

HOUSE BILL REPORT

ESHB 2688

As Passed House:

February 18, 2002

Title: An act relating to regulating commodity boards and commissions.

Brief Description: Regulating commodity boards and commissions.

Sponsors: By House Committee on Agriculture & Ecology (originally sponsored by Representative Linville; by request of Department of Agriculture).

Brief History:

Committee Activity:

Agriculture & Ecology: 2/1/02, 2/7/02 [DPS].

Floor Activity:

Passed House: 2/18/02, 94-0.

Brief Summary of Engrossed Substitute Bill

- Declares the regulation of commodity producers under various commodity boards and commissions to be only one aspect of the comprehensive regulation of the industry involved.
- Provides alternatives for appointing members of certain commodity boards and commissions.
- Exempts referendum approved rules from certain rule-making requirements for certain commodity boards and commissions and exempts certain records from public disclosure.
- Provides for the payment of certain costs of the Department of Agriculture (department) by commodity boards and commissions.
- Allows the members and employees of certain commodity boards and commissions to be reimbursed for their actual travel expenses.
- Grants certain commissions subpoena authorities and prescribes liability limitations for members and employees of certain commissions and for the Fruit and Apple Commissions.
- Provides procedures for terminating or suspending a marketing order creating a board or commission under the agricultural enabling acts and alters other provisions of the acts.

- Changes the name of the Apple Advertising Commission, expands the type of assessments it may levy, and makes certain fresh sliced or cut apples subject to assessment.

HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Linville, Chair; Hunt, Vice Chair; Schoesler, Ranking Minority Member; Chandler, Cooper, Delvin, Dunshee, Grant, Holmquist, Kirby, Quall, Roach and Sump.

Staff: Kenneth Hirst (786-7105).

Background: *United States et al. v. United Foods, Inc.* was decided by the U. S. Supreme Court in June 2001. In its decision, the court declared a mandatory assessment on mushrooms for a federal promotional program to be an unconstitutional infringement on free speech. Although the Supreme Court upheld a commodity assessment in a 1997 decision, in its 2001 decision, the Court noted important differences between this case and the previous case. For example, the Court stated that the program sustained in the previous case differs from the 2001 case in a fundamental respect. In a previous case, the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. In the 2001 case, the advertising itself, far from being ancillary, was the principal objective of the regulatory scheme.

Some agricultural commodity commissions have been created directly by statute. Examples of these type of commodity commissions are the Fruit Commission, Tree Fruit Research Commission, Apple Advertising Commission, Beef Commission, Dairy Products Commission and Wine Commission. The state's Agricultural Enabling Acts of 1955 and 1961 provide procedures under which the producers of agricultural commodities may prepare marketing agreements and orders to create, by referenda, agricultural commodity boards and commissions for the commodities without further statutory authority. The first commission created in this way was the Wheat Commission, which was established under the 1955 enabling act.

In 2001 members of commodity boards and commissions created under the enabling acts were authorized to receive reimbursement of their actual travel expenses if the board or commission adopts a rule providing that reimbursement. If the board or commission does not, the reimbursement is as provided for other state employees.

Summary of Engrossed Substitute Bill:

I. Commodity Commissions Generally.

Commodity Board Regulation - Part of Overall Regulation.

The statements of purpose for the 1955 and 1961 agricultural enabling acts are altered. They state that farmers and ranchers operate within a regulatory environment that imposes burdens, including those that may impair the producer's ability to compete in local domestic, and foreign markets and it is in the overriding public interest that each agricultural commodity be promoted individually and as part of a comprehensive industry. The enabling acts and their rules are only one aspect of the comprehensively regulated agricultural industry. A number of state and federal laws and rules are cited as being regulatory restraints on the industry.

The statements of purpose for the Beef Commission, Dairy Products Commission, Fruit Commission, Apple Commission and Wine Commission are similarly altered. In addition to their being regulated under the statutes of these commissions, a number of federal and state statutes and programs and federal marketing orders are cited as being regulatory restraints on the industry. The director of Department of Agriculture may consult with commodity commissions to establish or maintain an integrated, comprehensive regulatory scheme.

Electronic Notices; Lists. Under the Agricultural Enabling Acts and the statutes creating the Beef, Dairy Products, Fruit Commissions, and Wine Commission mailing or sending required notices includes sending them electronically. Provisions regarding compiling, maintaining, and certifying lists of affected parties for referenda and other purposes, and the responsibilities for providing information for the lists, are altered or clarified for boards and commission created under the enabling acts and for the Dairy Products Commission.

Adopting Rules Determined by Referenda. When the adoption of rules by the Apple, Beef, Dairy Products, or Fruit Commissions or a commission or board created under the enabling acts is determined by a referendum of affected parties, the rule-making is exempt from the provisions of the Administrative Procedure Act regarding pre-notice statements of inquiry and negotiated and pilot rule-making and from the Regulatory Fairness Act.

Funding for the Department of Agriculture. The director may adopt rules that provide for a method to fund the costs of staff support for all commodity commissions if the position is not directly funded by the Legislature and costs are related to the specific activity undertaken on behalf of an individual commission. The staff support must be limited to one-half full time equivalent employee for all commodity commissions.

Travel Reimbursement. Members of the Beef, Dairy Products, and Wine Commissions and their employees are to be reimbursed for actual travel expenses for official business as defined by the commissions by rule. If not defined by rule, the reimbursement is as

established by law for state employees. Employees of the Apple Commission are authorized to be reimbursed for actual travel expenses for in-state (not just out-of-state) travel.

Public Disclosure of Certain Records.

The agricultural business records exempt from public disclosure include: the production or sales records required by the department to administer any of its programs, and financial and commercial information supplied to the department for the purposes of conducting a referendum, or with respect to marketing activities or individual producer's production information. The enabling acts and the statutes for the Tree Fruit Research Commission, Fruit Commission, Dairy Products Commission, Wine Commission, and Beef Commission do not prohibit the issuance of general statements based upon the confidential information that does not identify the information provided by any one person or the publication of the name of a person violating a marketing order or agreement and a violation statement.

II. Boards and Commissions Created under the 1955 and 1961 Enabling Acts.

A marketing order under the 1961 enabling act may be one for agricultural commodities with like or common qualities or producers. Under the 1955 and 1961 acts, lists of affected entities may include the amount by unit of the affected commodity produced or handled during a designated period. For this purpose, a production period is either a minimum three-year period or as specified in a marketing order or agreement.

Board or Commission Membership. A marketing order or agreement may, after a referendum, permit the director to appoint a majority of the members of a board or commission, with certain statutorily provided procedures and guidance. Two options are established for providing those procedures and guidance. However, not less than one-third of board or commission members must be elected by affected producers. If there is a vacancy in a director appointed position, the remaining board or commission members must recommend a qualified person for the appointment and the director must appoint the person recommended unless he or she fails to meet the qualifications of board or commission members listed in the marketing order and its enabling act. Each handler member of a board must be at least 18 years old (rather than 25). The definition of "person" is expanded and no more than one board member may be part of one such "person." The director is a member of a commission created under the 1955 act unless otherwise specified in the commission's marketing order.

Amending a Marketing Order or Agreement. A commodity board expressly may petition the director to issue or amend a marketing order or agreement. The director may adopt amendments to marketing agreements or orders under the enabling acts without conducting a referendum if the proposed amendments relate only to internal administration of a marketing order or agreement and are not subject to violation by a person; or adopt or incorporate by reference without material change state or federal statutes or rules and the material regulates the same activities as are authorized under the

marketing order. The director may also adopt such amendments without a referendum if the content of the amendments is explicitly and specifically dictated by statute.

Terminating or Suspending an Order or Agreement. Procedures and conditions for terminating a marketing order or agreement are specified. If the referendum to terminate is affirmed by referendum, the director must adopt the termination. If it is not affirmed, the director is to take no further action on the referendum. Inadvertent failure to notify an affected producer does not invalidate the referendum. If petitioned by 100 percent of the affected producers to terminate a marketing order or agreement, the director may terminate it without conducting a referendum at the end of the marketing season. Requirements are modified for settling the business of a terminated commodity board and for transferring files to the department. The director is not required to hold a hearing or referendum more than once in 12 months on petitions to issue, amend, or terminate a commodity board or commission if the action requested is similar to certain others. The director may, upon the request of a commodity commission, suspend the commission's order or the term or provision of an order for a period of not to exceed one year, if the director finds that the suspension will tend to effectuate the declared policy of the 1955 act.

Tallying Referenda Results. Requirements are established for tallying the results of referenda, providing the results to affected parties and disputing those results. After all matters are resolved and finalized, the individual ballots may be destroyed. Notice procedures for conducting hearings on proposals to issue, amend, or terminate a marketing order and for proposing the issuance of a marketing order under the 1955 act are altered.

Other. The director may adopt rules for carrying out the director's duties under the enabling acts. A commodity board or commission must reimburse the director for costs incurred in administering the act and for costs when the board petitions the director to amend or terminate a marketing order. The funds of commissions may also be invested in savings or time deposits of financial institutions out-of-state, rather than only those in-state.

Repealed are statutes that: provide general statements of legislative intent for the enabling acts; allow hearings and permit an administrative law judge to preside over inquiries or investigations under the 1961 act; create a Marketing Act Revolving Fund and require all income received under the 1961 act to be deposited in the fund; and allow the hop and mint commodity boards to raise assessments to specified levels in excess of the fiscal growth factor.

III. Beef Commission.

The Beef Commission's assessment on the sale of cattle is increased to \$1 per head (from 50 cents per head). The additional assessment allowed for cattle subject to assessment under federal order for national beef promotion and a research program is decreased to

50 cents per head (from \$1 per head).

The commission may subpoena witnesses and issue subpoenas for the production of records for the purpose of enforcing the Beef Commission laws.

IV. Dairy Products Commission. The Dairy Products Commission is authorized to retain the services of private legal counsel to conduct legal actions on behalf of a commission or board. The retention is subject to review by the Office of the Attorney General. The commission is also authorized to: establish foundations using commission funds as grant money when the foundation benefits the dairy products industry; accept and expend or retain gifts, bequests, contributions, or grants to carry out the purposes of the commission's statutes; engage in appropriate fund-raising activities to support activities of the commission or board; expend funds for commodity-related education, training, and leadership programs; and work cooperatively with other agencies, universities, and other organizations. Rather than conducting "advertising," the commission is authorized to take actions that "build demand."

The statutory minimum for the commission's milk assessment is altered. It is either 0.75 percent of the Class I price for whole milk or, while the federal Dairy and Tobacco Adjustment Act's dairy promotion program is in effect, it is the combination of: 0.625 cents per hundredweight, and an assessment rate not exceeding the rate approved at the last referendum that would achieve 10 cents per hundredweight credit to local, state, or regional promotional organizations under the act. The authorized educational use of the commission's assessment on Class II milk is altered. The commission may subpoena witnesses and issue subpoenas for the production of records for the purpose of enforcing the Beef Commission laws.

A member of the commission may be a member or officer of an association with the same purpose as the commission and the commission may contract with the association for services. The extent of the waiver of liability currently provided for the state and for actions of commission members and employees of the commission is clarified.

V. Fruit and Apple Commissions.

The Fruit Commission's assessments are due upon receipt of an invoice for them. The assessments are the personal debt of the person assessed or who owes the assessment. The commission may add up to 10 percent of the amount of delinquent assessment to defray the costs of collection. The department must withhold inspection services under the grades and packs statutes from a delinquent party.

The name of the Apple Advertising Commission is changed to the Apple Commission. The commission may decrease, not just increase, assessments. Rather than an assessment being based only on a rate per on hundred pounds of apples, the commission may use a reasonable equivalent net product assessment. The latter may include a different rate for a specific variety or for fresh apples sliced or cut for raw consumption. Such sliced or

cut apples are fresh apples and, therefore, subject to assessment.

In a civil or criminal action or proceeding for a violation of any prohibitions against monopolies or combinations in restraint of trade, including any action under the state's consumer protection laws, proof that the act complained of was done in compliance with and in furthering the purposes of the Fruit Commission's or Apple Commission's statutes is a complete defense to the action or proceeding. The Fruit Commission may serve as an advisory committee to the director regarding the adoption of rules on grading, packing, and size and dimensions of containers for soft tree fruit and setting the grades of soft tree fruit and issuing certificates of inspection.

VI. Fair Fund.

The allocations the director may make from the Fair Fund include allocations of interest income accruing to the fund. The provisions of law describing the uses of the Fair Fund identify the exclusive uses of the fund. The specifically authorized use of the fund for administrative expenses is confined to expenses for administering the fair fund statutes, including expenses incurred by the Fair Commission.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect July 1, 2002.

Testimony For: (1) The provisions for the Beef Commission update the commission's laws to make them more consistent with the federal program. Prices for the industry have been strengthened by our promotional programs. (2) Differences between the department and the commodity commissions on the original bill have been worked out for the substitute bill. (3) It will be nice, as provided in the bill, not to have the department's support for commodity commissions and boards be funded by the Fair Fund. (4) The Wine Commission has asked for a statement of purpose for the commission to be added to the bill, similar to the statements provided for other boards and commissions.

Testimony Against: None.

Testified: (In support) Mary Beth Lang, Department of Agriculture; Heather Hansen, Washington State Fair Association; Jim Zimmerman, Washington Cattlemen Association; and Casey Lankhaar, Washington State Beef Commission.

(In support, with proposed changes): Chris Cheney, Dairy Products Commission, Washington Fryer Commission, and Fryer Association.