

SENATE BILL REPORT

E2SSB 6267

As Amended by House, March 11, 2010

Title: An act relating to water right processing improvements.

Brief Description: Regarding water right processing improvements.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Rockefeller and Honeyford; by request of Department of Ecology).

Brief History:

Committee Activity: Environment, Water & Energy: 1/15/10, 2/05/10 [DPS-WM, DNP].

Ways & Means: 2/08/10, 2/09/10 [DP2S, DNP, w/oRec].

Passed Senate: 2/16/10, 46-2.

Passed House: 3/04/10, 51-47; 3/11/10, 96-1.

SENATE COMMITTEE ON ENVIRONMENT, WATER & ENERGY

Majority Report: That Substitute Senate Bill No. 6267 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; Fraser, Marr, Oemig and Ranker.

Minority Report: Do not pass.

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

Staff: Karen Epps (786-7424)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 6267 be substituted therefor, and the second substitute bill do pass.

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

Minority Report: Do not pass.

Signed by Senators Honeyford and Schoesler.

Minority Report: That it be referred without recommendation.

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; Brandland, Carrell, Hewitt, Parlette and Pflug.

Staff: Maria Hovde (786-7710)

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.

Summary of Engrossed Second Substitute Bill: Cost Reimbursement. The requirement that an applicant pay for the costs of all other applications from the same water sources does not apply 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. 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, groundwater, or surface and groundwater together if Ecology believes they are hydraulically connected. Ecology must consider technical information from the applicant in making its determinations.

Upon the request of an applicant seeking cost-reimbursement processing, Ecology may elect to initiate a coordinated cost-reimbursement process. If Ecology initiates 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 Ecology 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 applicant must pay for the initial phase of cost-reimbursement. The cost for each applicant must be based on the proportionate quantity of water requested by the applicant.

Ecology must competitively select contractors who are qualified by training and experience to investigate and make recommendations on the disposition of water rights applications. The applicant may select the consultant from Ecology's list or may be assigned a consultant by Ecology. The applicant may also use its own consultant at the discretion of Ecology. The contractor list must be renewed at least every six years, though Ecology 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 Ecology receiving the draft reports of examination, an applicant may provide comments to Ecology on the contents of the report. Ecology may modify the reports of examination submitted by the contractor. Ecology'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 Ecology. 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 Ecology for the cost of defending the decision before the PCHB unless otherwise agreed to by the applicant and Ecology. If an applicant appeals either an approval or denial by Ecology, the applicant is responsible for his or her own appeal costs.

If an applicant elects not to participate in a cost-reimbursement process, the application remains on file with Ecology, retains its priority date, and may be processed in the future under regular processing, expedited processing, or through cost-reimbursement.

Expedited Processing. Ecology may expedite processing of applications within the same surface water or groundwater source on its own volition when there is interest from a sufficient number of applicants or upon receipt of written requests from at least 10 percent of the applicants within a water source. If those conditions are met and Ecology determines it is in the public interest to expedite applications in a water source, Ecology must notify everyone with a pending application that expedited processing is being initiated, provide the criteria under which the applications are examined and determined, provide the estimated cost, provide an estimate of how long the expedited process takes, and provide at least 60 days for applicants to respond to Ecology.

Ecology must determine the full costs to process applications on an expedited basis and recover those costs from applicants who elect to participate through expedited processing fees. Ecology must calculate the estimated cost to the applicant based primarily on the quantity of water requested by the applicant and may adjust the fee if it appears that the application requires more time due to its complexity. Any application fees that were paid by the applicant must be credited against the applicant's expedited processing fee. Ecology

must collect the expedited processing fee prior to the expedited processing of an application. The expedited processing fees must be deposited into the water rights processing account.

If an applicant elects not to participate in expedited processing, the application remains on file with Ecology, retains its priority date, and may be processed in the future under regular processing, expedited processing, or through cost-reimbursement. Such an application may not be processed through expedited processing within 12 months after the previous expedited processing has been completed unless the applicant pays the full proportionate share that would otherwise have been paid for expedited processing. Any proceeds collected from an applicant may be used to reimburse the other applicants who participated in the previous expedited processing.

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. An individual must be registered in Washington as a professional engineer, professional land surveyor, or registered hydrogeologist or demonstrate at least five years of applicable experience or be a conservancy board member in order to be eligible to become a certified water right examiner.

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. Ecology must make its final decision within 60 days of the date of receipt of the proof examination from the certified water right examiner, unless otherwise requested by the applicant.

Notification to Affected Tribal Governments. Ecology must provide electronic notice and opportunity for comment to affected federally recognized tribal governments concurrently when providing notice to applicants under cost-reimbursement, coordinated cost-reimbursement, or expedited processing of applications.

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 on Original Bill (Environment, Water & Energy):

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 (Environment, Water & Energy): 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.

Staff Summary of Public Testimony on Recommended First Substitute (Ways & Means): PRO: This bill will help to improve the administration of processing water rights which will help those waiting in line.

CON: The goal of this bill is to reduce the number of applicants waiting in line but we want to ensure that this is done fairly and efficiently. There are concerns with Ecology declaring an area short of water and the short timeframe given to develop a mitigation approach. This limited timeframe will be difficult for those who have more complicated applications.

Persons Testifying (Ways & Means): PRO: Senator Rockefeller, prime sponsor.

CON: Kathleen Collins, Washington Water Policy Alliance.

House Amendment(s): Cost Reimbursement. Allows the cost for each applicant for conducting a coordinated cost-reimbursement agreement to be based primarily on proportionate quantity of water requested by each applicant, but allows for adjustment if it appears that the application will require a disproportionately greater amount of time and effort to process due to its complexity. Provides that only Ecology may approve or deny an application processed under cost-reimbursement. Allows Ecology to recover costs associated with cost-reimbursement. Allows Ecology to use the work of a prequalified consultant done prior to the initiation of the cost-reimbursement process. Makes technical changes.

Expedited Processing. Requires posting of notice on Ecology's website. Makes technical changes.

Certified Water Right Examiners. Clarifies that Ecology can conduct a final proof of examination. Allows Ecology to request corrections to a draft final proof of examination received from the certified water right examiner. Makes technical changes.