water Resource Management - General. With the adoption of the surface water code in 1917 and the groundwater code in 1945, new rights to the use of water were to be established under a permit system. However, certain uses of groundwater not exceeding 5,000 gallons per day have been exempted from this permit requirement. The permit system is based on the prior appropriation doctrine that "first in time is first in right." Other laws authorize the state to establish minimum flows and levels for streams and lakes. The Water Resources Act of 1971 as amended establishes a broad range of fundamentals for the utilization and management of the waters of the state. The permit system and the state's laws for managing water resources are administered by the Department of Ecology (DOE).

Water Resources Inventory Area (WRIA) Planning. The Water Resources Act directs the DOE to develop a comprehensive state water resources program for making decisions on future water resource allocation and use. The act permits the department to develop the program in segments. Under the act, the DOE has divided the state into 62 WRIA's. The department has adopted water resource programs or instream resources protection programs for a number of the WRIA's.

Groundwater Planning. The groundwater code permits the DOE to designate and manage groundwater areas, sub-areas, or depth zones to prevent the overdraft of groundwaters. In 1985, legislation was enacted that permits groundwater management studies to be initiated locally and allows local governments to assume the lead agency role in developing local groundwater management programs.

Transfers and Relinquishment. State law permits water rights or portions of water rights to be transferred to other uses or places if the transfer can be made without detriment or injury to existing rights. In consideration for the financial assistance the state provides for a water conservation project, the state may receive a portion of the net water savings as a trust water right. State statutes do not expressly provide for

the transfer of conserved water under other circumstances. If a portion of a water right is not beneficially used for five consecutive years without sufficient cause recognized by statute, that portion of the right reverts to the state.

Interties. Public water system interties were expressly acknowledged by statute in 1991 and new interties were authorized under certain circumstances. By definition, interties do not include the development of new sources of supply to meet future demand.

Appeals. In general, decisions and orders of the department are subject to review by the Pollution Control Hearings Board (PCHB). Decisions of the board may be appealed to superior court.

Summary of Bill:

Water Resource Commissions. Two state commissions, known jointly as the Washington Water Resources Commissions, are created. One is for eastern Washington and one is for western Washington. Skamania County is within the jurisdiction of the eastern Washington commission.

Each commission is made up of eight members. In general, the members are nominated by county legislative authorities and appointed by the Governor. For the purposes of making nominations, the counties within the jurisdiction of the eastern commission are assigned to the two groups. Collectively, the counties in each group nominate six people for appointment. The Governor must appoint four members from each of these two lists to the eastern commission. The counties in western Washington are divided into four groups: The counties of the Olympic and Kitsap peninsulas; King, Pierce, and Snohomish counties; the counties to the north of these three; and the remaining counties. King, Pierce, and Snohomish counties and the cities of Seattle, Tacoma, and Everett each nominate two people. The Governor must appoint five members of the western commission from these county and city nominations. The counties in the other three groups each nominate three people and the Governor must appoint one member from each of three groups to the western commission. Deadlines are established for making nominations and appointments. If the entities in a district or group do not submit nominations within the deadline, the Governor must make the appointments allocated to the district or group without nomination. All commission members must be knowledgeable of state water law and have at least five years' experience in water resource matters. Rules are established for voting by members of county legislative authorities in nominating members of the commissions, in appointing planning unit members, and for adopting WRIA plans.

No elective state official, state officer, state employee, or person who has been such an official, officer, or employee within two years of appointment, may be a member of the commissions. Each member of a commission must reside within the

jurisdiction of the commission at the time of appointment. No more than two members of a commission may reside in the same county. The members serve four-year terms. A chair for each commission is chosen biennially from the members of the commission. Each member is to receive up to \$100 per day as a member of a part-time commission plus travel expenses. The Governor may remove a member of a commission for malfeasance or misfeasance in office or for having a certain number of unexcused absences from commission meetings.

Acting jointly, the commissions appoint the state engineer, approve the budget, and biennially report to the Governor and the Legislature, and adopt procedures for interbasin transfers. Each commission approves interbasin transfers within its jurisdiction. Each may employ staff as necessary for its direct support. The commissions' proceedings are subject to the Open Public Meetings Act; their public records and those of the state engineer are subject to the public records laws.

Authorities. Beginning July 1, 1996, the commissions have rule making authority under the state's water allocation and other water quantity programs. These laws are administered on behalf of the commissions by the state engineer through the Office of the State Engineer. The state engineer serves at the pleasure of the commissions. The engineer is the administrator of the office and supervises the employees of the office.

WRIA Planning. The county with the greatest population residing within a WRIA, as those areas have been set by rule, is the lead agency for water resource planning in the WRIA. Such planning is not required; the lead agency may choose to initiate the planning process. However, if funding is received from the state engineer for this purpose, a local water resource plan for the WRIA must be submitted to the counties in the WRIA for approval within three years of the receipt of the funding, or the state engineer will develop the plan.

If planning is conducted for the WRIA, one planning unit for the WRIA is to be appointed as follows: one member representing each county in the WRIA, appointed by the county; one member for each county in the WRIA (but not less than two) representing collectively all cities in the WRIA, appointed by the cities jointly; two members representing collectively all water-supply special purpose districts in the WRIA, appointed by all such districts jointly; one member representing collectively conservation districts in the WRIA, appointed by all such districts jointly; four members representing the general citizenry, appointed by the counties jointly; and six members representing various interest groups, appointed by the counties jointly. In addition, the largest purveyor in a WRIA is to be represented on a planning unit for a WRIA in King, Pierce, or Snohomish counties whether the main offices of the purveyor are or are not located in the WRIA. The lead agency county must notify the cities and districts in the WRIA that they are to convene to appoint members to the planning unit. The lead agency also provides staff support for the planning process.

Procedures for conducting multi-WRIA planning and for appointing the members of one planning unit for the multi-WRIA area are established.

For the development of plans, a county must have more than 15 percent of the area of a WRIA within its boundaries to be considered to be a county with territory in the WRIA. Each member of a WRIA planning unit must have lived in the WRIA for at least five years. None may be state employees or officials. Two of the members representing the general citizenry must be water right holders. In selecting "interest group" members, counties are encouraged to select persons from certain listed interest groups and other groups with interest in the WRIA, including tribal representatives. No person who is a member of a WRIA planning unit may designate another to act on behalf of the person as a member of the unit. If a member of a WRIA planning unit has a certain number of unexcused absences, the member's position on the planning unit is considered to be vacant.

WRIA plans may not interfere in any manner with a general adjudication of water rights. Such a plan may not impair or interfere with a water right that exists prior to the adoption of the plan. All meetings of a WRIA planning unit are to be conducted as open public meetings. Some time must be set aside at the end of each meeting of a WRIA planning unit for public comments.

Each WRIA plan must contain certain elements and may include other elements added by the planning unit. Once organized, the first task of the planning unit is to prioritize these elements regarding their importance. A plan may not be developed such that its provisions are in conflict with state or federal law. A unit's estimations regarding hydraulic continuity between ground and surface waters are to be based on available data and any data the planning unit may secure with funds other than those provided to the unit by the state engineer for WRIA planning.

Plan Approval. Upon completing a proposed water resource plan for the WRIA, the WRIA planning unit must conduct at least one public hearing in the WRIA on the proposed plan. The planning unit then provides interim approval of its proposed plan by a simple majority vote and submits the plan to the commission with jurisdiction over the WRIA. The commission must conduct at least one public hearing on the plan. The commission must provide advice as to any aspects of the plan that are in conflict with state or federal law and may provide other recommendations. The WRIA planning unit must vote on each recommendation provided by the commission and on the commission's advice but is not required to adopt either. The WRIA planning unit must approve a water resource plan for the WRIA by a two-thirds majority vote of the members of the planning unit. An approved plan is then submitted to the counties with territory within the WRIA for approval. The legislative authority of each of the counties with territory within the WRIA must conduct at least two public hearings on the WRIA plan. The counties, in joint session, may approve or reject the plan, but may not amend the plan.

If the plan is approved by the members of the legislative authorities, the plan is transmitted to the commission with jurisdiction over the WRIA for adoption. The commission must adopt such an approved WRIA water resource plan by rule. If the commission advised a planning unit that an element of its WRIA plan is in conflict with state or federal law and the unit did not remove the conflict from its plan, the state is not liable for any judgement that may be awarded regarding the conflict.

Funding. Once a WRIA planning unit is organized and has established its priorities, it may apply to the state engineer for funding assistance for developing a water resource plan for the WRIA. The state engineer is to provide \$500,000 per WRIA for each planning unit applying in this manner from appropriations made expressly for this purpose. The funding is to be provided on a first come, first served basis to the extent of the appropriations except that preference is to be given to planning units requesting funding for multi-WRIA planning. The planning units may accept grants and receive other assistance and funding.

Commissions & State Engineer. Among the powers, duties, and programs currently administered and enforced by the DOE that are expressly transferred to the commissions and the state engineer on July 1, 1996, are: Water regulation, management, and development; permitting authority regarding appropriation and use of water; participation with the federal government in development of the Columbia basin project and the Yakima enhancement project; reclamation authority for agricultural lands; and enforcement and administrative authority over water resources, including the water codes and minimum flows and levels; and administration of the water well construction laws.

The state engineer is encouraged to contract with local government for field investigations. The state engineer must rule in a timely manner on permit applications for surface and groundwater. Regarding applications for water in a WRIA for which a WRIA plan has been adopted, the engineer must grant or deny the application within 180 days of the date the application is filed. For applications for water in a WRIA for which no WRIA plan has been adopted, the engineer must grant or deny the application within one year of the date the application is filed. These deadlines do not include the time it takes the applicant to respond to one explicit request for additional information reasonably required to make a determination on the application. The cost of obtaining such information must be reasonable in relation to the quantity and value of the water right applied for.

An adopted plan must be used by the state engineer as the basis for all water resource decisions and actions within the WRIA. The state may not set instream flows except as provided by WRIA plans. It may not conduct WRIA planning except for a WRIA planning unit that has failed to meet its three year deadline for preparing a plan after receiving planning monies from the state engineer.

Personnel, Records, Appropriations, Rules & Business Transferred. On July 1, 1996, the employees of the DOE classified under the state's Civil Service Act and engaged in performing the functions transferred to the commissions and state engineer are transferred to the jurisdiction of the commissions and engineer without loss of rights. The rules and pending business regarding the transferred functions are transferred to the commissions and engineer. The records, files, furniture, equipment, assets and appropriations of the DOE pertaining to the transferred functions are also transferred to the commissions and the engineer.

Interties. Transfers include the exchange of acquired water between public water systems through an intertie. Interties are no longer prohibited from including the development of new sources of water supply to meet future demand. The DOE or its successor may not deny or limit a change-of-place of use for an intertie on the grounds that the holder of a permit has not yet put all of the water authorized in the permit to beneficial use.

Appeals. New appeals procedures for certain water quantity decisions of the DOE are established. The procedures apply to these decisions until July 1, 1996, after which time they apply to all decisions of the state engineer or the commissions. Instead of being appealed to the Pollution Control Hearings Board, the decisions are appealable directly to superior court or to an administrative law judge (ALJ) assigned by the Office of Administrative Hearings. If appealed to superior court, they are appealed de novo to the court in the county that will be directly and immediately affected by the decision. Decisions regarding relinquishment of a water right may be appealed only to superior court.

Under the ALJ option, the agency must begin an adjudicatory proceeding under the provisions of the Administrative Procedures Act within 30 days after receiving a request for an administrative hearing regarding such a decision. The ALJ who conducts the hearing also makes the final decision. The decision of the ALJ is not appealable back to DOE, the commissions, or the state engineer, but may be appealed by any of the parties to the superior court in the county that will be directly and immediately affected by the decision. The Chief Administrative Law Judge must develop procedural rules for conducting such appeals.

Water Transfers and Spreading. New rules are established for water made surplus to a water right through the implementation of practices or technologies that are more efficient or more water use efficient than those under which the right was perfected and for water made surplus through a change in the crops grown with the water. If the water is not supplied by an irrigation district, the person who holds the water right may use the water on other lands owned by the person that are contiguous to the lands upon which use of the water was authorized before this change in use. The person who holds the water right is to notify the Department of Ecology of the change. The notification provides a change in the person's water right.

If the water is supplied by an irrigation district, an individual water user does not have a right to such water made surplus through a change in the crops grown. However, the water made surplus through such crop changes may be used for the benefit of the district generally. The use of the water made surplus through the efficiency or water use efficiency practices or technologies is regulated solely by the irrigation district and must be approved or authorized by the district. If the use of such surplus water results in the total irrigated acreage within the district exceeding the irrigated acreage recorded with the department for the district's water right, the board is to notify the department of the change. The notification provides a change in the district's water right. Whether the water is or is not supplied by an irrigation district, the priority date for the right to the use of the surplus water is the same as for the original water right.

The Department of Ecology may not initiate relinquishment proceedings regarding a water right for which an application for a transfer or change is filed for a period of two years after the application is filed. An irrigation district must consider the effect of a transfer or change of a water right on the financial and operational integrity of the district when it considers requests for such transfers or changes. The requirements for applications for new water rights do not apply to transfers of water rights.

Hydraulic Continuity. New rules are established for determining whether surface water and groundwater are interconnected such that they are hydraulically continuous. All wells in an unconfined aquifer and located within one-fourth of a mile from a surface water source are assumed to be hydraulically continuous to the surface water, unless the operator of the well or applicant for water right for the well can provide information to the contrary. If the water is from a confined aquifer, the burden of proving hydraulic continuity is on the department and must be based on a relationship that is demonstrable. Rules are established for determining hydraulic continuity in other wells and techniques for determining such continuity are provided.

General Permits. The department is directed to develop a streamlined, general permit system for nonconsumptive, nonbypass uses of water. Such a use is one which consumes less than 5,000 gallons of water per day. It cannot impair senior water rights. Water diverted from a stream or drawn from an aquifer must, following use, be discharged back into or near the point of diversion or withdrawal and, when discharged, must meet state water quality standards. An application for such a permit must be processed within 120 days.

Repealers. Repealed are: a section of law specifying certain powers and duties of the director of DOE regarding water resources; and a section of law prescribing the DOE's water resources information system.

Rulemaking. The commissions are authorized to adopt rules: to the extent specifically required by federal law or a court order; to the extent explicitly authorized by state law; or to implement a specific objective of a state law.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Bill: The sections of the bill transferring authorities from the DOE to the commissions and the state engineer take effect on July 1, 1996. The sections regarding instream flows and hydraulic continuity and those authorizing WRIA planning other than as described in the bill take effect immediately. The remaining sections of the bill take effect ninety days after adjournment of session in which bill is passed.

Testimony For: (Agriculture & Ecology) (Original bill) (1) DOE's water management has avoided smart strategies such as transfers and storage. Water permit decisions should be based on good science and local involvement in planning. (2) DOE's environmental bias has shackled permit processing. The delays caused by DOE's permit processing system have forced people to use exempt wells instead of water systems. Permits should be issued unless research shows otherwise. DOE has made it difficult to research a person's own water rights. Administration of the system should be balanced; it should not favor any extreme. (3) A number of western states have agencies specifically for water management; a number of these are headed by commissions or boards. (4) Requiring habitat planning as part of water planning is biting off more than the planning units can chew. (5) Regional planning should not require the consensus of all parties; consensus can slow or stop decision making. The will of the majority must prevail. (6) The composition of the planning units must be set in statute or too much time will be spent organizing for planning. (7) The bill provides certainty and deadlines for the permit process, which are needed. (8) Appealing decisions to local superior courts will permit decisions to be made by those who understand local problems. The courts will provide a fair review of water decisions; currently they may overturn a decision of the PCHB only if it acted arbitrarily or capriciously. (9) The water transfer portions of the bill will provide water allocation competition. (10) Under current law, water users can spend a great deal of money to save water, but are not able to use it; the bill solves this problem. (11) Irrigation districts should be in charge of intradistrict transfers, but those transfers should not injure third parties or the district's delivery system. Transfers should also be used to complete the second half of the Columbia basin project. (12) Many people were not aware of the planning as it was being done in the Methow basin. A public hearing was not held on the plan; the plan is costly and bureaucratic to implement.

(Appropriations) We want to bring local people into the water resource planning process. The substitute bill no longer makes planning in 62 Water Resource Inventory Areas mandatory, it is now voluntary. We've tried to create an incentive for planning. There should be few new costs just transferring staff. The well drillers fee is intended to be transferred. We support \$10 million for local government costs in regional planning.

Testimony Against: (Agriculture & Ecology) (Original bill) (1) Mandating that all watersheds conduct planning simultaneously is very costly. (2) Watershed planning should include habitat planning to manage fish and wildlife. (3) State funding is needed for the regional planning efforts; otherwise, the bill creates Initiative 601 problems regarding unfunded mandates. Funding should be provided for other forms of planning as well. (4) Chelan-style consensus requires cooperation and offers a more stable result than planning without such consensus. The bill will be divisive and prompt litigation. Fear of the Chelan process is unwarranted. A government-to-government approach is needed for tribal involvement. The bill would allow others to vote away tribal rights; it does not recognize tribal treaty rights to instream flows or shellfish. Inclusiveness and consensus are the keys to successful water planning. (5) The bill's water transfer policies do not take into consideration the public interest in those transfers. The bill focuses on water allocation, with inadequate emphasis on instream requirements and conservation. Fish and free-flowing streams will be lost under the bill. (6) The entities created by the bill are run by trade associations. (7) More attention should be paid to non-consumptive uses of water. (8) Existing water rights need to be protected; the bill should not allow them to be diminished. Holders of private water rights should be represented in the planning process. Transfers should be limited to conserved water only and third party rights should be protected. Multiple changes in the use, place, and season of a water right should be restricted. (9) A water right holder should not have to participate in the process to protect his or her property right in court. De novo review of the facts of an administrative decision may be unconstitutional. The bill's provisions for appeals lack due process. The PCHB settles most of its cases by informal mediation; it should be allowed to continue to review these cases. (10) The administrative restructuring required by the bill will increase costs and cause more delays. Restructuring alone will not solve the problem. (11) Water quality and water quantity administration should be linked. (12) The counties should be in charge of setting up the planning units; they should select the lead agency. Watershed planning should be done by grassroots people, not by local governments. Yakima watershed planning should not be disrupted; the watershed planning done by conservation districts should be incorporated into the process. (13) Acreage expansion limitations currently set for groundwater subareas should not be overturned by transfer authority.

(Appropriations) It will not be without cost to meet the time requirements established in the bill for issuing water rights. To accomplish these timelines, given the backlog, adequate staff must be provided.

Testified: (Agriculture & Ecology) (Original bill) Kathleen Collins, Water Alliance (pro); Dave Arbaugh, Washington Public Utilities Association (pro); Scott Barr (pro); Delmar Smith (pro); John Worling, Washington State Farm Bureau (pro); Darryl Olson, Columbia-Snake River Irrigators Association (pro); Ron Summers, Lone Star Gravel Company (pro); Dennis Burton, Oroville-Tonasket Irrigation District (pro); Jan Teague, Building Industry Association of Washington (pro); Dick Erickson, East Columbia Basin Irrigation District (pro); Shannon McDaniel, South Columbia Irrigation District (pro); Paul Cross, Lake Chelan Irrigation District (pro); James Trull, Sunnyside Valley Irrigation District (pro); Dan Boast (pro); Brian Boast (pro); Judy Turpin, Washington Environmental Council (con); Joe LaTourrette, Rivers Council of Washington (con); Bruce Wishart, Sierra Club (con); Patricia Sumption, Friends of Green River (con); Polly Dyer, The Mountaineers (con); Mary Pearson, Suquamish Tribe (con); Dawn Vyvyen, Skagit System Coop and Yakima Indian Nation (con); Tom Deschner, Recreation Caucus (con); Bob Jensen, Environmental Hearings Office (against appeals process); Dick Ducharme, Building Industry Association of Washington (commented); Mark Triplett, Washington Aggregates and Concrete Association (commented); Ted Bottiger (commented); Alice Parker (commented); Dave Schultz and Paul Parker, Washington State Association of Counties (commented); Edward McCleary, Trout Lodge and Washington Fish Growers Association (commented); Chris Lyle, Washington Association of Wheatgrowers (commented); Mary Burke (commented); Mel Wagner, Tom Carpenter, and Dave Wyckoff, Yakima River Watershed Council (commented); Glen Rice, City of Yakima (commented); and Steve Devin (commented).

(Appropriations) Representative Gary Chandler, prime sponsor; Kathleen Collins, Washington Water Policy Alliance (pro); and Judy Turpin, Washington Environmental Council (con).