

HOUSE BILL REPORT

HB 1832

As Reported by House Committee On:
Agriculture & Ecology

Title: An act relating to water resources management.

Brief Description: Modifying provisions concerning water management.

Sponsors: Representatives Linville and G. Chandler; by request of Governor Locke.

Brief History:

Committee Activity:

Agriculture & Ecology: 2/13/01, 2/23/01[DP].

Brief Summary of Bill

- Allows local watershed planning units to receive additional funding from the Department of Ecology (DOE) for optional planning components, and allows a more flexible funding schedule.
- Allows applications for modifying existing water rights to be processed separately from applications for new water rights and does not protect the latter applications from being impaired by decisions regarding the existing rights.
- Expressly allows water conservancy boards to process the same types of modifications of water rights as may be processed by the DOE (except for trust water rights), waives certain liability of such a board and its members and employees, establishes new conflict-of-interest requirements for board members, broadens who may intervene in a board's action, lengthens the DOE's review period when objections are filed, and requires the review of board decisions to deny applications.
- Requires the DOE to establish by rule certification procedures, qualifications, and fees for certified water rights examiners and establishes specific requirements that must be satisfied before a final water right certificate may be issued.
- Expressly allows changes in the purpose of use of an agricultural irrigation water right secured under a family farm permit under specified circumstances.
- Waives public utility taxes regarding certain reclaimed water and water conservation services.
- Alters requirements for donating water rights to the trust water right systems for instream flows in areas where aquatic species have been listed as endangered or threatened.

HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

Majority Report: Do pass. Signed by 10 members: Representatives G. Chandler, Republican Co-Chair; Linville, Democratic Co-Chair; Cooper, Democratic Vice Chair; B. Chandler, Grant, Hunt, Kirby, Quall, Schoesler and Sump.

Minority Report: Without recommendation. Signed by 3 members: Representatives

Delvin, Dunshee and Roach.

Staff: Kenneth Hirst (786-7105).

Background:

Watershed Planning. State law establishes procedures and policies for initiating watershed planning at the local level. If certain local governments choose to initiate the planning for one or more Water Resource Inventory Areas (WRIA's) or watersheds, they appoint a planning unit to do the planning. The planning unit must address water quantity issues in the WRIA. The initiating governments may choose to add other components to the planning process. These may include instream flows, water quality, and fish habitat. The maximum amount of money that may be granted by the Department of Ecology (DOE) to a planning unit for each of three phases of planning is: for Phase I (for organizing), up to \$50,000 for one WRIA or up to \$75,000 for multiple WRIA's; for Phase II (for watershed assessments), up to \$200,000/WRIA; and for Phase III (for developing a watershed plan and recommending actions), up to \$250,000/WRIA. If a planning unit receives more than the organizational grant monies from the DOE, it must submit its watershed plan for county approval within four years of the date the funding was first received by the planning unit.

Modifying Existing Water Rights. There are several fundamental elements of a water right. One is its priority (or seniority). Other elements include: the amount of water that may be withdrawn from a particular water source under the right, the time of year and point from which the water may be withdrawn, the type of water use authorized under the right (such as an agricultural or municipal use), and the place that the water may be used. Certain of these elements of a water right may be modified with the approval of the DOE if the modification would not impair other existing water rights. In a 1983 decision, the state's Supreme Court required the DOE to consider the rights represented by applications for new water permits that have not yet been granted or denied when it considers applications for modifying existing rights. This currently has the effect of tying together the DOE's consideration of the two types of applications.

Conservancy Boards. Historically, applications for modifying existing water rights were filed with and processed by the DOE and its predecessor agencies. An alternative processing system was established with the enactment of legislation in 1997 authorizing water conservancy boards. These boards may be created by a county legislative authority with the approval of the DOE. A board has three members, called commissioners. A water right holder who claims that his or her existing water right will be detrimentally affected or injured by an application being considered by the board may intervene. If the board approves an application, the director of the DOE has 45 days in which to review the board's action to affirm, reverse, or modify it. With the consent of the parties, this review period may be extended an additional 30 days. If the director fails to act within this time period, the action taken by the board is considered to be final, although it is

subject to appeal in the same manner as other water right decisions of the director. A board member who has an ownership interest in a water right that is the subject of an application before the board cannot participate in the board's review or decision on the application. A board member who is on the governing board of or is an employee of a municipally owned water system cannot participate in the board's review of an application regarding a water right in which the system has an ownership interest.

In rules adopted by the DOE, the types of modifications of water rights that may be approved by a board are defined broadly: the board may consider the same types of modifications as may the DOE. In a Thurston County Superior Court case, the court found the authority of the boards to be much more limited: they may review applications to modify the place of use or the point of diversion or withdrawal of a water right, but they may not review applications involving other modifications. The DOE has appealed the court's ruling. The laws authorizing these boards also waive the liability of the county and the DOE regarding claims of damages arising from the water right modifications approved by such a board.

Issuing Water Right Certificates. If a water right permit is issued by the DOE, the permit holder may develop water use under the terms of the permit. Upon a showing that the appropriation of water has been "perfected" as required by the Surface Water Code or a showing of certain evidence of completed construction under the Ground Water Code, the DOE is to issue the permit holder a water right certificate. For an application to modify an existing water right, the DOE is to issue a water right certificate when it approves the application.

Family Farm Permits. Family farm permits are water right permits issued under the Family Farm Water Act, which was adopted by the voters through the approval of Initiative Measure No. 59 in 1977. Under the act, the principal permit for using water to irrigate privately owned agricultural lands is the family farm permit. A family farm permit must limit the use of water withdrawn for irrigating agricultural lands to land qualifying as a family farm, i.e., not more than 2000 contiguous or noncontiguous acres of irrigated agricultural lands. The right to withdraw water for use for irrigating agricultural lands under authority of a family farm permit is subject to the irrigated land's complying with the definition of a family farm as defined at the time the permit is issued. If a person's acquisition of land and water rights would otherwise cause land being irrigated under a family farm permit to lose its status as a family farm, all lands held or acquired must again be in compliance with the definition of a family farm within certain specified periods of time. The DOE interprets these requirements as prohibiting the water right from being modified so that it may be used for any purpose other than irrigating agricultural lands.

Reclaimed Water. The Department of Health may issue a reclaimed water permit for industrial and commercial uses of reclaimed water to the generator of the reclaimed water. The generator of the reclaimed water may then distribute the water according to

the terms of the permit. The permit governs the location, rate, water quality, and purpose of use of the reclaimed water. A permit is required from the DOE for any land application of reclaimed water.

Trust Water Rights. A water right may be donated to or acquired by the state for management as a trust water right. The laws governing the state's trust water right system are divided into two parts: one for the Yakima River Basin; and the other for the rest of the state. The DOE may acquire water rights for the trust water right systems by purchase, gift, or other appropriate means other than condemnation. Water rights may be acquired for either system on a temporary or permanent basis. Among the uses expressly authorized for such trust water rights are instream uses.

Relinquishment. In general, if a person abandons his or her water right or voluntarily fails to use the right for five successive years, the person relinquishes the right or the portion of the right abandoned or not used. However, exemptions from this requirement are provided. For example, these relinquishment requirements do not apply to trust water rights or to the non-use of water resulting from federal laws imposing land or water use restrictions either directly or through the landowner's enrollment in certain federal programs.

Summary of Bill:

Watershed Planning. For Phase II planning, a planning unit whose initiating governments choose to include an instream flow, water quality, or habitat component in the planning may apply for up to \$100,000 in additional funds for each component included. A planning unit may also request a different amount of funding than the amounts specified by law for Phase II and Phase III if the total does not exceed the total of the amounts specified by statute for all three phases of planning. The planning unit must demonstrate that the alternative funding schedule will not impair its ability to complete a plan. The date by which a watershed plan must be submitted for county approval is now four years after the date funds beyond the initial funding were first expended by the planning unit.

"Two Lines." Pending applications for new water rights are not entitled to protection from impairment when an application relating to an existing surface or ground water right is considered. Applications relating to the existing water rights may be processed and decisions on them may be rendered independently of the applications for new water rights from the same source of supply. An application relating to an existing water right may be set aside for insufficient information if the applicant is sent a written notice and explanation. The application does not lose its priority date. Until January 1, 2004, the DOE must report annually to the Legislature on the results of processing applications under these new authorities.

Conservancy Boards.

Water conservancy boards may process the same types of these modifications of existing water rights countywide as the DOE may under the surface and ground water codes, except that they may not process applications to establish trust water rights. A board may act upon an application to transfer an historic right represented by a water right claim filed with the DOE by making a tentative determination as to the validity and extent of the right in the claim. A board may establish a water right transfer information exchange. The DOE must provide technical assistance to a board as soon as is reasonably possible. A board may also receive assistance and support from the county government of the county in which it operates.

A county may appoint two additional commissioners to a board. One position must represent the overall public interest from the public at large and the person in that position cannot have an affiliation with any water user group or other water interest group. The remaining positions must represent the major water interests in the county. If a county does not choose to appoint the additional two commissioners and no commissioner on its board currently is from the public at large, a commissioner from the public at large need not be appointed until the first vacancy on the board occurs.

Any person claiming in writing that he or she will be aggrieved or adversely affected by a transfer may intervene. The person is entitled to a hearing before the board if the claim: involves impairment to the claimant's water right or to instream flows set by the DOE; or would be detrimental to the public interest or in violation of other requirements of law. If the intervener establishes that his or her claim is true, the board cannot approve the transfer unless it can be cured by required compensation or mitigation. All decisions of a board, not just approvals of applications, are subject to review by the director of the DOE. Within 30 days of the date a board makes a decision on an application, any person may file written objections with the DOE. If one or more objections are filed, the director has 75 days (rather than 45 days) to review the board's decision. This period may be extended for 30 days with the consent of the applicant.

A commissioner of a board may not participate in the board's review or proposed decision on an application if the commissioner has an interest, financial or otherwise, direct or indirect, in the outcome of the decision. This includes serving as an officer, director, trustee, member, or employee of the applicant, any potential purchaser of the water right, or an intervener in the application. A violation of this prohibition is grounds for removal from office and imposition of a civil fine and is enforceable in an action brought before the superior court of the county in which the board operates. A conservancy board or its employees or commissioners is not subject to a cause of action or claim for damages arising out of the decisions made by the board.

A decision by the director to deny (not just approve) an action by a county to create a board is also appealable to the Pollution Control Hearings Board. A county's board may be dissolved by the adoption of a resolution by the county's legislative authority. A board must maintain minutes of its meetings and the minutes are open to public

inspection. A board is subject to the state's public disclosure laws and must maintain records of its proceedings and determinations which must be available for public inspection and copying. A quorum is defined.

Certified Water Rights Examiners. By June 30, 2002, the DOE must adopt rules to establish certification procedures, qualifications, fees, and other requirements for certified water rights examiners. Examiners are to be certified to carry out the proof examination that is a prerequisite for issuing of a water right certificate and to provide advice and assistance to the public.

Certification is valid for one year and is renewable. The DOE's denial of a certification or renewal may be appealed to the Pollution Control Hearings Board (PCHB). The DOE must set by rule the fees for the examination, certification, certificate renewal, and training of water right examiners. The fees are to be deposited in the state's Reclamation Revolving Account for use by the director for administering the water rights examiner program.

The DOE may suspend or revoke the certificate of an examiner for good cause. The DOE's action may be appealed to the PCHB. The DOE's records regarding complaints concerning examiners must be made available to any person who requests them. Each examiner may set his or her own fees for services. Proof examinations, opinions, or other actions taken by certified water rights examiners are not binding on the DOE, nor are they prima facie evidence in any legal proceeding. The DOE and its officers or employees may not be found liable for damages alleged to have arisen from the actions or inactions of the DOE or its officers or employees under the program.

Issuing a Water Right Certificate. After a holder of a water right permit has completed the project as provided in the permit and has put water to beneficial use, the permit holder must submit to the DOE a notarized statement to that effect. Before issuing a water right certificate to replace the permit, the DOE must review certain specified information regarding the various elements of the water right and evidence that use under the permit was perfected, including the maximum instantaneous and annual quantity of water that has been put to beneficial use based on measurements of flow through the system during operation. The additional information required for irrigation, domestic and municipal water supply, and hydropower rights is specified.

The evidence must also include evidence that the conditions of the permit have been complied with including the proper installation and operation of any required measuring devices, fish screens, well inspection ports, well identification tags, and well surface seals. The DOE may review any other information to confirm the water has been put to beneficial use.

The permit holder may choose to use, at the holder's expense, a certified water rights examiner to conduct the review, or "proof examination." The DOE must make its

decision whether to issue a certificate within 120 days of receiving the report of the examiner. A water right certificate for a change of an existing water right is to be issued once the change has been perfected.

Family Farm Water Permits. A transfer of a water right under the Family Farm Water Act is defined broadly to include transfers, changes, and amendments of surface and ground water rights. If a portion of the water governed by a water right established under the authority of a family farm permit is made surplus to the beneficial uses exercised under the right, the right to use the surplus water may be transferred to any purpose of use that is a beneficial use of water. For this purpose, a water right or portion of a water right may be made surplus through the implementation of practices or technologies, including conveyance practices or technologies, that are more efficient or more water-use efficient than those under which the right was perfected. This authority cannot be used to transfer the portion of a water right that is necessary for the production of crops historically grown under the right nor to transfer a water right or a portion of a water right that has not been perfected through beneficial use before the transfer. All other transfers of water for agricultural irrigation purposes are subject to the 2000 irrigated acreage provisions of the Family Farm Water Act. Within this limitation for irrigated acreage, a family farm permit may be transferred to any purpose of use that is a beneficial use of water: if the transfer is made exclusively under a lease agreement; or if the water right is for the use of water at a location that is, immediately before the transfer is approved, within the boundaries of a city or town or within the boundaries of an urban growth area designated under the Growth Management Act.

Reclaimed Water Tax Exemption and Water Conservation Tax Credit. The public utility tax does not apply to amounts received for water services supplied by an entity with a reclaimed water permit for industrial and commercial uses of water when the water supplied is reclaimed water. In computing the public utility tax, the amounts expended to improve consumers' efficiency of water use or otherwise to reduce the use of water by consumers are deductible from the utility's gross income. These expenditures are deductible if they implement elements of the conservation plan within a state-approved water system plan.

Trust Water Rights. The DOE may accept a donation of water rights to either the Yakima River or the statewide trust water right system under the following circumstances: (1) an aquatic species is listed as threatened or endangered under the federal Endangered Species Act for a body of water; (2) certain instream flows are needed for the species; and (3) the holder of a right to water from the body of water chooses to donate all or a portion of the person's water right to the trust water system to assist in providing those instream flows on a temporary or permanent basis. Neither the right donated nor the sum of the portion of a right remaining with the person plus the portion donated may exceed the extent to which the right was beneficially used during any of the last five years. Once accepted, such rights are trust water rights within the conditions prescribed by the donor that satisfy the requirements of the trust water laws.

If, upon an appeal of a decision of the DOE, it is found that a donation impairs existing water rights, the donated trust water right must be altered to eliminate the impairment. Current requirements that notice be published before a trust water right is exercised apply only for the first time the donation is exercised as a trust water right. The provisions of the surface water code regarding transfers do not apply to such donations. If a water right acquired by the state for the state's trust water right systems is expressly conditioned to be for instream use, it must be managed in that manner. If it is conditioned to be for instream use, it must be managed for public purposes to ensure that the gift qualifies as a deduction for federal income tax purposes for the person who gave it. The DOE is expressly given the authority to lease water rights for the Yakima River trust water rights system.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Testimony For: (1) The Governor's water team has a multi-year water strategy that is performance based, not activity based. For this session, its objective is to provide tools to make the current water rights system work and to reduce the backlog of applications. The bill would provide those tools. (2) This bill deals with process. Its provisions for watershed planning, "two lines," and trust water rights are small but important fish-friendly steps. (3) Some of the provisions of the bill are important in some regions of the state and others in other regions. (4) The state may be facing the worst drought of the last half-century. (5) More time and money should be spent on developing watershed plans. (6) The bill expands use of the trust water rights systems.

Testimony Against: (1) The bill does not resolve the problems it addresses; it exacerbates them. (2) Timely decisions cannot be made on permits if there is a moratorium on issuing permits except those for health and safety or for fish flows. The DOE will wait until after watershed planning is done in areas doing such planning before it processes permits. (3) The bill contains nothing to address the problems of growing communities. Its provisions on proving-up use for water right certificates should be applied prospectively only. Human beings should be placed on an equal footing with fish. Cities have an obligation to provide water for people under the Growth Management Act. (4) There is no assurance that the bill will provide water for fish. Instead, water conservation performance standards should be established and increased funding should be provided for enforcement activities, as called for in the Governor's salmon strategy. (5) The criteria for standing before a water conservancy board should not be broader than criteria for standing before the DOE when it makes the same type of decision. The boards have more public process than does the DOE for processing such applications. The boards just do the DOE's field work for them and make

recommendations to the DOE. (6) The authority of the boards should not be expanded. They are a cost ineffective means of doing transfers. Defacto approvals by the DOE should be eliminated if the boards just make recommendations. (7) The DOE does not have the resources to set up and administer an examiners' program. The program is not needed. (8) The bill would discourage the consolidation of smaller water systems because they would lose their inchoate rights, yet the DOH encourages consolidation. (9) It is against the law to slice up a water right for the benefit of the public interest once it has become a right. (10) The Legislature has received reports regarding the activities of conservancy boards. It knows much more about their activities than the transfer and change activities of the DOE. (11) Commissioners must already represent the public interest. The bill would make the boards dysfunctional. The conflict-of-interest prohibitions go well beyond any tangible interest. The bill will create gridlock. (12) Conservancy boards are opposed because they represent local regulation of interests that impact federally reserved rights. (13) "Two lines" authority should not be granted to the DOE until the powers of the conservancy boards have been restored. (14) Voluntary donations of water rights to streams should not be coerced from applicants as a condition for processing their applications. (15) Watershed planning units should receive an additional \$100,000/ WRIA without other restrictions. (16) Relinquishment and the five-year calculation used to determine what water can be transferred should be addressed in the bill. (17) The bill is a piecemeal approach that is detrimental to fish. (18) Members of the conservancy boards do not have a scientific or technical background. Rather than support them, the Legislature should provide the DOE more resources to do transfers and changes. (19) Water conservation should be mandatory. The B&O tax credit for conservation should be expanded. (20) The application line for new water permits should be moved as well. (21) The provisions of the bill regarding family permits do not go far enough. The transfers allowed for agriculture-to-agriculture uses should be broader. (22) The approaches to this bill's subjects found in competing bills are preferred. (23) A donor to the trust water right systems should be empowered to set reasonable terms for the donations that must be accepted by the DOE. (24) Proceed with caution; the Governor's veto message for the last municipal water rights provisions (though he commented on current law, not just the matter in the bill) made matters worse for the municipalities.

Testified: (In support) Jim Waldo, Governor's Water Team; and Jeff Koenings, Department of Fish and Wildlife.

(In support with concerns) Chris Cheney, Washington Dairy Federation, Washington Fryers Commission, and Lewis County Conservancy Board; Steve Lindstrom, Snohomish-King County Water District Coalition; Jim Miller, City of Everett; Dave Williams, Association of Washington Cities; Bob Mack, cities of Seattle, Tacoma, and Bellevue; Josh Baldi, Washington Environmental Council; Kathleen Collins, Washington Water Policy Alliance; Mike Moran, Muckleshoot Indian Tribe; Scott Hazelgrove, Washington Association of Water and Sewer Districts; and William Hahn, Kitsap Public Utility District.

(Opposed) Darryll Olsen, Benton County Conservancy Board; Leo Bowman, Benton County Commissioner; Tim Boyd, Columbia Snake River Irrigator's Association; Jim Halstrom, Washington State Horticultural Association; Jim Zimmerman, Cattleman's Association; Dawn Vyvyan, Yakama Indian Nation; Charlie Brown, Washington State Potato Commission; and Paul Parker, Washington State Association of Counties.