
**Agriculture & Natural Resources
Committee**

HB 2367

Brief Description: Promoting Washington-grown apples.

Sponsors: Representatives Linville, Schoesler, Campbell, McDonald, Delvin, Sullivan, Hunt, Moeller, McDermott, Kenney and Morrell; by request of Department of Agriculture.

Brief Summary of Bill

- Declares the Washington Apple Commission (Commission) is a state agency and includes provisions authorizing activities by the Commission on behalf of the state government.
- Requires appointment of Commission members by the Director of the Washington State Department of Agriculture.
- Changes the statutory assessment amount and revises provisions regarding assessment adjustments by the Commission.
- Limits liability in actions against the Commission to Commission assets.

Hearing Date: 1/21/04

Staff: Caroleen Dineen (786-7156).

Background:

Commodity Commissions and Boards

Commodity commissions and boards may be created to perform a variety of functions, including advertising, sales promotion, research, and education, related to a particular commodity.

Commodity commissions and boards may be established under Washington law by three methods:

- directly by statute (examples include commodity commissions for apples, dairy products, and beef);
- according to the Washington Agricultural Enabling Act (examples include commodity commissions for wheat, potato, fryers, and barley); and
- according to the Washington State Agricultural Enabling Act (examples include commodity boards for hops, cranberries, asparagus, and turfgrass seed).

Washington Apple Commission

The Washington Apple Commission (Commission) is a corporate body composed of 13 voting members: nine apple producers and four apple dealers. The Director of the Washington State Department of Agriculture (WSDA Director) is a non-voting member. A producer member must be a person engaged in apple production in Washington for at least five years. Commission statutes allow selection of a producer member who sells apples or packs and stores apples grown by others if a substantial quantity of the apples sold or handled are grown by the producer member. A dealer member must be a person actively engaged as an apple dealer in the state for at least five years. Producer and dealer members must be currently engaged in these activities in the districts they represent, and these qualifications must continue throughout their terms.

Commission members are elected to three-year terms. Producer members are elected from three grower districts, and the dealer members are elected from two dealer districts. Grower District No. 1 includes Chelan, Okanogan, and Douglas counties; Grower District No. 2 includes Kittitas, Yakima, Benton, and Franklin counties; and Grower District No. 3 includes all other counties.

Commission Assessments

The Commission may impose on all fresh apples grown in this state a levy of 12 cents per hundred pounds gross billing or reasonable equivalent determined by the Commission. The Commission may change the statutory assessment amount upon determination that the assessment levied is either too high or inadequate to accomplish the Commission's purposes. The Commission must adopt a resolution relating to the assessment change and refer the resolution to a referendum mail ballot of the state's apple producers. The resolution must be approved by at least a majority of the voting producers and the voting producers operating more than 50% of the acreage voted in the same election. The increase or decrease becomes effective 60 days after the resolution is adopted if approved by the voting producers.

Legal Challenges to Commodity Commissions

In 2001 the United States Supreme Court decided *United States et al. v. United Foods, Inc.*, in which a mandatory assessment on mushrooms for a federal promotional program was challenged as an unconstitutional infringement on free speech. The U.S. Supreme Court concluded in that case that the federal mushroom assessment was unconstitutional. Although it had upheld a commodity assessment for a different commodity in a 1997 decision, the U.S. Supreme Court in *United Foods* noted important differences between the challenged mushroom assessment and the previous commodity assessment. For example, the Court stated that the commodity program sustained in the 1997 decision differed from the mushroom program in a fundamental respect: in the 1997 case, the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. The U.S. Supreme Court in *United Foods* concluded the advertising itself was not ancillary to a comprehensive regulatory scheme but was in fact the principal objective of the regulatory scheme for the mushroom program.

In March 2003 a federal district court in Washington determined the Commission's statutory authority to collect mandatory assessments is unconstitutional. *In re Washington State Apple Advertising Commission*, Case No. CS-01-0278-EFS (U.S. District Court, Eastern District of Washington, filed March 31, 2003). The court in that case concluded the Commission's activities are not part of a comprehensive regulatory structure and that its marketing program is not

government speech protected from constitutional challenge. In July 2003 the parties to this suit reached a settlement, which included a proposal for legislative changes to restructure the Commission.

2003 Commodity Commission Legislation

Legislation enacted in 2003 – after the *In re Washington State Apple Advertising Commission* decision but before the July 2003 settlement – added and revised numerous provisions regarding supervision, governance, and operation of various commodity commissions. This legislation does not amend the statutes governing the Commission's structure or operations. Chapter 396, Laws of 2003 (HB 1361). Among other changes, the 2003 legislation:

- specifies each commission or board exists primarily for the benefit of the people of the state and its economy and is charged with speaking, with the WSDA Director's oversight, on behalf of the state government with regard to its particular commodity;
- requires approval by the WSDA Director of commissions' and boards' plans, programs, activities, and budgets;
- modifies commission and board member selection provisions to designate the WSDA Director as a voting member of each of these commissions and boards and to require the WSDA Director to appoint all or a majority of the members;
- adds liability protective provisions to the Dairy Products Commission statutes; and
- grants commodity commissions some additional powers.

Compensation and Liability Provisions

In 2001 members of commodity boards and commissions not created directly in statute 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. Under state law, agricultural commodity commissions are entitled to up to \$100 per day for each day spent attending official commission meetings or performing statutorily prescribed duties. The Commission statutes specifically authorize compensation of its commissioners.

Neither the state nor a Commission member, agent, or employee is liable for the Commission's acts or contracts. Commission members may not be held liable for acts other than their individual crimes or acts of dishonesty.

Summary of Bill:

Commission Status, Powers and Duties

The Commission is declared an agency of the Washington state government. The Commission is authorized, with the WSDA Director's oversight, to speak on behalf of the state with regard to apples and apple-related issues. In addition to other powers and duties, the Commission also is authorized to:

- maintain, protect, acquire or own intellectual property rights and collect royalties from Commission-funded research;
- apply for and administer federal market access or similar programs and provide matching funds as needed;

- provide, with oversight by the WSDA Director, funding and support to organizations representing and supporting the apple industry;
- fund, conduct, and participate in scientific apple-related research;
- provide services relating to production, promotion, sale, or distribution of Washington apples on a fee-for-service basis; and
- gather, maintain, and distribute apple production, processing, shipment and sales data related to Commission operations, services, and assessment collections.

Provisions are added specifying that the Commission exists primarily for the benefit of the state's people and economy. The Commission also is authorized to adopt rules to implement specified provisions.

The first Commission meeting after the effective date of these provisions must be held in Wenatchee. Subsequent Commission meetings must alternate between Yakima and Wenatchee.

Commission Assessments

The Commission's authorized levy is changed from 12 cents per hundred pounds gross billing to 8.75 cents per hundred pounds of apples based on net shipping weight or reasonable equivalent determined by the Commission. The WSDA Director must oversee any changes by the Commission to the statutory assessment amount. Increases must be approved by at least two-thirds of the voting producers and of the voting producers operating acreage voted in the same election. Decreases must be approved by at least a majority of the voting producers and of the voting producers operating acreage voted in the same election.

The Commission also may collect assessments imposed by the Washington Tree Fruit Research Commission. If it does so, the Commission must be reimbursed for its actual collection costs.

Commission Members

Provisions regarding the Commission's composition are revised. The WSDA Director's position is changed from a nonvoting to a full voting Commission member. A person operating an apple warehouse or selling apples who meets the qualifications of both producer and dealer may serve as either a producer member or a dealer member.

Commission members are selected by appointment rather than election. The nine producer and four dealer members are appointed by the WSDA Director. The number of producer members appointed from each grower district is to be determined according to the relative acreage of planted commercial apple orchards as of July 1, 2003, with adjustments every ten years according to census information from the Agricultural Statistics Service of the United States Department of Agriculture. At all times at least two producer members must be from Grower District No.1 (with one from Okanogan County) and no fewer than one member must be from Grower District No. 3.

Procedures for appointment of Commission members are added. Initially the WSDA Director is required to appoint the currently elected Commission members to the remainder of their terms. The WSDA Director then must appoint replacement producer members from the most underrepresented grower districts until the initial representation balance is achieved. Thereafter the Commission must hold a secret ballot advisory vote between 60 and 75 days before the beginning of a Commission member's term from nominees of apple producers and apple dealers. Candidates for appointment to the Commission are to be selected by majority vote of apple

producers in the respective districts for producer positions and of apple dealers in the respective districts for dealer positions.

The Commission must forward to the WSDA Director the names of the two candidates receiving the most votes in the advisory vote. These candidates must send a letter to the WSDA Director stating the reasons he or she wishes to be appointed to the Commission. Upon receiving the candidate names, the WSDA Director may:

- choose one of the two candidates whose names are forwarded by the Commission; or
- reject both candidates and request a new advisory vote, with nominees selected by the Commission and/or the WSDA Director.

The WSDA Director must appoint a member to fill a vacant position for the unexpired terms from two candidates nominated by the remaining Commission members.

Approval of Commission Programs and Budgets

The WSDA Director is required to approve the Commission's plans, programs, activities, and budgets concerning market research projects, market development projects, and other programs or projects within the Commission's powers and duties. The WSDA Director also must approve the Commission's industry support plans, programs, and projects such as market access or trade banner work. Further, the Commission must submit its budget to the WSDA Director for approval. The WSDA Director must strive for timely review of all submissions to ensure they properly benefit the state's people and economy and properly speak the state's message.

Liability Provisions

The state's liability for Commission acts or contracts is limited solely to the Commission's assets. Commission members have been and continue to be state officers or volunteers entitled to the defenses, indemnifications, liability limitations, and other benefits and protections of statutory provisions regarding actions against the state.

Statutory Construction

A severability provision is added to specify that the judicial invalidation of any of the legislation's provisions does not affect the validity of the remaining provisions.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.