

Washington State
House of Representatives
Office of Program Research

**BILL
ANALYSIS**

Agriculture & Ecology Committee

HB 1832

Brief Description: *Modifying provisions concerning water management.*

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

Brief Summary of Bill

- *Allows local watershed planning units to receive additional funding from the Department of Ecology (DOE) if their planning includes optional components, and allows a more flexible schedule of funding from the DOE.*
- *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 those for trust water rights, and to establish water right transfer information exchanges.*
- *Waives certain liability of a water conservancy board and its board members and employees and establishes new conflict-of-interest requirements for board members.*
- *Broadens who may intervene in a board's action, allows any person to file objections to a board's action with the DOE, lengthens DOE's review period when objections are filed, and requires the review of board decisions to deny applications.*
- *Establishes requirements for boards when processing applications involving water right claims, alters record-keeping requirements for boards, and makes those records publicly accessible.*
- *Requires the DOE to establish by rule certification procedures, qualifications, and fees for "certified water rights examiners" who may carry out the proofs of examination that are prerequisite to issuing water right certificates and who may provide technical assistance to members of the public, and establishes training requirements for examiners.*
- *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 the public utility tax on amounts received for supplying reclaimed water to customers and provides a public utility tax deduction from taxable income for amounts expended to reduce water use by consumers. · Allows the DOE to accept certain donations of water rights for the trust water right systems for instream flows in areas where aquatic species have been listed as endangered or threatened and alters notification requirements regarding use of the donated trust water rights.*

Hearing Date: 2/13/01

Staff: Kenneth Hirst (786-7105).

Background:

Watershed Planning. Chapter 90.82 RCW 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's by conducting an assessment of water supply and use in the watershed and developing strategies for future use. The initiating governments may choose to add other components to the watershed planning process. These may include any combination of the following: an instream flow component, a water quality component, and a fish habitat component. The maximum amount of money that may be granted by the DOE to a planning unit for each of three phases of planning is specified by statute: for Phase I (for organizing) it is up to \$50,000 for one WRIA or up to \$75,000 for multiple WRIA's; for Phase II (for watershed assessments) it is up to \$200,000/WRIA; and for Phase III (for developing a watershed plan and recommending actions) it is up to \$250,000/WRIA. The use of Phase III grant monies includes making recommendations for actions by local, state, and federal agencies, tribes, private property owners, private organizations, and individual citizens, including a recommended list of strategies and projects that would further the purpose of the plan. If a planning unit receives more than the organizational grant monies from the DOE, it must submit its watershed plan for approval by the counties within its planning area within 4 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 of the water right 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 Schuh v. Department of Ecology (100 Wn.2d 180), the state's Supreme Court requires 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. An approved modification does not affect the priority date of the right. Modifications in water rights are referred to in statute as transfers, changes, and amendments of water rights.

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 3 members, called commissioners. A water right holder who claims that his or her existing water right will be detrimentally affected or

injured by a application being considered by 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.

The DOE has adopted rules to implement the statutes regarding water conservancy boards. In these rules, the type of modification of water rights that may be approved by a board is defined broadly: the board may consider the same types of modifications as may the DOE under the surface and ground water codes. In a Thurston County Superior Court case, the breadth of that authority was challenged. The superior 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 water conservancy 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. The DOE may require evidence of compliance with the terms of the amendment to a certificate for a ground water right.

Family Farm Permits. Family farm permits are water right permits issued under the Family Farm Water Act. The Act was adopted by the voters through the approval of Initiative Measure No. 59 in 1977. The Act requires that all water right permits issued after December 8, 1977, for irrigating agricultural lands be classified as: family farm permits, family farm development permits, public water entity permits, and publicly owned land permits. The principal permit for using water to irrigate privately owned agricultural lands under the Act 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 which, under the Act, is not more than 2000 contiguous or noncontiguous acres of irrigated agricultural lands. The Act states that 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 5 years from the date of the acquisition. Further, if the DOE determines that water is being withdrawn under such a permit for use on land not in conformity with the definition of a family farm, the DOE must notify the permit holder and the permit must be suspended 2 years later unless the land is again in conformity with the definition of a family farm. The period may be extended in certain circumstances. If conformity is not achieved within 5 years of the notice, the withdrawal rights must be canceled. 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 also 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.

The water transfer and change provisions of the Surface Water Code do not apply to trust water rights in the Yakima system or to trust water rights acquired through the state's funding of conservation projects under the statewide system. A trust water right in the Yakima system may be exercised only if the DOE first determines that no existing water rights will be impaired and publishes notice and provides notice to the Department of Fish and Wildlife. To exercise a trust water right in the statewide system, the DOE must first determine that neither water rights existing at the time the trust water right was established nor the public interest will be impaired. Before a trust water right may be created or modified for the statewide system, the DOE must also publish notice and provide notice to certain entities and other interested parties. Trust water rights are administered by the DOE. 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 5 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. They also do not apply if the non-use of water is the result of 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 additional funds to conduct the assessments. They may apply for up to

\$100,000 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. However, the total amount of funds awarded by the DOE to the planning unit cannot 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 the unit's ability to complete its plan. (Section 2.) The date by which a planning unit must submit a watershed plan to the counties in the planning area for approval is now 4 years after the date funds beyond the initial funding were first expended by the planning unit. (Section 3.)

"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 pending applications for new water rights within the same source of supply. An application relating to an existing water right may be processed ahead of a previously filed application when sufficient information for a decision on the previously filed application is not available and the applicant for the previously filed application is sent a written notice and explanation. The previously filed 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, two lines authorities. (Section 5.)

Conservancy Boards.

The type of applications for modifying water rights that may be processed by water conservancy boards is expressly stated broadly and are collectively called "transfers." The boards may process the same types of these modifications countywide as the DOE may under the surface and ground water codes, except that they may not process applications to establish trust water rights. (Sections 7 and 8.) A board may act upon an application to transfer an historic right represented by a water right claim filed with the DOE. To do so, the board must make a tentative determination as to the validity and extent of the right in the claim and may only approve a transfer of such a claim to the extent it is tentatively determined to be valid. (Section 8(1)&(2).)

A board may establish a water right transfer information exchange through which all or part of a water right may be listed for sale or lease and in which notices may be posted from persons interested in acquiring or leasing water rights. The DOE must provide technical assistance to a board as is reasonably possible. A board may also receive assistance and support from the county government of the county in which it operates. (Section 8(3)&(4).)

A county may appoint 2 additional commissioners to a board. In making appointments to a board, a county must appoint one position to 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 2 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 occurs. (Section 9.)

Any person claiming in writing that he or she will be aggrieved or adversely affected by a transfer may intervene. The claim must be received by the board within 30 days of the last date of publication of the notice for the application and must clearly state the reasons for the intervention. It may include recommendations for relieving the claimant's concerns or objections. 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. (Section 10(4).) 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. As is the case with the current review period, this period may be extended for 30 days with the consent of the applicant. If objections are filed with the DOE, all of the board's files and records regarding the application must be forwarded to the DOE; otherwise, only its decision and report of examination must be forwarded. (Section 11.) Upon concluding its business on an application, the board must forward the originals of all of its records regarding the application to the DOE. (Section 17.)

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. (Section 14.)

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. The waiver of liability currently provided to the county and the DOE regarding a board's approval of an application now applies to its decision to deny an application as well. (Section 13.)

The information required by a board for an application must be provided in a reasonable period of time. Comments submitted to a board regarding an application must be considered by the board. If the board approves a transfer, its approval must state that the applicant cannot proceed with the transfer until the Director makes a decision. (Section 10(1),(2)&(5).) 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. (Section 12.) A county's board may be dissolved by the adoption of a resolution by the county's legislative authority. (Section 15.) A board must maintain minutes of its meetings and the minutes are open to public inspection. (Section 16.) 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. (Section 17.) The physical presence of 2 members of a 3 member board or 3 members of a 5 member board constitutes a quorum. (Section 18.)

Certified Water Rights Examiners (Section 20). By June 30, 2002, the DOE must adopt

rules to establish certification procedures, qualifications, fees, and other requirements for certified water rights examiners. These examiners are to be certified to:

- Carry out the proof examination of a permitted water right development as a prerequisite to the issuance of a final water right certificate or for a change or transfer of an existing water right or water right claim;*
- Provide advice and assistance or act as an agent for a person applying or considering whether to apply for a new water right or for a water right change or transfer; and*
- Evaluate water rights and provide an opinion to a person seeking such an opinion regarding the validity and quantification of an existing water right. Such an opinion is not subject to public disclosure nor may the DOE request a copy of it.*

The DOE must develop and administer a written examination for certifying the examiners. Certification is valid for one year and is renewable. Former examiners whose certifications have lapsed for more than one year are required to retake the examination. 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 must be in amounts sufficient to defray all costs of administering the program. The fees are to be deposited in the state 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, including illegal acts, misrepresentation of the facts associated with a proof examination and report, or gross incompetence. The DOE's action may be appealed to the PCHB. The DOE must keep a record of complaints it receives or irregularities it observes regarding an examiner and must inform the examiner regarding the complaint or irregularity and permit the examiner to provide a written explanation. These records must be made available to any person who requests them. The DOE must investigate complaints that allege, or irregularities that indicate, a breach of law.

Each examiner may set his or her own fees for services. The DOE must retain a list of all active certified examiners and the geographic areas in which each is willing to work. The list must be provided to any person who requests it and must be posted electronically. The DOE must provide at least one day of continuing education training per year for examiners. Examiners must attend the training session or attend an alternative training opportunity approved by the DOE.

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. If an examiner carries out an examination prerequisite to the issuance of a final water right certificate, a superseding certificate, or a certificate of change, the examiner's report and a detailed map must be filed with the DOE. 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, 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 statement to that effect. The statement must be made on a form provided by the DOE and signed before a notary public. 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 of 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, and

- *For irrigation, the acreage that has been irrigated, the crops grown, and the type of irrigation system employed;*
- *for domestic or municipal water supply, the number and type of housing units, businesses, or other end uses that have received and beneficially used water from the system; and*
- *For hydroelectric power, the head, the maximum flow used during generation, the capacity of turbines, and the maximum electrical output.*

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. In addition, the DOE may review any other information it determines is necessary to confirm that the permit holder has completed the project and has put water to beneficial use. (Section 21(1)&(2).) A certificate for a water right issued the holder of a family farm permit under the Family Farm Water Act cannot be issued until the 2,000 irrigated acreage limitation of the Act is met. (Section 25.)

The permit holder may choose to use, at the holder's expense, a certified water rights examiner to conduct the review, or "proof examination." If the person elects to use such an examiner, the examiner must prepare a report of the proof examination and submit it to the DOE. The first page of the report and the first page of any attachments to the report, including any maps, must have the written certification and signature of the water rights examiner and the permit holder attesting to the truth and accuracy of the contents and must be in a form specified by the DOE. The DOE must make its decision whether to issue a certificate within 120 days of receiving the report of the examiner. (Section 21(3)&(5).) A water right certificate for a change of an existing water right is to be issued once the change has been perfected. (Section 21(4).)

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. (Section 23.) 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. Such a transfer must be consistent with provisions of current law for transfers and changes, including those regarding irrigating additional acreage. 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. (Section 22 and 24(4).)*

Reclaimed Water Tax Exemption; 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. (Section 26(2).) 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. (Section 26(1).)

Trust Water Rights. The DOE may accept a donation of water rights to either the Yakima 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 a person plus the portion donated may exceed the extent to which the right was beneficially used during any of the last 5 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. (Sections 29 and 32.) 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. (Sections 30 and 31.)

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. (Sections 29 and 32.) The DOE is expressly given the authority to lease water rights for the Yakima River trust water rights system. (Section 29.)

Appropriation: None.

Fiscal Note: Requested on February 8, 2001.

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