

HOUSE BILL REPORT

E2SSB 6267

As Passed House - Amended:
March 11, 2010

Title: An act relating to water right processing improvements.

Brief Description: Regarding water right processing improvements.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Rockefeller and Honeyford; by request of Department of Ecology).

Brief History:

Committee Activity:

Agriculture & Natural Resources: 2/18/10, 2/23/10 [DPA];
General Government Appropriations: 2/25/10 [DPA(APPG w/o AGNR)];
Ways & Means: 2/27/10 [DPA(AGNR w/o APPG)].

Floor Activity:

Passed House - Amended: 3/4/10, 51-47.
Senate Refuses to Concur.
House Amended.
Passed House: 3/11/10, 96-1.

Brief Summary of Engrossed Second Substitute Bill

- Authorizes an alternative cost-reimbursement process for water right applications.
- Authorizes an expedited processing procedure for water right applications.
- Establishes criteria for qualifying as a certified water right examiner.
- Creates a Water Rights Processing Account to support the processing of water right applications and for the examination, certification, and renewal of certification of water right examiners.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: Do pass as amended. Signed by 10 members: Representatives Blake, Chair; Chandler, Ranking Minority Member; Smith, Assistant Ranking Minority Member; Jacks, Kretz, Nelson, Pearson, Rolfes, Van De Wege and Warnick.

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.

Minority Report: Do not pass. Signed by 3 members: Representatives Ormsby, Vice Chair; Liias and McCoy.

Staff: Jaclyn Ford (786-7339).

HOUSE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS

Majority Report: Do pass as amended by Committee on General Government Appropriations and without amendment by Committee on Agriculture & Natural Resources. Signed by 10 members: Representatives Darneille, Chair; Takko, Vice Chair; Blake, Dunshee, Hudgins, Kenney, Pedersen, Sells, Van De Wege and Williams.

Minority Report: Do not pass. Signed by 4 members: Representatives McCune, Ranking Minority Member; Armstrong, Assistant Ranking Minority Member; Klippert and Short.

Staff: Owen Rowe (786-7391).

HOUSE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended by Committee on Agriculture & Natural Resources and without amendment by Committee on General Government Appropriations. Signed by 22 members: Representatives Linville, Chair; Ericks, Vice Chair; Sullivan, Vice Chair; Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Dammeier, Assistant Ranking Minority Member; Chandler, Cody, Conway, Darneille, Haigh, Hinkle, Hunt, Hunter, Kagi, Kenney, Kessler, Pettigrew, Priest, Ross, Schmick and Seaquist.

Staff: Owen Rowe (786-7391).

Background:

An applicant for a water right pending before the Department of Ecology (DOE) may enter into a cost-reimbursement agreement with the DOE to expedite review of the 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 source of water.

The DOE retains the authority to render a final decision on the application, but 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.

An applicant may appeal a decision if he or she disagrees. In such cases, the applicant is responsible for paying for the legal costs of his or her own appeal. The DOE's decisions on water rights are defended by the state Office of the Attorney General. 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). The DOE may negotiate further reimbursement if the decision is appealed beyond the PCHB.

Summary of Bill:

Cost-Reimbursement.

The requirement to pay for the cost of all other senior applications from the same source of supply does not apply if the application would not diminish the water available to earlier pending applicants from the same source of supply. A water source may include surface water only, groundwater only, or surface and groundwater together if the DOE finds they are hydraulically connected. When determining the boundaries of a water source, the DOE must also consider technical information submitted by the applicant.

Upon the request of an applicant seeking cost-reimbursement processing, the DOE may elect to initiate a coordinated cost-reimbursement process. If the DOE initiates a coordinated cost-reimbursement project, they must notify in writing all persons who have pending applications. The notice must be posted on the DOE's web site and published in a newspaper of general circulation in the area where affected properties are located. The notification must inform those applicants that a coordinated cost-reimbursement process is being initiated, and the criteria under which the applications will be examined and determined. The notice must also provide the estimated cost for having an application processed on a cost-reimbursement basis and how long the cost-reimbursement process will take before an application is approved or denied. The notice must provide at least 60 days for the applicants to respond in writing as to their interest in participating in the cost-reimbursement processing of their applications. The applicant must pay for the initial phase of cost-reimbursement. The cost for each applicant must be based primarily on the proportionate quantity of water requested by each applicant. The cost may be adjusted if it appears that an application will require a disproportionately greater amount of time and effort to process due to its complexity.

If an applicant elects not to participate in a cost-reimbursement process, the application remains on file with the DOE, retains its priority date, and may be processed under regular processing, priority processing, expedited processing, coordinated cost-reimbursement processing, cost-reimbursement processing, or through Water Conservancy Board processing.

The DOE must process remaining applications on file within the framework of other water right processing needs, as determined by agency rule and to the extent resources are available. Coordinated cost-reimbursement applies only to the sequence of application processing and does not affect the relative priority date of any resulting water rights.

Cost-Reimbursement Consultants.

For any cost-reimbursement process or coordinated cost-reimbursement process, the applicant may, after consulting with the DOE, select a prequalified consultant or be assigned a prequalified consultant by the DOE.

Only the DOE may approve or deny a water right application, and such a final decision remains solely the responsibility and function of the DOE. The DOE retains full authority to amend, refuse, or approve any work product provided by any consultant. The DOE may recover its costs related to: (1) the review of a consultant to ensure that no conflict of interest exists; (2) the management of consultant contracts and cost-reimbursement agreements; and (3) the review of work products provided by participating consultants.

In lieu of having one or more of the work products performed by a prequalified consultant, the DOE may, at its discretion, recognize specific work completed by an applicant or an applicant's consultant prior to the initiation of cost-reimbursement processing. The DOE may also, at its discretion, authorize the use of a consultant to perform a specific scope of the work that would otherwise be assigned to prequalified consultants. At any point during the cost-reimbursement process, the DOE may request or accept technical information, data, and analysis from the applicant or the applicant's consultant to support the cost-reimbursement process or the DOE's decision on the application.

The DOE is authorized to adopt rules and guidance providing minimum qualifications and standards for any consultant's submission of work products, including standards for submission of technical information, scientific analysis, work product documentation, review for conflict of interest, and report presentation.

When a prequalified cost-reimbursement consultant is assigned or selected to investigate an application or set of applications, the consultant must document his or her findings and recommended disposition in the form of written draft technical reports and preliminary draft reports of examination. Within two weeks of the DOE receiving draft technical reports and preliminary draft reports of examination, the DOE must provide the applicant the documents for review and comment prior to their completion by the consultant. The DOE must consider the comments by the applicant prior to the issuance of a draft report of examination. The DOE may modify the preliminary draft reports of examination submitted by the consultant. The DOE's decision on a permit application is final unless it is appealed to the PCHB.

Appeals.

Each individual applicant is responsible for his or her own appeal costs that may result from a water right decision made by the DOE. In the event that an applicant's water right approval is appealed by a third party, the applicant for the water right in question must reimburse the DOE for the cost of defending the decision before the PCHB unless otherwise agreed to by the applicant and the DOE. If an applicant appeals either an approval or denial made by the DOE, the applicant is responsible for his or her own appeal costs.

Water Rights Processing Account.

The Water Rights Processing Account (Processing Account) is created in the State Treasury. Money in the Processing Account may be spent only after appropriation. Expenditures from the Processing Account may only be used to support the processing of water right applications for a new appropriation, change, transfer, or amendment of a water right or for the examination, certification, and renewal of certification of water right examiners.

Expedited Processing.

The DOE may expedite processing of applications within the same surface water or groundwater source on its own volition when there is interest from a sufficient number of applicants or upon receipt of written requests from at least 10 percent of the applicants within a water source. If those conditions are met and the DOE determines it is in the public interest to expedite applications in a water source, the DOE must notify everyone with a pending application that expedited processing is being initiated, provide the criteria under which the applications are examined and determined, provide the estimated cost, provide an estimate of how long the expedited process takes, and provide at least 60 days for applicants to respond to the DOE.

The DOE must determine the full costs to process applications on an expedited basis and recover those costs from applicants who elect to participate through expedited processing fees. The DOE must calculate the estimated cost to the applicant based primarily on the quantity of water requested by the applicant and may adjust the fee if it appears that the application requires more time due to its complexity. Any application fees that were paid by the applicant must be credited against the applicant's expedited processing fee. The DOE must collect the expedited processing fee prior to the expedited processing of an application. A participating applicant must transmit the processing fee within 60 days of the DOE's notification. The expedited processing fees must be deposited into the Processing Account.

If an applicant elects not to participate in expedited processing, the application remains on file with the DOE, retains its priority date, and may be processed under regular processing, priority processing, expedited processing, coordinate cost-reimbursement processing, cost-reimbursement processing, or through Water Conservancy Board processing. Such an application may not be processed through expedited processing within 12 months after the DOE's issuance of decisions on participating applications at the conclusion of expedited processing unless the applicant agrees to pay the full proportionate share that would otherwise have been paid during the processing. Any proceeds collected from an applicant under this delayed entry into expedited processing must be used to reimburse the other applicants who participated in the previous expedited processing of applications, provided sufficient proceeds remain to fully cover the DOE's cost of processing the delayed entry application and the DOE's estimated administrative costs to reimburse the previously expedited applicants.

Certified Water Right Examiners.

The DOE 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. 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 Water Conservancy Board member in order to be eligible to become a certified water right examiner. Qualified individuals must also pass a written examination demonstrating knowledge and competency in specific water-related topics prior to being certified by the DOE. The DOE may suspend or revoke a water right examiner's certification based on poor performance, malfeasance, failure to acquire continuing education credits, or excessive

complaints from the examiner's customers. The DOE may also require the retesting of an examiner. The DOE must establish and collect fees for the examination, certification, and renewal of certification of water right examiners.

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.

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 the DOE: (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. The DOE may waive the requirement to secure the services of a certified water right examiner in situations in which the DOE has already conducted a final proof of examination or finds it unnecessary for purposes of issuing a certificate of water right. The DOE must make its final decision within 60 days of the date of receipt of the proof examination from the certified water right examiner, unless otherwise requested by the applicant, or returned for correction by the DOE.

The DOE may return an initial proof of examination for correction within 30 days of the DOE's receipt of the initial proof from a certified water right examiner. After receipt of the returned proof from the certified water right examiner, the DOE must make its final decision, unless otherwise requested by the applicant.

Notification to Affected Tribal Governments.

The DOE must post on its website and provide additional electronic notice and opportunity for comment to affected federally recognized tribal governments concurrently when providing notice to applicants under cost-reimbursement or expedited processing of applications.

Groundwater Right Amendments.

A holder of a valid right to withdraw public groundwater may, without losing the holder's priority of right, construct wells or other means of withdrawal at a new location in substitution for or in addition to those at the original location, or the holder may change the manner or the place of use of the water. The location of the original well or wells of a water right permit or certificate is the area described as the point of withdrawal in the original public notice published for the application for the water right for the well. The location of the original well or wells of a water right claim is the area located within a one-quarter mile radius of the current well or wells.

Report to the Legislature on the Water Resources Program.

The DOE must review current water resource functions and fee structures, and report to the Legislature and the Governor by September 1, 2010, on improvements to make the Water Resources Program more self-sustaining and efficient.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed, except for section 10 which reinstates prior law relating to groundwater right amendments after a scheduled expiration and takes effect June 30, 2019.

Staff Summary of Public Testimony (Agriculture & Natural Resources):

(In support) Stakeholders have been involved in the drafting of this bill and this bill will improve the process and make the water resources program more efficient. Allowing applicants to pay for the cost to evaluate their own application is a good thing. This doesn't change underlying water law. This would be a good program all-around. This will provide better fiscal stability for the DOE employees. This bill helps those who are ready to be helped and does not hurt those that are not ready.

(In support with amendments) Comment language needs to be improved to add clarity.

(With concerns) This bill has potential, but needs to be improved. Public input and comment should be improved. The Water Resources Program needs a broader look.

(Opposed) This would fully privatize the water right process. There would be no oversight of consultants. The cost of implementing this bill would be substantial.

Staff Summary of Public Testimony (General Government Appropriations):

(In support) This bill has been improved since its introduction. This bill provides an expansion to a program that has been in place for 10 years. This bill makes the existing policy more equitable by removing the provision which allows for an expedited water rights decision if an applicant pays for all water rights processing costs that are in line before an applicant. This approach moves the DOE away from dependence on the General Fund to support the processing of water rights applications. There can be discussion in future legislative sessions about how to adjust fees. The DOE is continuing to work with stakeholders to make this a better bill. The DOE maintains full discretion under this bill on the decisions related to water rights. In general, this is a more efficient and economical process for the cost-reimbursement option. This legislation should spur economic development, and is needed to help the DOE meet the water needs of the state in the future.

(In support with concerns) There is another bill, Second Substitute House Bill 2591, that addresses cost-reimbursement for water rights better than this bill does because it allows the state to recover the full cost of processing water rights applications. One of the most meritorious sections of the underlying bill has been removed in the bill as amended by the Agriculture and Natural Resources Committee. This section directed the DOE to take into consideration a cost-benefit analysis that included the impact on the environment from water rights applications.

(Opposed) None.

Staff Summary of Public Testimony (Ways & Means):

(In support) Support this bill as amended in the General Government Appropriations Committee. The addition of Substitute House Bill (SHB) 2591 to this bill is a good approach to the issue of creating a new revenue source to support processing water rights applications.

(With concerns) It is unknown how much revenue would be collected with the new fees in this bill, or how many appeals to water rights permitting decisions may be initiated. This bill needs more clarity to determine eligibility, and work on the differentiated fee structure.

(Opposed) This bill will have a negative impact on farmers. Do not pass this bill as it was amended in the General Government Appropriations Committee; support the version of this bill that passed the Agriculture and Natural Resources Committee, since this version will provide better results for water rights applicants. The provisions of SHB 2591 that have been added to this bill will cost water rights applicants more money, with fewer results. All this bill does now is replace General Fund-State funds with an unpredictable fee. Increasing fees is not the best way to address the current backlog of water rights applications.

Persons Testifying (Agriculture & Natural Resources): (In support) Senator Rockefeller, prime sponsor; Bill Clarke, Washington Public Utility District Association; John Stuhlmiller, Washington Farm Bureau; and Kathleen Collins, Washington Water Policy Alliance.

(In support with amendments) Doug Levy, Cities of Kent and Everett.

(With concerns) Darcy Nonemacher, American Rivers.

(Opposed) Seth Ballhorn, Center for Environmental Law and Policy.

Persons Testifying (General Government Appropriations): (In support) Kathleen Collins, Washington Water Policy Alliance; and Evan Sheffels, Department of Ecology.

(In support with concerns) Seth Ballhorn, Center for Environmental Law and Policy.

Persons Testifying (Ways & Means): (In support) Seth Ballhorn, Center for Environmental Law and Policy.

(With concerns) Ken Slattery, Department of Ecology.

(Opposed) John Stuhlmiller, Washington Farm Bureau; Steve Gano, Suncadia; Bill Clarke, Washington Public Utility Districts Association; Kathleen Collins, Washington Water Policy Alliance; and Glen Smith, Washington State Ground Water Association.

Persons Signed In To Testify But Not Testifying (Agriculture & Natural Resources): None.

Persons Signed In To Testify But Not Testifying (General Government Appropriations): None.

Persons Signed In To Testify But Not Testifying (Ways & Means): None.