

# HOUSE BILL REPORT

## SHB 1608

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**As Passed House:**

March 8, 2005

**Title:** An act relating to the potato commission.

**Brief Description:** Creating the potato commission.

**Sponsors:** By House Committee on Economic Development, Agriculture & Trade (originally sponsored by Representatives Grant, Holmquist, Linville, Buri, Wallace, Newhouse, Hinkle, Walsh, Quall, Kenney, Armstrong, Clements, Kristiansen, P. Sullivan, Blake, Haler, Kessler, Morrell, Chase, Skinner, McDermott and Santos).

**Brief History:**

**Committee Activity:**

Economic Development, Agriculture & Trade: 2/22/05, 2/25/05 [DPS].

**Floor Activity:**

Passed House: 3/8/05, 95-2.

**Brief Summary of Substitute Bill**

- Creates a separate statute governing the Washington State Potato Commission.

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**HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT, AGRICULTURE & TRADE**

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 21 members: Representatives Linville, Chair; Pettigrew, Vice Chair; Kristiansen, Ranking Minority Member; Blake, Buri, Chase, Clibborn, Condotta, Dunn, Haler, Holmquist, Kenney, Kilmer, Kretz, McCoy, Morrell, Newhouse, Quall, Strow, P. Sullivan and Wallace.

**Staff:** Meg Van Schoorl (786-7105).

**Background:**

Agricultural Commodity Commissions

Agricultural commodity commissions and boards may be established in Washington law either under individual chapters or as part of enabling acts covering multiple commodities. Commodity commissions perform a variety of functions, including advertising, sales promotion, research, and education, related to a particular commodity.

Currently, 24 commodity commissions are established under Washington law. Six were created under their own individual chapters: apple; dairy products; fruit; beef; tree fruit

research; and wine. Six were created under the 1955 Commodity Commission Enabling Act and have their own chapters under the Washington Administrative Code (WAC): potato; seed potato; bulb; wheat; fryer; and barley. The remaining 12 were created under the 1961 Commodity Commission Enabling Act and have their own chapters under the WAC: hop; dry pea and lentil; mint; blueberry; alfalfa seed; red raspberry; cranberry; strawberry; asparagus; Puget Sound salmon; canola and rapeseed; and turfgrass seed.

Depending upon industry priorities, some commissions perform primarily marketing programs; some perform only research programs; while some commissions perform both research and marketing. The majority of the commissions' funding derives from mandatory producer assessments. Their annual budgets range from \$12,000 to \$6.1 million.

### Court Challenges

In recent years, there have been numerous court challenges nationwide objecting to commodity commissions' use of mandatory assessments for advertising and market promotion programs. The lawsuits have centered on allegations that such programs infringe upon First Amendment rights to free speech by mandating that producers pay assessments to fund generic advertising with which they may disagree.

Some court decisions have disallowed the use of grower assessments for advertising and market promotion programs, while other courts have upheld such use based upon specific rationale and criteria. Decisions by various courts have not left consistent and clear guidance as to the structure that commissions engaged in advertising and marketing programs must have to avoid the constitutional violation.

In March 2003, a federal district court determined that the Washington Apple 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 that the Apple Commission's activities are not part of a comprehensive regulatory scheme 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.

### Statutory Changes in Response to Court Challenges

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. Among other changes, the 2003 legislation affected:

- **Advertising and promotion:** Each commission or board is specified to exist primarily for the benefit of the people of the state and its economy, and is charged with speaking, with oversight by the Director (Director) of the Department of Agriculture (WSDA), on behalf of the state government with regard to its particular

commodity. The Director must review each advertising or promotion program to ensure no false claims are being made regarding the commodity.

- **Programs, activities and budgets:** Each commission or board must develop and submit to the Director for review and approval any plans, programs, and projects concerning commodity advertising, promotion, market research projects, market development projects, research plans, education and training plans, and budgets. The commissions and boards must pay the WSDA's costs for these reviews.
- **Selection of commission and board members:** The Director or a designee now serves as a voting member of each of the commissions and boards, instead of as an ex-officio, non-voting member. In addition, requirements for election of commission and board members have been modified or replaced by various procedures for appointment by the Director of all or a majority of the members.

As part of the settlement agreement for *In re Washington State Apple Advertising Commission*, legislation was proposed and enacted in 2004 that significantly changed the Washington Apple Commission's statute with respect to its status, powers, duties, assessments, members, programs, budgets, and liability. These changes were similar to those made in 2003 to other commission statutes. Commodity commissions are in various stages of updating their administrative rules to comply with the 2002, 2003, and 2004 changes in law described above.

The U.S. Supreme Court is now considering consolidated cases challenging the federal Beef Promotion Program (Beef Check-off). Washington has signed onto an *amicus* brief with 32 other states in support of the Beef Check-off. Oral arguments occurred in December 2004, and a decision is expected in spring 2005.

#### Washington State Potato Commission (WSPC)

The WSPC was formed in 1956 under a general enabling act, chapter 15.66 RCW, and operates under chapter 16.516 WAC. According to the WSDA, the WSPC's annual estimated budget is \$3.3 million. The WSPC is governed by 13 commissioners who serve two-year rotating terms.

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#### **Summary of Substitute Bill:**

The WSPC previously formed under RCW 15.66 is transferred to a separate, new chapter of law.

**Intent and Purpose:** The production of potatoes in Washington is in the public interest. For the general welfare and economic well-being of the state's citizens, the potato industry should be encouraged to enable producers to help themselves in potato marketing, trade, grading and standardization. The purpose of the chapter is to promote the general welfare of the state, maintain and protect existing markets, increase production efficiency, ensure a fair regulatory environment, and increase use and consumption of Washington potatoes.

WSPC membership includes number, eligibility, qualifications, terms, districts, process for nomination and selection, and term. Of the 15 commissioners, nine are elected by producers through a process conducted by the WSPC. Five are appointed by the elected commissioners. One is appointed from the WSDA by its Director. Existing board members continue to serve, but nomination and election of new board members will be in accordance with the new chapter.

Other election processes: Provides for elections to modify the assessment or to consider continuation or termination of the WSPC. Elections are conducted by the WSPC in accordance with the chapter.

WSPC powers include administering, enforcing, implementing the chapter; rulemaking; electing officers; hiring employees, consultants, and private legal counsel; acquiring real property and leases; taking legal action; keeping records; borrowing money; paying expenses; collecting producer assessments; preparing budgets; accepting and receiving gifts and grants; working cooperatively with other agencies; entering into contracts or agreements; participating in proceedings regarding potatoes; assisting the WSDA or other agencies regarding pests and diseases affecting trade and export of potatoes; acquiring intellectual property rights, licenses, patents, royalties; fund-raising activities; establishing a foundation; maintaining a list of producers and handlers; checking assessment payment records; and other duties.

WSPC programs may include: prevention or elimination of unfair trade and regulatory barriers and practices; information on production, irrigation, processing, transportation, export, handling, or uses of potatoes; research or survey studies; labeling requirements to improve standards and grades; public education; and industry education. Explicitly excluded in the new chapter are the authorities to engage in marketing and advertising programs.

Producer assessments, use of moneys collected, investment of funds: Assessments are levied and collected by the WSPC at the rate of 4 cents per hundredweight on all potatoes sold, processed, delivered for sale or processing by a producer or stored or delivered for storage. Assessments may be increased or decreased by referendum approved by affected producers. Provides for reporting, paying assessments, and penalties for nonpayment. Allows Commission funds to be deposited in banks, trust companies, and savings banks that are public depositories in Washington.

Hosting, agricultural development, trade promotion: Provides procedures for expenditure approval and eligible activities.

Public disclosure: Exempts certain agricultural business records, WSPC records and WSDA records from disclosure.

Obligations and liabilities: Will be enforced only against the assets of the commission as if it were a corporation. No liability for the debts or actions of the WSPC will be against the State of Washington, a subdivision or instrumentality, or any individual commission member, employee or agent.

Assets, personnel, contracts, obligations, rules and pending business: Are all transferred from the former commission to the new commission.

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill contains an emergency clause and takes effect on July 1, 2005.

**Testimony For:** The Washington State Potato Commission (Commission) was formed in 1956. Marketing orders for the potato industry began at the federal level during the depression. The system allows producers to self-assess and self-promote. Since the various lawsuits began, the state has acted to make commissions more in line with government speech, including having the Director of the WSDA approve the Commission budget and appoint the commissioners. Having the Director select commissioners is like having the Superintendent of Public Instruction appoint local school board members. The Commission's funds are not state general funds. They are from assessments on producers. The Commission submitted a referendum to the WSDA last spring through which they would have continued electing their own commissioners but also would have eliminated the advertising and marketing functions. The WSDA told them that they needed to have the commissioners appointed by the Director. The myriad of court cases are not consistent. But we believe that the WSDA's position will disenfranchise growers. The people who are most impacted should make the decision, not the WSDA. This bill takes the Commission, which is now under rule, and puts it in a separate statute. Currently, commissions that are under the general enabling statute are at risk - if one of the other commissions within the general enabling statute makes a mistake, they will all be affected. The statute will be challenged in a lawsuit, not the rule. Right now the Commission is in the worst of all worlds. They are in a statute that could be legally challenged and have a rule that allows them to do advertising and promotion.

(Concerns) From the beginning of the lawsuits, the WSDA has wanted to reduce risk and protect the commissions. Their best judgment at this moment is for the Director to appoint the majority of the commissioners; one-third of the commissioners will be elected by the growers. For the other two-thirds, there will be an advisory vote by growers and the Commission will provide two names to the Director. The Director has said that no Director of Agriculture would go against the wishes of the commissions unless there was some amazing circumstance. We are trying to balance the risks of the court challenges with what's best for producers. The United States Supreme Court has already heard Federal Beef Check-off oral arguments. The Beef Check-off has survived so far by having the members appointed by the Director, the budget approved by the Director, and Department oversight of programs. We feel it is premature to second guess the outcomes now before the federal court makes a ruling regarding the Beef Check-off. We should wait for the decision then take action. The WSDA's intent is for producers to have as much power as possible.

**Testimony Against:** None.

**Persons Testifying:** (In support) Representative Grant, prime sponsor; Representative Holmquist; and Jim Jesernig, Washington Potato and Onion Association.

(Concerns) Mary Beth Lang, Washington State Department of Agriculture.

**Persons Signed In To Testify But Not Testifying:** None.