

SENATE BILL REPORT

SB 5536

As of February 14, 2011

Title: An act relating to the management of water resources.

Brief Description: Regarding the management of water resources.

Sponsors: Senators Rockefeller, Honeyford, Ranker, Nelson, Shin and Kline; by request of Department of Ecology.

Brief History:

Committee Activity: Environment, Water & Energy: 2/09/11.

SENATE COMMITTEE ON ENVIRONMENT, WATER & ENERGY

Staff: Karen Epps (786-7424)

Background: Washington operates under a water right permit system. With certain exceptions, new rights to use surface or ground water or to establish reservoir and storage projects must be established according to the permit system. Exemptions include any withdrawal of public groundwater for stock watering purposes or for watering a lawn or a noncommercial garden less than one half an acre. Single or group domestic uses or industrial purposes in an amount not exceeding 5000 gallons a day are also exempt.

A person seeking a new water right files an application with the Department of Ecology (Ecology), which must consider a four-part test when deciding whether to issue the requested right: (1) whether water is available; (2) whether a beneficial use of water would be made; (3) whether granting the right would impair existing rights; and (4) whether the proposed use would detrimentally affect the public welfare. If an application passes this test, Ecology issues a permit which establishes a time table for constructing the infrastructure to access the water and for putting water to beneficial use. When the conditions of the permit are satisfied, Ecology issues a water right certificate.

Ecology may permit certain changes to a water right. Ecology may also permit a transfer of a water right from one holder to another. In processing change or transfer applications, Ecology analyzes the validity, limits, and quantity of the right. Changes or transfers cannot impair existing rights of other water right holders. Ecology must, when evaluating an application for a water use permit or for a transfer, change, or amendment of a water right,

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take into consideration the benefits of any water impoundment that is included as a component of the application.

Ecology may establish instream flow requirements by rule. It may do so on its own, or as part of watershed planning. Once established, the instream flow constitutes a water right with a priority date that is the effective date of the rule establishing the instream flow.

If a person abandons or voluntarily fails to use beneficially all or any part of the person's water right for five successive years, the right or unused portion is relinquished and reverts to the state. A number of exemptions and exceptions from relinquishment are listed in statute.

The Watershed Planning Act establishes a process for local groups to develop and implement plans to manage and protect local water resources and rights. The local groups are organized by water resource inventory areas (WRIA), which are distinct watersheds or river basins. Once constituted, a WRIA is eligible for grant funding from Ecology. Watershed planning is conducted in four phases: (1) initiation and organization of a planning unit; (2) water quantity assessment and future use strategy; (3) development of a watershed plan and recommendations for action; and (4) implementation of the plan.

Summary of Bill: Ecology must take into consideration the benefits and costs of a mitigation technique that mitigates the impacts through new or existing storage or other infrastructure, operations, or institutional arrangements that are included in an application for a water right, transfer, or change. Including mitigation techniques in an application are solely at the discretion of the applicant. Ecology may reject the application for lack of completeness if an application does not have a mitigation plan under certain circumstances.

Under the groundwater permit exemption, Ecology may by rule establish quantity and acreage limits for new uses of water that are lower than those provided in statute. The rules, which may include instream flow rules, must be specific to a watershed or aquifer that Ecology believes is at or close to being fully appropriated and that lower limits on new uses of groundwater are needed in the interest of conservation and stretching the beneficial use of remaining waters as far as possible.

Ecology may tentatively determine the extent, validity, and priority of respective rights to the use of water in certain circumstances, including:

- for purposes of protecting senior water rights from impairment by junior water rights,
- when necessary for effective water management, or
- when a question arises among competing water users whether any of them is using water in excess of the amount to which the user of the water is lawfully entitled.

A tentative determination is binding among the water users whose rights are determined if there is a general adjudication. Any person aggrieved by Ecology's tentative determination may appeal the decision to the Pollution Control Hearings Board.

In making a determination of the extent and validity of a water right, Ecology may only evaluate the exercise of the water right during the most recent 30-year period. For the purposes of appeal, the 30-year review by Ecology does not alone constitute an agency

action. Parties may appeal the primary action taken by Ecology. Water right determinations during a general adjudication are not limited to a 30-year review.

The relinquishment statute is amended to provide that beneficial use is the basis, the measure, and the limit of all rights to the use of water in this state. Relinquishment does not occur if a right is a perfected and developed water right used for an agricultural irrigation purpose and the following conditions are also met:

- the water user's diversion and delivery facilities are maintained in good operating condition;
- each part of the authorized acreage is irrigated for beneficial use at least once every five years and is nonwasteful; and
- the actual use of water is less than 110 percent the annual crop requirement for the most water intensive crop normally grown in the area.

If a change or transfer application may be made without injury or detriment to existing rights, Ecology must issue to the applicant an authorization to implement the change together with any conditions that may be required to avoid injury or detriment to another water right. Once the applicant has shown that the change or transfer has been implemented, Ecology must issue a certificate granting the transfer or change.

Ecology may establish a schedule for completion of necessary work to change the purpose, place, or manner of use of a water right or for the construction of works necessary for the change of the water right. Nonuse during the schedule is not subject to relinquishment, but failure to complete the work under the schedule may result in relinquishment unless it meets another exception to relinquishment.

Ecology may set, either by rule or order, nonbinding achievable stream flow restoration benchmarks after consulting with potentially affected tribal governments, local governments, and stakeholders. The rule or order may describe the preferred means by which Ecology and other parties may seek to achieve the benchmarks.

A WRIA may apply for an implementation grant for a maximum of nine years. For years one through four, the WRIA must provide a 10 percent match. For years five through nine, the WRIA must provide a 50 percent match. Ecology must give priority to grant applications that directly support activities or implement projects that:

- integrate watershed plan implementation with the objectives of other water resource, water quality, or fish recovery plans;
- develop new water supplies;
- develop or implement strategies to enhance or restore stream flows; and
- include a review of the implementation plan.

During implementation, certain WRIAs are eligible to apply for special grants from the state's operating or capital budgets. When awarding these grants, Ecology must consider various factors, including critical water supply and demand issues, critical water quality issues, and the extent to which the project proposals support other statewide or regional water quantity or quality initiatives.

Ecology must recover the full cost of processing an application received after this act takes effect or an application that is awaiting processing from an applicant. Ecology must fully recover its costs related to providing water users mitigation credits, issued as a result of water banking. Ecology must continue to improve efficiency, including utilizing technology to streamline processes. Ecology must calculate a processing fee for each application based primarily on:

- projected workload;
- cost to process the application to a decision; and
- the quantity of water requested by an applicant.

Ecology must ensure that applicants are charged only for services necessarily related to the processing of their applications. Ecology may adjust the fee if it appears that an application will require a greater amount of time and effort to process due to its complexity. Any application fees that were paid by the applicant must be credited against the total cost of processing their application. The applicant must transmit the processing fee within 60 days of the written request. Ecology may adopt a new fee schedule by rule, but the fees must be based on Ecology's actual cost to process applications.

Prior to collecting the processing fee, Ecology must provide an initial assessment to the applicant that estimates the cost and scope of issues likely involved in processing the application. The purpose of this initial assessment is to assist the applicant by providing them with information so they can decide whether to proceed with having the application processed. If additional information will need to be collected or studies will have to be conducted to answer the applicable tests for issuing a permit or change approval, Ecology must tell the applicant the time and cost to gather the information or complete the studies. Ecology's initial assessment is not appealable or considered a final decision by Ecology.

If an applicant withdraws his or hers application before the initial assessment, Ecology must refund any application fees paid by the applicant. If an applicant withdraws his or her application after the initial assessment, the applicant does not get a refund of application fees paid up to that point.

An applicant for municipal supply or community domestic supply may request that the processing of the application be deferred until the applicant is ready to proceed with development of the proposed water use. A request to defer an application must be accompanied by a statement of why the deferral is necessary and include the projected timing for development of the water under the application. A deferred application retains its priority date if an annual fee is paid to Ecology that is equal to 10 percent of the estimated cost to process the application.

Ecology's goal is to process all pending applications by July 30, 2017, such that the average waiting period to receive a decision is no longer than one year for new applications received after that date. Ecology must report to the Office of Financial Management and the Legislature on ways to make the state's Water Resource Management Program financially self-sufficient by September 1, 2011. Additionally, Ecology must submit a report to the Governor and the Legislature on the status of water rights processing by November 30, 2012, and by November 30 of every even-numbered year thereafter through 2020.

Appropriation: None.

Fiscal Note: Requested on January 28, 2011.

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 bill is intended to start a new conversation about the future of water management in Washington. This bill allows Ecology to work with applicants on a mitigation package to offset their water use. In water-short basins, water from permit exempt wells can be used at a lower use limit. When looking at extent and validity, Ecology could only look back 30 years, but a full look back could happen in the courts. The fear of relinquishment is too often a disincentive; so, this bill tries to address that issue. This bill allows Ecology to establish restoration benchmarks to look at how to restore the flows. Ecology needs the capacity and the resources to do this very complex work. Water rights processing is 98 percent general fund dependent. In order to lose less ground and be consistent with the Governor's directive to look hard at where to apply the beneficiary pays principle; applicants for water rights should pay for that work. Finally, critical to finding local solutions to local problems, local watershed groups should be able to continue to receive funding for implementation, if and when it is available.

CON: This provision would allow Ecology to act with impunity when it believes a watershed is at or close to being fully appropriated. Allowing Ecology to set lower limits for exempt wells where Ecology believes a basin is close to or fully appropriated is too subjective to be useful policy. This bill proposes to expand Ecology's authority. In *Rettkowski*, the court determined that adjudication of competing water rights is solely with the authority of Superior Court. The change to allow Ecology to regulate among users is an expansion of Ecology's authority. Utilities have concerns that this bill expands Ecology's authority. There is concern that this bill will further delay the water permit process. Ecology is conflicted as they are charged with protecting the environment but also manage the water resource for people and jobs. Ecology is not adequately equipped and does not have the resources to adequately manage water in Washington. Ecology has had a history in recent years of handling applications for new water rights and changes and transfers at an incredibly slow pace. It is unclear how the relinquishment changes will benefit agriculture. Providing the water resources program with new funding sources, without requiring management and fiscal reform would be irresponsible. The need for state funding to administer the water resources program should be limited, based on a reformed model of accountability and governance, and possibly with a change to its governance structure to a commission. There needs to be certainty for water right users. The cost recovery changes are inconsistent with changes to the statute passed last year. Full cost recovery does not make any guarantee that an application will be processed in a timely manner. There could be support for cost recovery if applicants knew they were getting something for their money. There is concern about having applicants pay for any studies it thinks it needs to be done to process the applications in that region.

OTHER: The inconsistent evaluation period between a preliminary determination and an adjudication can only result in false expectations with respect to the extent and validity of a

water right by right holders. Ecology should evaluate the full period of water use upon request of an applicant or an affected party. The public receives substantial benefits when water is put in the Trust Water Rights Program to maintain flows so it would be appropriate for the general fund to support the cost of processing that application. There is concern about compliance and there needs to be metering of permit exempt wells. This bill takes a broader approach to fix the water management system. There needs to be better information so Ecology can make better decisions. The *Rettkowski* fix allows Ecology to make decisions about conflicts among water users in a more timely way. There are concerns that the benchmarks may stand in place of instream flow rules.

Persons Testifying: PRO: Ted Sturdevant, Maia Bellon, Department of Ecology.

CON: Alan Crankovich, Kittitas County; Bryan Kelley, Pure Glacial Water; Miguel Perez-Gibson, Colville Tribes; Jim Halstrom, Washington State Horticultural Association; Steve Lindstrom, Sno-King Water District Coalition; Robert Johnson, Lewis County; Tom Mortimer, City of Kent; Bill Clarke, Washington Public Utility District Association, Washington Realtors Association; John Stuhlmiller, Washington Farm Bureau; Daryll Olsen, Columbia-Snake River Irrigators Association; Kathleen Collins, Washington Water Policy Alliance; Chris McCabe, Association of Washington Business; Holli Johnson, Washington State Grange.

OTHER: J. Roach, citizen; Carla Carlson, Muckleshoot Indian Tribe; Dawn Vyvyan, Yakama Nation; Darcy Nonemacher; David McClure, Klickitat County; Steve Robinson, Center for Environmental Law and Policy; SueLani Madsen, Lincoln County Chair, WRIA 13.