

# SENATE BILL REPORT

## SB 6267

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As of January 15, 2010

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

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

**Sponsors:** Senators Rockefeller and Honeyford; by request of Department of Ecology.

**Brief History:**

**Committee Activity:** Environment, Water & Energy: 1/15/10.

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### SENATE COMMITTEE ON ENVIRONMENT, WATER & ENERGY

**Staff:** Karen Epps (786-7424)

**Background:** In 2000 the Legislature authorized the departments of Ecology (Ecology), Natural Resources, Health, and Fish and Wildlife, and local air pollution control authorities to use voluntary cost-reimbursement agreements for complex projects, meaning those that require an environmental impact statement. The agreements are intended to help assure that complex projects are handled appropriately, without diverting resources away from smaller projects.

An applicant for a water right pending before the Ecology may enter into a cost-reimbursement agreement to expedite review of their water right 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 water source.

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. Ecology renders a final decision.

An applicant may appeal a decision if he or she disagrees with Ecology's decision. In such cases, the applicant is responsible for paying for the legal costs of his or her own appeal. 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). Ecology may negotiate further reimbursement if the decision is appealed beyond the PCHB.

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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.*

**Summary of Bill: Cost-Reimbursement.** The requirement that an applicant pay for the costs of all other applications from the same water sources does not apply: (1) if the application is for a change, transfer, or amendment of a water right that would not diminish the water available to earlier pending applicants from the same water source; or (2) the applicant agrees to pay for the cost of processing his or her application as part of a coordinated cost-reimbursement agreement. In pursuing a cost-reimbursement project, Ecology must determine the source of water, including the boundaries of the area that will be affected by the project. Additionally, Ecology must determine if any other water right permit applications are pending from the same source. A water source may include surface water, ground water, or surface and ground water together if Ecology believes they are hydraulically connected. Ecology must consider technical information from the applicant in making its determinations. Ecology must provide a list of qualified cost-reimbursement contractors and must make work assignments based on availability and qualifications. The contractor must document its findings and recommended disposition in the form of written draft reports of examination. Under a cost-reimbursement agreement for new applications, changes, transfers, or amendments of a water right, each applicant is responsible for any appeal costs related to the processing of his or her application.

Ecology 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 legislative authority with jurisdiction over the area in which the water source is located.

If Ecology determines that the public interest is best served by the initiation of a coordinated cost-reimbursement, they must notify in writing, by mail, and by publication in a newspaper in the area, all persons who have pending applications on file. The notice must:

- offer the opportunity to participate in funding a cost-reimbursement contractor to investigate and make recommendations to Ecology regarding the disposition of the applications;
- provide the estimated cost for having an application processed using a cost-reimbursement contractor;
- provide not less than 60 days for the applicants to respond in writing as to their interest in participating in the coordinated cost-reimbursement project.

Ecology must adjust the estimated costs for each participant based on those applicants electing to participate in a coordinated cost-reimbursement project. Any applicant who elects not to participate in a coordinated cost-reimbursement project or fails to respond within the allotted time will have their application remain on file with Ecology until Ecology is able to process it. Coordinated cost-reimbursement applies only to the sequence of application processing and does not affect the relative priority date of any resulting water rights.

**Certified Water Right Examiners.** Ecology must establish and maintain a list of certified water right examiners. Certified water right examiners are eligible to perform final proof examinations of permitted water uses leading to the issuance of a water right certificate. In order to qualify as a certified water right examiner, an individual must be registered in Washington as a professional engineer, professional land surveyor, or registered hydrogeologist. Additionally, qualified individuals must also pass a written examination and

demonstrate knowledge and competency regarding Washington water law; measurement of water through open channels and enclosed pipes; water use and water level reporting; estimation of capacity of reservoirs and ponds; irrigation crop water requirements; aerial photo interpretation; location of land and water infrastructure through maps and global positioning; proper construction and sealing of well bores; and other topics related to the preparation and certification of water rights in Washington.

Each certified water right examiner must complete eight hours annually of qualifying continuing education in the water resources field and be bonded for at least \$50,000. Ecology must establish and collect fees for the examination, certification, and renewal of certification of water right examiners. Additionally, Ecology may adopt rules concerning water right examiners.

In order to receive a final water right certificate, the permit holder must hire a certified water right examiner to perform a final examination of the project to verify its completion and to determine and document for the permit holder and Ecology: (1) the amount of water that has been appropriated for beneficial use; (2) the location of diversion or withdrawal and conveyance facilities; and (3) the actual place of use. Ecology may waive the requirement to secure the services of a certified water right examiner in situations in which Ecology deems it unnecessary for purposes of issuing a certificate of water right.

Limited Water Availability. If Ecology determines by the adoption of rules, order, or other appealable agency action that no surface water or ground water remains available from a water source, Ecology may notify all persons holding pending applications to divert water from that water source. Such notice must be made by mail and publication in a newspaper in that area. Within three years after the date of notification is mailed and published, Ecology may issue an order requiring each applicant to amend their application to include provisions for a water impoundment or other resource management technique that would ensure that, if the application were granted, the effects of the diversion would not impair any senior water right, adopted instream flows, or closed water sources. For applications that do not submit an alternative proposal, Ecology must issue an order denying the application within the three years provided. An applicant may submit a written request for a two-year extension for good cause shown, including demonstrated diligence in working to identify a water impoundment or resource management technique. Ecology may provide a contact list of all other applicants who receive notification that no water remains available from a water source so that the applicants can coordinate with each other to develop plans for water impoundment or other resource management techniques.

Ecology may place pending applications into project-dependent status where a proposed water supply development project, or projects, could feasibly make water available for those applications in certain circumstances: (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 legislative authority with jurisdiction over the area in which the water source is located. Ecology cannot extend project-dependent status for an application by more than 20 years from the date the application was placed into project-dependent status.

**Appropriation:** None.

**Fiscal Note:** Requested on January 6, 2010.  
[OFM requested ten-year cost projection pursuant to I-960.]

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: This is a critical issue for the state as people will continue to seek water. The backlog in water right application processing will continue to grow because of budget cuts. Ecology is trying to come up with a creative way to get at the back log. Ecology has had experience doing cost reimbursement projects and it currently provides a good alternative to waiting in the backlog. Ecology has had many applicants interested in cost reimbursement but do not want to cover everyone's costs and this bill will address that situation. This bill would effectively privatize Ecology's water right processing program.

CON: The cost reimbursement process adds another level of bureaucracy. Additionally, cost reimbursement will adversely effect Ecology staff getting their work done as they will now have to be also managing contractors. There are no provisions for setting costs and the applicant does not get to be involved in selecting the contractor. This bill takes the wrong approach to trying to solve the back log problem. Rather than adequately funding the water resources program, this bill relies on the private sector to attempt to solve the back log problem. The private sector charges more and often brings incomplete or flawed applications to Ecology. This causes further delays the processing of applications and burdens the staff. There is vigorous opposition to Ecology closing basins and denying applications. There is concern about where in the state Ecology might use this authority. Third party processing of water right applications removes the government to government relationship between the Tribes and Ecology.

OTHER: The cost reimbursement approach provides a solution to the backlog problem. Allowing Ecology to close basins and require applicants to pursue mitigation within a three year window, even with a two year extension is too short. Additionally, the process under which Ecology would close basin and deny applications is not a very clear process and either needs to be modified or removed from the bill. Cost reimbursement helps remove the impediments to getting a person's application processed timely. It might make sense to add a sunset date or require a performance audit to see how cost reimbursements are being handled.

**Persons Testifying:** PRO: Ken Slattery, Department of Ecology, Seth Ballhorn, Center for Environmental Law and Policy

CON: Don Smith, Klickitat Water Conservancy Board, Matt Zuvich, Washington Federation of State Employees, John Stuhlmiller, Washington Farm Bureau, Kathleen Collins, Washington Water Policy Alliance, and Miguel Perez Gibson, Colville Tribes.

OTHER: Doug Levy, Cities of Everett and Kent, Dawn Vyvyan, Puyallup Tribe and Yakama Nation.