

SENATE BILL REPORT

SB 5869

As of February 12, 2001

Title: An act relating to water resources management.

Brief Description: Modifying provisions concerning water management.

Sponsors: Senators Fraser, Morton, Regala, McDonald, Jacobsen, Swecker and Horn; by request of Governor Locke.

Brief History:

Committee Activity: Environment, Energy & Water: 2/13/01.

Brief Summary of Bill

- Watershed planning units receive additional funding and time.
- Decisions on water rights changes and transfer can be made separately and independently of decisions on new water rights.
- Authority, liability, and procedures of water conservancy boards are established.
- Certified water rights examiners are established.
- Conditions for transfer of family farm water permits are established.
- A public utility tax deduction for implementation of conservation plans is established.
- Conditions for donation of trust water rights for instream flows are established.

SENATE COMMITTEE ON ENVIRONMENT, ENERGY & WATER

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Background: Watershed Planning. Under Chapter 90.82 RCW, watershed planning is conducted according to water resource inventory area (WRIA), which corresponds to a river basin. Planning is conducted in three phases: (1) organization of a planning unit and determination of the scope of planning, which must include a water quantity component and may also include instream flow, water quality, and habitat components; (2) water quantity assessment and development of strategies for future use, and, if flow, quality, or habitat components have also been included, specified examination and recommendation requirements for each; and (3) development of a watershed plan and recommendations for action. For each phase, a planning unit can apply to the Department of Ecology for funding. Up to \$50,000 can be provided for phase one; up to \$200,000, for phase two; and up to \$250,000, for phase three. If a planning unit receives funding beyond phase one, it must submit a proposed plan to the counties that have territory in the WRIA within four years of when funds were first received.

Water Rights. As a result of growing population and economic development, applications to the state for new water rights and for changes and transfers of existing water rights have continued to increase, as has the complexity of the analysis that is required, in order to render decisions on them. Among other requirements, state law allows approval of an application, only if it will not impair any other existing water rights. By law, applications for new water rights that have not yet been approved must be treated as existing rights and applications must be considered in the order of the date on which they were filed. For purposes of efficiency, however, the law does allow all applications for the same source of supply to be analyzed as a group, even though there may exist older applications whose group, according to source of supply, is still awaiting consideration. Due to limited funding, increasing numbers of applications, and the complexity of analysis, which results both from large numbers of pending applications and large numbers of existing rights, there is an accumulation of over 7,000 pending applications, many of which will not be able to be considered for many years.

Water Conservancy Boards. In 1997, the Legislature passed SHB 1272, creating local water conservancy boards. The Legislature's findings state that voluntary water transfers— could result in more efficient use of water, among other benefits, and that the state should expedite uncontested water transfers.— Section 8 of the act established the powers of water conservancy boards. In subsection (1), boards were authorized to establish water transfer exchanges and approve water transfers involving a change in place of use, point of diversion or withdrawal, purpose of use, time of use, source of supply, quantity of use permitted, and the place of storage.— In subsection (3), water transfers approved by boards were required to remain within an existing category of beneficial use. Citing the apparent conflict between subsections (1) and (3), the Governor vetoed Section 8. Citing a conflict with existing law regarding irrigation districts, the Governor also vetoed Section 10, which concerned board approval of transfers involving a change in place or use— of water provided by an irrigation district. In the remaining sections of the act, as it became statute, it is the word transfer— that is used in connection with stating the purpose of the boards and establishing the procedures to be used by the boards and the Department of Ecology. The department subsequently adopted administrative rules for carrying out the provisions of the statute. The rules defined transfer— to mean an alteration in point of diversion or withdrawal, purpose of use, place of use, or change or amendment of a water right. The rules were challenged in superior court on the grounds that they gave boards broader powers than authorized by the statute. The court ruled that the statutory language gives boards authority over transfers of either ownership or location, including associated changes in point of diversion or withdrawal. The court ruled that the statutory language does not give boards authority to modify purpose of use.

Certified Water Rights Examiners. Before an applicant for a water right can be issued a water right certificate, the applicant must demonstrate to the satisfaction of the Department of Ecology that the applicant has put the water to use, according to the terms and conditions of the water right permit and as required by law.

Family Farm Permits. In 1977, the Legislature considered, but did not pass, ESHB 1120, which would have established a term permit system for significant appropriations of water for agricultural irrigation, whereby permits would be issued for limited periods of at least 50 years and could, thereafter, be terminated in favor of a higher beneficial use. At the same time, there was concern in the state regarding proliferation of large corporate farms. In the 1977 general election, Initiative 59 was approved. Codified as the Family Farm Water Act,

it provides that permits to appropriate water for agricultural irrigation can be issued only for family farms of up to 2,000 acres. These permits have no time limit, but are conditioned on the land continuing to comply with the definition of a family farm. If it does not, and is not brought into compliance, the permit is canceled.

Public Utility Tax Deduction. Together with other utility and transportation businesses operating in the state, water distribution businesses are taxed on their gross income. In the case of water utilities, 20 percent of the revenue generated is deposited in the public works assistance account and the rest in the general fund. Certain water-sewer districts and irrigation districts are exempt from the tax on gross income according to a number of statutory criteria relating to size and revenue. Deductions from gross income that are currently allowed, among others, such as taxes levied by municipal utilities and proceeds from the sale of commodities to other water utilities, include proceeds that a nonprofit uses for capital improvements.

Trust Water Rights. The state has established a trust water rights program for the Yakima River Basin and one for the rest of the state. Both programs allow the state to acquire water rights, hold them as trust water rights, and reallocate them to other uses, including instream flows. The water rights can be acquired on a permanent or a temporary basis, by purchase, gift, or other means, excluding condemnation. Both programs provide for acquisition of trust water rights as part of public funding of conservation measures. Both programs are exempt from the approval process otherwise required for changes or transfers of water rights and have their own process.

Summary of Bill: Watershed Planning. A planning unit that includes an instream flow, water quality, or habitat component may apply for up to an additional \$100,000 for phase two. Within the total amount that is available to a planning unit for phase two and phase three, together, a unit can request a different amount for each phase than what is currently specified, if it demonstrates that this will not impair the unit's ability to complete its plan. A unit must submit a proposed plan to the counties that have territory in the WRIA within four years of when funds beyond the initial funding are first expended.

Water Rights Applications for new water rights that have not yet been approved are not entitled to protection from injury by changes and transfers of existing water rights. Applications for new water rights and those for changes and transfers of existing water rights within the same source of supply can be considered independently. Applications can be considered ahead of previously filed applications that do not have sufficient information for a decision. The latter receives notice and retains their priority date. The Department of Ecology reports annually to the Legislature and, in the report due January 1, 2004, provides an evaluation and recommendations regarding these provisions.

Water Conservancy Boards. Transfer- is defined to mean a transfer, change, or amendment to a water right, as provided in the surface and the ground water codes.

Water conservancy boards are authorized to act on the same kinds of applications as the Department of Ecology, except trust water rights and water rights within an irrigation district.

Boards can establish water transfer information exchanges. They can receive technical assistance from the department and assistance from counties.

Up to five commissioners can be appointed. One position must represent the public-at-large; others must represent all major water interests. A county can dissolve a board.

Public comments received by a board must be considered. Any person adversely affected may intervene. Requests to intervene must be in writing, within 30 days of publication of notice, and state their reasons. Claims of impairment of water rights or instream flows, detriment to the public interest, or other violations of law are entitled to hearing by a board. If substantiated, these must be cured by compensation or mitigation.

Proposed decisions are by majority, with a quorum being two out of three, or three out of five members. A copy of the board's proposed decision is supplied to the applicant, rather than a certificate conditionally approving the application. The copy must include any conditions, a report of examination, and state that it is not final until approved by the department. Proposed denial is required, if an application cannot be approved.

Any person can file a written objection to a proposed decision. If an objection is filed, the department has 75 days to take final action on a proposed decision. The department's action is final. If the department fails to act, a proposed decision becomes final. Final action is appealable to the Pollution Control Hearings Board.

A board, its members, and employees are not liable for board decisions.

A board member with an interest in the outcome cannot participate in a decision. Violation is grounds for removal and a civil fine, which are enforceable in superior court.

Boards must keep and record minutes. They are subject to the public disclosure law, and must send copies of their files to the department.

Certified Water Rights Examiners. By June 30, 2002, the Department of Ecology must adopt rules to establish certified water rights examiners. Certified water rights examiners can carry out the proof requirements for certification of new water rights and changes or transfers of existing water rights, advise and assist applicants, and provide opinions regarding the extent and validity of water rights. Their opinions are not subject to public disclosure or available to the department. Examiners' actions are not binding on the department and are not prima facie evidence in legal proceedings.

After initial examination and payment of a fee, certification is valid for one year and is renewable. Lapsed certifications require re-examination. Denials of certification can be appealed to the Pollution Control Hearings Board. Examiners set their own fees for services.

Certification can be revoked or suspended for illegal acts, misrepresentation, or gross incompetence. Revocation or suspension can be appealed to the Pollution Control Hearings Board. The department must keep a record of complaints received regarding examiners, inform the examiners, make the records available to anyone on request, and investigate any alleged illegalities.

At least one day of continuing education that is provided or approved by the department is required per year. The department must maintain a list of examiners. Program fees must be set to cover costs and are deposited to the state reclamation revolving account.

Specific information requirements for issuance of a water right certificate are established. The department must make a decision within 120 days of receiving an examiner's report.

Family Farm Permits. A family farm permit can be transferred or leased to another family farm. It can be leased to any other nonagricultural use and can be transferred to any other nonagricultural use within an urban growth area. Conserved water can be transferred to any use. Transfer— is defined to mean transfer, change, or amendment. A certificate must be issued to the extent that water has been put to beneficial use under a family farm permit.

Public Utility Tax Deduction. Expenditures for implementing elements of the conservation plan within an approved water system plan are deducted from gross revenue. Suppliers of reclaimed water are exempt from taxation on gross revenue. The Office of Financial Management, in consultation with the departments of Revenue, Health, and Ecology evaluates the effect of this deduction and exemption and report to the Legislature by October 1, 2001.

Trust Water Rights. Where aquatic species are listed under the Federal Endangered Species Act and instream flows are needed for those species, the holder of a water right may donate all or part of the water right to the trust water right program on a permanent or temporary basis for instream flows, and the department may accept the donation on the terms prescribed by the donor, so long as the donation meets the requirements for a trust water right. The extent of the water right is determined by the extent to which it was used during any of the preceding five years, and the total of the portion donated and the portion retained cannot exceed that amount. If a determination by the department that use of the donated trust water right impairs existing water rights is upheld on appeal, the donation is altered to eliminate the impairment. Existing requirements for use of a trust water right do not apply, except that notice must be published, when the trust water right is first used. Trust water rights donated for instream purposes must be managed so that they qualify as federal tax deductible gifts. Trust water rights are not subject to relinquishment.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 6, 2001.

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