

SENATE BILL REPORT

SB 6803

As Reported by Senate Committee On:
Environment, Water & Energy, February 5, 2010
Ways & Means, February 9, 2010

Title: An act relating to clarifying withdrawal of groundwater for stock watering purposes.

Brief Description: Concerning the withdrawal of groundwater for stock watering purposes.

Sponsors: Senator Rockefeller.

Brief History:

Committee Activity: Environment, Water & Energy: 2/02/10, 2/05/10 [DPS-WM, DNP, w/oRec].
Ways & Means: 2/08/10, 2/09/10 [DP2S, DNP, w/oRec].

SENATE COMMITTEE ON ENVIRONMENT, WATER & ENERGY

Majority Report: That Substitute Senate Bill No. 6803 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Rockefeller, Chair; Pridemore, Vice Chair; Marr, Oemig, Ranker and Sheldon.

Minority Report: Do not pass.

Signed by Senators Honeyford, Ranking Minority Member; Delvin and Morton.

Minority Report: That it be referred without recommendation.

Signed by Senator Fraser.

Staff: Karen Epps (786-7424)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 6803 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Fraser, Vice Chair, Capital Budget Chair; Tom, Vice Chair, Operating Budget; Fairley, Keiser, Kline, Kohl-Welles, McDermott, Murray, Oemig, Pridemore, Regala and Rockefeller.

Minority Report: Do not pass.

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.

Signed by Senators Zarelli, Ranking Minority Member; Carrell, Honeyford and Schoesler.

Minority Report: That it be referred without recommendation.

Signed by Senators Brandland, Hewitt, Parlette and Pflug.

Staff: Maria Hovde (786-7710)

Background: All groundwater withdrawals require an application and permit from the Department of Ecology (Ecology). Exemptions from this permit requirement include any withdrawal of public groundwater for stock watering purposes, or for watering a lawn or a noncommercial garden of less than one-half acre. Single or group domestic uses or industrial purposes in an amount not exceeding 5,000 gallons a day are also exempt.

In 2009 the Legislature adopted ESHB 1244, which required Ecology to convene a Stock Water Work Group (Work Group). The Work Group reviewed the issues surrounding the use of permit-exempt wells for stock-watering purposes.

Summary of Bill (Recommended Second Substitute): Existing dairy farms using less than 13.8 acre feet per year remain exempt from permitting requirements. Existing dairy farms using more than 13.8 acre feet per year remain exempt from permitting requirements if:

- the dairy farm files a registration;
- water withdrawal thereafter does not exceed the amount in the registration; and
- the dairy farm begins metering by December 31, 2012, if the operation is withdrawing water from a groundwater body that has been closed to further withdrawal by rule, that is in hydraulic continuity with surface waters that are closed to further appropriation by rule or have an established instream flow that is not regularly met, or that is in hydraulic continuity with surface waters with depressed or critical salmonid stock status.

Existing dairy farms must obtain a water right permit, certificate, claim, a department-approved transfer of an existing water right, or a department-approved change or consolidation amendment for any amount of water use exceeding the registered annual quantity withdrawal limit contained in the operation's registration. Existing dairy farms can amend their registration until December 31, 2015, if the dairy farm increases the highest annual quantity of water withdrawn and beneficially used for stock watering purposes. Existing dairy farms with a withdrawal for stock watering purposes of less than 13.8 acre feet per year must obtain a water right permit, certificate, claim, a department-approved transfer of an existing water right, or a department-approved change or consolidation amendment for any amount of water use exceeding 13.8 acre feet per year. Nothing in this act authorizes the impairment of, or operates to impair, any existing water right. Nothing in this act precludes an action, on the basis of priority date, in favor of senior water rights, whether such an action is brought by the holder of an existing right or by Ecology.

Any new withdrawal by a new dairy farm is exempt from permitting if the total withdrawal for stock watering purposes does not exceed 13.8 acre feet per year, and annual withdrawal quantities are metered and recorded. A new dairy farm must obtain a water right permit,

certificate, claim, transfer, change, or consolidation for any amount exceeding 13.8 acre feet per year.

An existing dairy farm that uses more than 13.8 acre feet of water for stock watering purposes must register with Ecology. The registration must include:

- the name and address of either the water user or the stock watering operation, or both;
- the name and address of the owner of the land on which the well, wells, or other means used for the withdrawal are located;
- the legal description of the location of the point of withdrawal and the place of use;
- the depth, and any other pertinent specifications, of the well or wells;
- the date or approximate date, to the best of the registrant's knowledge, of the first beneficial use of groundwater withdrawn;
- a description of the stock watering purposes associated with such a withdrawal and use; and
- a declaration of the highest annual quantity, estimated to the nearest acre foot, of water withdrawn and beneficially used by the livestock operation for stock watering purposes during the period of January 1, 2005, through December 31, 2009.

Submittal of the registration is done under the penalty of perjury. An existing dairy farm that fails to register by December 31, 2010, has a priority date as of the date of filing the registration, unless the operation obtains an extension for good cause.

A registered dairy farm may request that Ecology do an extent and validity review of the water used for stock watering purposes so that the dairy farm may then submit a transfer or change application or an amendment to accommodate expansion or consolidation of registered livestock operations.

A registered dairy farm may request that Ecology do an extent and validity review of the water used for stock watering purposes so that the dairy farm may then submit a change or consolidation amendment be expedited between consenting owners of other registered dairy farms or water rights for other agricultural purposes. An expedited change or consolidation amendment may tap different bodies of groundwater if Ecology:

- conducts an extent and validity review and determines that withdrawing the water from a different body of groundwater would improve overall sustainability of groundwater resources, any increase in water withdrawn by the receiving operation will be matched by an equal or greater reduction by the sending operation, other existing water rights will not be impaired, the proposed change or consolidation will not be detrimental to the public welfare; and
- if the withdrawals do tap different bodies of public groundwater, the priority date will be subordinated to existing rights in order to protect them from impairment.

A registered dairy farm that conserves water may increase the operation's numbers or types of livestock without notice to Ecology as long as the withdrawal quantities described in the registration are not exceeded or may elect to protect the excess from relinquishment and put that unused portion into the Trust Water Rights Program.

Ecology must convene a dairy stock water advisory group that includes members representing the dairy industry, members representing environmental interests, and the Director of the Department of Agriculture or the Director's designee.

The group must review issues surrounding the use of permit-exempt wells for stock watering purposes by dairy farms and report its activities and recommendations to the Governor and the appropriate legislative committees by December 1, 2013.

EFFECT OF CHANGES MADE BY WAYS & MEANS COMMITTEE (Recommended Second Substitute): Makes technical changes including correcting incorrect references within the bill.

EFFECT OF CHANGES MADE BY ENVIRONMENT, WATER & ENERGY COMMITTEE (Recommended First Substitute): Amends the existing bill so that it only applies to dairy farms that are licensed under chapter 15.36 of the RCW. Exempts new dairy farms from permitting if the total withdrawal for stock watering purposes does not exceed 13.8 acre feet per year, and annual withdrawal quantities are metered and recorded. Allows a registration to be amended until December 31, 2015, if the dairy farm increases the highest annual quantity of water withdrawn and beneficially used for stock watering purposes. Requires Ecology to convene an advisory group and report activities and recommendations to the Legislature by December 31, 2013. Removes the definition of stock watering purposes.

Appropriation: None.

Fiscal Note: Requested on January 31, 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 on Original Bill (Environment, Water & Energy):
CON: There is concern about the Legislature acting while there is current litigation pending regarding this exemption. Many agricultural groups are actively involved in that litigation. Some organizations feel it is inappropriate to proceed while that litigation is ongoing. It is very important to let the litigation play out. With the size of cattle feeding operations, the exemption under this bill might as well be zero for us. The smallest cattle feeding operation is about 7,500 head of cattle, which means they would not be able to expand at all. There is some concern about how a livestock operation would prove up the amount of water they have been using. The bill as currently written does not address the economic realities of the livestock industry. This bill does not provide a realistic water management approach to stock watering. Many would like the Stock Water Working Group to continue discussions on this issue. It is necessary to allocate water resources in Eastern Washington in a fair, sustainable, and equitable way. Allocating an unlimited amount of Washington's groundwater to a single industry, the mega industrial feedlots and dairies, is very unfair to existing water right holders. Additionally, it sets up a bigger conflict in the future as water resources become more depleted. Finally, it prejudices the outcome of an existing lawsuit. Every other industry requiring water to do business must get a water right permit. There will be a call for

legislative action after the lawsuit is decided. There are concerns about going to an acre foot per year limitation as it is not known how that will affect other users.

OTHER: Much of the bill is very good in concept. There are some concerns about timeframes. There has been a lot of effort and thought put into this bill. We have had a lot of uncertainty over this exemption in recent time, but the one thing we have had since 1945 is great flexibility. The change needs to duplicate that flexibility. It might be helpful to have an advisory group that could assist Ecology when implementing this bill. This bill strikes a middle ground between the environmental concerns and the needs of the industry. Resolution of the lawsuit one way or another will create chaos. The Legislature is best poised to propose a solution that makes sense for the environment and the industry. It would be nice to limit the focus of the bill so that the lawsuit can continue. However, there are real and very significant risks in allowing the litigation to play out.

Persons Testifying (Environment, Water & Energy): CON: Jack Field, Washington Cattlemen's Assn.; Ed Field, Washington Cattle Feeders Assn.; John Stuhlmiller, Washington Farm Bureau; Pat Boss, Columbia Snake River Irrigators Assn.; Heather Weiner, Sierra Club; Seth Ballhorn, Center for Environmental Law and Policy; Miguel Perez Gibson, Colville Tribes.

OTHER: Chris Cheney, Jay Gordon, Washington Dairy Federation; Lee Falconer, WA Department of Agriculture; Mo McBroom, WA Environmental Council; Evan Sheffels, Ecology.

Staff Summary of Public Testimony on Recommended First Substitute (Ways & Means): PRO: This bill brings some certainty to an area of ambiguity and helps to protect future water resources. Having unlimited water withdrawals is not good water policy. Most of the fiscal impacts in the bill can be pushed out for a number of years, although there will be impacts as a result of the registration process.

CON: This bill will have negative impacts on those groups not identified in the legislation. This places an additional burden on Ecology and they cannot work through the existing backlog. The current Attorney General opinion gives an unlimited amount of water for stock water purposes, which causes issues in critical basins and those basins that are closed or over-appropriated. It is the state's duty to manager water resources to protect senior water right holders and this bill shifts the burden to the water right holders to defend, which is a major shift in policy and is a lengthy and expensive process and will add litigation costs to Ecology. Water programs are being cut so there will not be adequate enforcement or extent and validity determinations. This bill has some constitutional issues with retroactive lawmaking and the grandfathering in of permit-exempt wells raises issues of equal protection. This bill will interfere with the court's summary judgment which is expected to occur on March 29, 2010.

Persons Testifying (Ways & Means): PRO: Senator Rockefeller, prime sponsor; Evan Sheffels, Ecology; Chris Cheney, Washington Dairy Federation.

CON: Jack Field, Washington Cattlemen's Association; Dawn Vyvyan, Yakama Nation, Puyallup Tribe of Indians; Seth Ballhorn, Center for Environmental Law and Policy; John Stuhlmiller, Washington Farm Bureau.