

# HOUSE BILL REPORT

## HB 2508

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**As Reported by House Committee On:**  
Agriculture & Natural Resources  
General Government Appropriations

**Title:** An act relating to water right processing improvements.

**Brief Description:** Regarding water right processing improvements.

**Sponsors:** Representatives Blake and Chandler; by request of Department of Ecology.

**Brief History:**

**Committee Activity:**

Agriculture & Natural Resources: 1/15/10, 2/2/10 [DPS];

General Government Appropriations: 2/4/10, 2/5/10 [DPS(AGNR)].

**Brief Summary of Substitute Bill**

- Authorizes a coordinated cost-reimbursement process for water right applications.
- Establishes criteria for qualifying as a certified water right examiner.
- Creates a "project-dependent" water right application status.

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### HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Blake, Chair; Ormsby, Vice Chair; Jacks, Liias, McCoy, Nelson, Rolfes and Van De Wege.

**Minority Report:** Do not pass. Signed by 5 members: Representatives Chandler, Ranking Minority Member; Smith, Assistant Ranking Minority Member; Kretz, Pearson and Warnick.

**Staff:** Jaclyn Ford (786-7339).

**Background:**

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

An applicant for a water right pending before the Department of Ecology (DOE) may enter into a cost-reimbursement agreement with the DOE to expedite review of the application. The applicant must agree to pay for, or as part of a cooperative effort agree to pay for, the cost of hiring a private consultant to evaluate their water right application plus any senior applications from the same source of water.

The DOE retains the authority to render a final decision on the application, but the consultant conducts a site investigation, performs the environmental and hydrogeologic analyses, identifies whether the water is available or would impair other water users, prepares a report with his or her findings and a recommendation whether to approve or deny the application.

An applicant may appeal a decision if he or she disagrees. In such cases, the applicant is responsible for paying for the legal costs of his or her own appeal. The DOE's decisions on water rights are defended by the state Office of the Attorney General. If a third party appeals a decision, the applicant may be responsible for reimbursing the state for the cost of defending the decision before the Pollution Control Hearings Board (PCHB). The DOE may negotiate further reimbursement if the decision is appealed beyond the PCHB.

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

#### Cost-Reimbursement.

Any applicant for a new withdrawal, or a change, transfer, or amendment of a water right may initiate a cost-reimbursement agreement with the DOE to provide expedited review of the application. A cost-reimbursement agreement may be initiated if the applicant agrees to pay for the cost of processing his or her application and all other applications from the same source of supply that were filed prior to the date of when the applicant filed. A water source may include surface water only, ground water only, or surface and ground water together if the DOE believes they are hydraulically connected. When determining the boundaries of a water source, the DOE must also consider technical information submitted by the applicant.

The requirement to pay for the cost of all other senior applications from the same source of supply does not apply if: (1) the application would not diminish the water available to earlier pending applicants from the same source of supply; or (2) the applicant agrees to pay for the cost of processing his or her application as part of a coordinated cost-reimbursement agreement.

Provided resources are available, the DOE may initiate a coordinated cost-reimbursement project: (1) on its own volition; (2) upon receipt of a written request from an applicant; (3) upon receipt of a written request or recommendation from a watershed planning unit; or (4) upon receipt of a resolution of a county or city legislative authority with jurisdiction over the area in which the water source is located.

The DOE's share of work related to a cost-reimbursement application, such as final certificate approval, must be prioritized within the framework of other water right processing needs.

If the DOE determines that the public interest is best served by initiation of a coordinated cost-reimbursement project, they must notify in writing all persons who have pending applications for a new appropriation or withdrawal of water from that particular source. The notice must be made by way of mail. The notification must inform those applicants that a coordinated cost-reimbursement process is being initiated and offer the opportunity to voluntarily participate in funding a cost-reimbursement contractor to investigate and make recommendations to the DOE regarding the disposition of the applications. The notice must also provide the estimated cost for having an application processed using a cost-reimbursement contractor. The notice must provide at least 60 days for the applicants to respond in writing as to their interest in participating in the coordinated cost-reimbursement processing of their applications. The DOE must adjust the estimated costs for each participant based on those applicants electing to participate.

For any applicant who elects not to participate in the coordinated cost-reimbursement process or who fails to respond in writing within the time allowed, the DOE must retain the application on file until the DOE is able to process it. These applicants may seek to initiate a cost-reimbursement process at a later date. The DOE must process remaining applications on file within the framework of other water right processing needs, as determined by agency rule and to the extent resources are available. Coordinated cost-reimbursement applies only to the sequence of application processing and does not affect the relative priority date of any resulting water rights.

The DOE must competitively select contractors who are qualified by training and experience to investigate and make recommendations on the disposition of water rights applications. The contractor list must be renewed at least every six years, though the DOE may add qualified cost-reimbursement contractors to the list at any time. When assigned an application or set of applications to investigate, the contractor must document his or her findings and recommended disposition in the form of written draft reports of examination. Within two weeks of the DOE receiving the draft reports of examination, an applicant may provide comments to the DOE on the contents of the report. The DOE may modify the reports of examination submitted by the contractor. The DOE's decision on a permit application is final unless it is appealed to the PCHB. Each individual applicant is responsible for his or her own appeal costs that may result from a water right decision made by the DOE. In the event that an applicant's water right approval is appealed by a third party, the applicant for the water right in question must reimburse the DOE for the cost of defending the decision.

#### Water Right Examiners.

The DOE must establish and maintain a list of certified water right examiners. Certified water right examiners on the list are eligible to perform final proof examinations of permitted water uses leading to the issuance of a water right certificate. In order to qualify for inclusion on the list, an individual must be registered in Washington as a professional engineer, professional land surveyor, registered hydrogeologist, or demonstrate five years of applicable experience. Qualified individuals must also pass a written examination demonstrating knowledge and competency in specific water-related topics prior to being certified by the DOE. The DOE may suspend or revoke a water right examiner's certification based on poor performance, malfeasance, failure to acquire continuing education credits, or excessive complaints from the examiner's customers. The DOE may also require the

retesting of an examiner. The DOE must establish and collect fees for the examination, certification, and renewal of certification of water right examiners.

Each certified water right examiner must be bonded for at least \$50,000.

In order to receive a final water right certificate, the permit holder must secure the services of a certified water right examiner who has been tested and certified by the DOE. The examiner must carry out a final examination of the project to verify its completion and to determine and document for the permit holder, and the DOE, the amount of water that has been appropriated for beneficial use, the location of diversion or withdrawal and conveyance facilities, and the actual place of use.

The DOE may waive the requirement to secure the services of a certified water right examiner in situations in which the DOE deems it unnecessary for purposes of issuing a certificate of water right.

#### Water Impoundments and Resource Management Techniques.

If the DOE determines that no water remains available for new appropriation from a water source, the DOE must notify all persons holding pending applications to divert water from that source. The DOE's determination and notice must be specific in describing the affected stream reaches, the extent of groundwater hydraulically connected to those reaches, and when applicable, the location and seasonality of water available for interruptible use. Any proposed impoundment or resource management technique must not diminish the water available from the described source of supply.

The DOE may place pending applications from a particular water source into project-dependent status where a proposed water supply development project or projects could feasibly make water available for dormant applications, including municipal water applicants that have an approved water system plan that outlines projected future water demand and how they intend to acquire the water to supply those demands. The DOE may make a determination to place pending applications for appropriation from a particular water source into project-dependent status: (1) on its own volition; (2) upon receipt of a written request or recommendation from a watershed planning unit; or (3) upon receipt of a resolution of a county or city legislative authority with jurisdiction over the area in which the water source is located. The DOE must notify all persons holding pending applications of that determination. Each applicant retains their priority date while in project-dependant status. Pending applications remain in project-dependent status as long as the project remains feasible.

#### Notification of Affected Tribal Governments.

The DOE must provide electronic notice and opportunity for comment to affected federally recognized tribal governments concurrently when providing notice to applications of cost-reimbursement, project-dependant status, or when mitigation is required.

#### **Substitute Bill Compared to Original Bill:**

The substitute bill:

- clarifies that any final determination made the DOE is appealable to the PCHB;
- requires the DOE to notify applicants that are placed in project dependant status;
- allows the applications in project dependant status retain their priority date while in project-dependant status;
- allows applications in project dependant status to remain in the status as long as the project remains feasible;
- allows a resolution of a county or city legislative authority with jurisdiction over the area in which the water source is located to request an application be placed in project-dependant status or initiate a cost-reimbursement process;
- includes municipal water applicants that have an approved water system plan which outlines projected future water demand and how they intend on acquiring the water to supply those demands as eligible for project-dependant status;
- provides guidelines on the notice and determination of when no water remains available for any unmitigated new appropriation from a water source;
- provides an additional qualification for certified water right examiners if they demonstrate at least 5 years of applicable experience;
- allows the applicant to provide comments to the DOE on the contents of the contractor's draft reports of examination;
- allows applicants to seek cost-reimbursement at a later date;
- clarifies that in the event that an applicant's water right approval is appealed by a third party, the applicant must reimburse the DOE for the cost of defending the decision;
- states that the DOE's share of work related to a cost-reimbursement application, such as final certificate approval, is prioritized within the framework of other water right processing needs;
- requires the DOE to provide notice and comment to affected federally recognized tribal governments when notifying pending applicants of cost-reimbursement, project-dependant status, or when mitigation is needed;
- eliminates the provision that project-dependant applications terminate automatically;
- eliminates the timelines required before an applicant will get automatically denied when they fail to show demonstrated diligence in working to identify a water impoundment or resource management technique; and
- makes technical amendments.

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**Appropriation:** None.

**Fiscal Note:** Available. Requested on substitute bill on February 2, 2010.

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

**Staff Summary of Public Testimony:**

(In support) This bill is an attempt to eliminate the backlog. This is agency request legislation. The major problem with cost-reimbursement is the “free-rider” issue; this bill eliminates that problem. Neighboring states use the techniques in this bill successfully.

(Opposed) This could result in cancellation of water right applications. Cost-reimbursement is a useful tool. This will affect smaller water right holders. Everyone who applies should be able to have their application examined instead of a determination en masse. Going to the private sector is more expensive than public employees and private employees also usually make more mistakes than public employees. There should be cost control for the small applicant.

(With concerns) This is not the right approach. Applicants should be able to hire their own consultants instead of adding an extra layer of bureaucracy. The use of consultants will not cut down on the workload of the DOE. Smaller applicants who cannot buy their way to the top should be considered. This would allow people to jump ahead in line. This bill would erode the government-to-government relationship with the tribes. This will clean up the cost-reimbursement program. The DOE should put applications in a separate class instead of canceling the applications if they do not have mitigation.

**Persons Testifying:** (In support) Representative Blake, prime sponsor; Don Smith, Klickitat County Water Conservancy Board; Ken Slattery, Department of Ecology; and Nathan Weis, Central Cascade Land Co.

(Opposed) Kathleen Collins, Washington Water Policy Alliance; Matt Zuvich, Washington Federation of State Employees; and Jack Field, Washington Cattlemen's Association.

(With concerns) Tom Mortimer, Cities of Kent and Everett; Bill Clark, Washington PUD Association; Dawn Vyvyan, Yakima Nation Puyallup Tribe; Miguel Perez-Gibson, Coluilk Tribes; and John Stuhlmiller, Washington Farm Bureau.

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

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## HOUSE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS

**Majority Report:** The substitute bill by Committee on Agriculture & Natural Resources be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Darneille, Chair; Takko, Vice Chair; Blake, Dunshee, Hudgins, Kenney, Pedersen, Van De Wege and Williams.

**Minority Report:** Do not pass. Signed by 4 members: Representatives McCune, Ranking Minority Member; Klippert, Sells and Short.

**Staff:** Owen Rowe (786-7391).

### **Summary of Recommendation of Committee On General Government Appropriations Compared to Recommendation of Committee On Agriculture & Natural Resources:**

No new changes were recommended.

**Appropriation:** None.

**Fiscal Note:** Available.

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

**Staff Summary of Public Testimony:**

(In support) This bill is the Department of Ecology (Ecology) agency request legislation. Ecology has nine years of experience with the current cost reimbursement process for water rights processing. The Water Rights Processing Program (Program) at Ecology is almost entirely supported by the State General Fund. Budget reductions to the program last session make this initiative important to Ecology. Under the current cost reimbursement process applicants balk at the cost of paying for all applicants in line ahead of them in order to get a water rights decision from Ecology, this bill mitigates this issue. The contracting piece of this bill is net neutral in cost. Ecology has modeled this legislation after similar programs in Oregon and Idaho.

(With concerns) Large utilities in the state are concerned about section 4 in this bill. There is a concern that if this legislation passes and cost reimbursement is ramped up that utilities undertaking long range planning would be required to conduct mitigation and costly studies, which we feel runs counter to the spirit of the law. Water conservation should be emphasized to extend the state's water resources further.

(Opposed) None.

**Persons Testifying:** (In support) Ken Slattery; and Jim Skalski, Department of Ecology.

(With concerns) Doug Levy, Cities of Everett and Kent.

**Persons Signed In To Testify But Not Testifying:**