
**Agriculture & Natural Resources
Committee**

HB 1610

Brief Description: Regarding the management of water resources.

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

Brief Summary of Bill

- Makes a number of changes to the laws concerning water resources including mitigation and conservation, groundwater permit-exemptions, water right determinations and adjudications, relinquishment, water right changes or transfers, stream flow restoration, watershed management, and water resources cost recovery.

Hearing Date: 2/9/11

Staff: Courtney Barnes (786-7194).

Background:

Under the state Water Code, a person must have a water right for any use of surface water and for larger withdrawals of groundwater. A water right is a legal right to use a specified amount of water for a beneficial purpose. The Water Resources Program in Washington is managed by the Department of Ecology (DOE).

Mitigation and Conservation.

Washington water law allows applicants for water right permits to include mitigation plans as part of their proposals to offset any potential adverse effects of their proposed water use. When evaluating an application for a water right, transfer, or change that includes provision for any water impoundment or other resource management technique, the DOE must take into consideration the benefits and costs of any water impoundment or resource management technique that is included as a component of the application. The DOE's consideration extends

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.

to any increased water supply that results from the impoundment or resource management technique. An impoundment or resource management technique provided in an application must be made solely at the discretion of the applicant and must not otherwise be made by the DOE as a condition for approving an application that does not include such a provision.

Groundwater Permit-Exemption.

Generally, prospective water users must obtain authorization in the form of a water right permit or certificate from the DOE before withdrawing groundwater. The only exception to the permit requirement is for withdrawals of groundwater for:

- providing water for livestock (no gallon per day limit);
- watering a non-commercial lawn or garden one-half acre in size or less (no gallon per day limit, but limited to reasonable use);
- providing water for a single home or group of homes (limited to 5,000 gallons per day); and
- providing water for industrial purposes, including irrigation (limited to 5,000 gallons per day, but no acre limit).

On September 21, 2009, the Office of the Attorney General issued a formal opinion [AGO 2009 No. 6] regarding the interpretation of statutes exempting withdrawals of groundwater from permitting requirements. In addition to other conclusions, the formal opinion concluded that the DOE lacked the authority to impose lower or different limits on exempt withdrawals by partially withdrawing the waters of the applicable area from additional appropriations; however, the DOE does have the authority to withdraw waters from appropriation.

Review Process.

The Water Code establishes procedures for adjudicating all existing water rights. A general water right adjudication is a legal process conducted through Superior Court that determines the validity and extent of existing water rights in a given area. In *Rettkowski v. Department of Ecology* (commonly known as *Sinking Creek*), the State Supreme Court ruled that the DOE lacked the authority to determine the validity of a pre-code water right. Therefore, the DOE may not attempt to resolve disputes among conflicting water uses if one or more of them is based on an un-adjudicated vested claim on a water right.

Relinquishment.

Water rights may be relinquished when a person, for five or more consecutive years, abandons or voluntarily fails without sufficient cause to beneficially use water in accordance with their recorded right's terms. The water code provides a list of "sufficient causes" for voluntary nonuse that protect a water right from relinquishment. Examples of sufficient causes include: drought or unavailability of water, certain military service, and the operation of legal proceedings. The DOE may determine when a water right has reverted to the state for nonuse. A person may appeal the DOE's findings to the Pollution Control Hearings Board.

Water Right Changes or Transfers.

Generally, water rights or portions of water rights may be changed to other uses or places if the change can be made without detriment or injury to existing rights. A change or transfer must be made by application to the DOE. If it appears that a transfer or change may be made without injury or detriment to existing rights, the DOE is required to issue the applicant a certificate granting the right for transfer or change in the point of diversion or use.

Stream Flow Restoration.

An instream flow is, in essence, a water right for fish and other instream resources. Instream flows are set by rule through the DOE's rule-making authority. When stream flows are set in rule, the priority date is 30 days after the date of rule adoption. While an instream flow does not affect existing water rights, water rights issued after the rule adoption are junior to the instream flow, and can only be exercised when the instream flow is being met.

Watershed Management.

A watershed is an area draining into a river, lake, or other waterbody. The DOE and other state natural resources agencies have divided the state into 62 Water Resource Inventory Areas (WRIAs) to delineate the state's major watersheds.

The Watershed Planning Act provides a process to allow citizens in a watershed to join together to assess the status of the water resources in their watershed and determine how best to manage them. The plans must address water quantity by undertaking an assessment of water supply and use within the watershed.

Watershed planning and associated state grant funding is conducted in four phases:

1. Organizational Phase (up to \$50,000 per WRIA or up to \$75,000 for multi-WRIA planning units);
2. Assessment Phase (up to \$200,000 for each WRIA in the management area to fund watershed assessments after the organizational phase is complete);
3. Planning Phase (up to \$250,000 for each WRIA in the management area for watershed plan development, planning unit approval, and county board adoption); and
4. Implementation Phase (up to \$100,000 per WRIA for the first three years of implementation activity, and then up to \$50,000 per WRIA for fourth and fifth years of implementation. A 10 percent local match is required for all five years. For management areas including more than one WRIA, up to \$25,000 may be granted for the first three years and then up to \$12,500 may be granted for years four and five for each additional WRIA).

Supplemental funding is also available for up to \$100,000 for each of three optional assessment elements: instream flow, water quality, and multipurpose water storage. The DOE is required to use eligibility criteria set in statute when evaluating grant applications.

Water Resources Cost Recovery.

The Water Code contains a schedule of fees collected by the DOE for processing various applications for water rights, including application, examination, and extension fees. Eighty

percent of the fees collected by the DOE under the Water Code are deposited in the State General Fund. The remaining 20 percent of the fees collected by the DOE are deposited in the Water Rights Tracking System Account.

Summary of Bill:

Mitigation and Conservation.

Mitigation Plans. When evaluating an application for a water right, transfer, or change that includes provision for mitigation of impacts through new or existing storage or other infrastructure, operations, or institutional arrangements, the DOE must take into consideration the benefits and costs of a mitigation technique that is included as a component of the application.

The DOE may publish guidance on its web site to inform applicants of mitigation strategies and techniques that, where feasible, would ensure that the effects of the new diversion or withdrawal would not impair any senior water right or adopted instream flow, or negatively affect any closed water source. If the DOE has closed a water source or adopted an instream flow and has provided mitigation guidance on its web site, the DOE may reject an application for lack of completeness if it is not accompanied by a mitigation plan.

Groundwater Permit-Exemption. The DOE may lower the quantity and acreage limits in the groundwater permit-exemption by rule for specific watersheds or aquifers. The rules must be specific to a watershed or aquifer that the DOE 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.

Review Process.

Tentative Determinations. The DOE may tentatively determine the extent, validity, and priority of respective rights to the use of water for the 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 made by the DOE is binding among the water users whose rights are determined until such time as a partial or final decree is entered in a general adjudication. A water master may rely on the DOE's determination in dividing, regulating, and controlling the use of water. The DOE's determination may be appealed to the Pollution Control Hearings Board.

30-Year Review Period. In making a determination of the extent and validity of a water right, the DOE may only evaluate the exercise of the water right during the most recent 30-year period prior to the commencement of the DOE's determination at issue. For the purposes of appeal, the 30-year review by the DOE does not constitute an agency action. Aggrieved parties may appeal the primary action of the DOE that gave rise to the 30-year review. Water right determinations during a general adjudication are not limited to a 30-year review.

Relinquishment.

Voluntary Nonuse. References to "sufficient cause" for the voluntary nonuse of water are removed and replaced with "sufficient exception." Beneficial use is the basis, the measure, and the limit of all rights to the use of water in this state. A new exception is added to the list of exceptions for voluntary nonuse of water. A water right is not subject to relinquishment if the right is perfected and developed for an agricultural irrigation purpose and as long as:

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

Water Right Changes or Transfers. If it appears that a transfer or change may be made without injury or detriment to existing rights, the DOE is required to issue 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. Upon the applicant's showing that the change or transfer has been implemented, the DOE must issue a certificate granting the right for transfer or change in the point of diversion or use.

The DOE may establish a reasonable schedule for completion of necessary work to effect a change in the purpose, place, or manner of use or for the construction of works to effect an authorized change of point of diversion or withdrawal. Nonuse during the reasonable schedule is not subject to relinquishment. Failure to complete all or a portion of the change results in relinquishment of the right unless there is sufficient exception under the relinquishment statutes.

Stream Flow Restoration.

After consulting with potentially affected tribal governments, local governments, and stakeholders, the DOE may set nonbinding achievable stream flow restoration benchmarks and state the preferred means by which the DOE and other parties may seek to achieve these benchmarks. Benchmarks may be set by order or by rule.

Watershed Management.

Matching requirements for Phase Four watershed planning are modified. Grants may be extended to a total of nine years (instead of the current five) for Phase Four. The DOE must give priority consideration to grant proposals that directly support activities or implement projects that:

- integrate watershed plan implementation with the goals, objectives, or work plans of other local, regional, or statewide water resource, water quality, or fish recovery programs or plans;
- develop new, or improve existing assessment of water supply;
- develop or implement strategies and priorities to enhance, restore, or augment stream flows; and
- include in Phase Four, year six, a review of the adopted watershed plan and the detailed implementation plan.

Throughout Phase Four, planning units with a detailed implementation plan are eligible to apply for special grants from the state's operating or capital budgets. The eligibility and priority requirements used when evaluating grant applications during all phases are modified. For WRAs divided into two portions (i.e., WRAs 14a, 14b, 29a, 29b, 40a, and 40b), each portion of the WRA is eligible for the full amount of funding allotted to a whole WRA for planning units in Phase Four.

The annual report due to the Legislature from the DOE concerning watershed management planning is modified.

Water Resources Cost Recovery.

The DOE may adopt a new fee schedule by rule. The fees must be based on the DOE's actual cost to carry out the actions for which fees are charged under the Water Code. Fees collected by the DOE under the Water Code must be deposited in the Water Rights Processing Account.

In addition to the existing application, examination, and extension fees, the DOE must recover from applicants the full cost of processing all of the applications received after or awaiting the initiation of application processing as of the effective date of the bill. The DOE must calculate a processing fee for each application based primarily on the DOE's projected workload and cost to process the applications to a decision and the proportionate quantity of water requested by each applicant. The DOE may adjust the fee if it appears that an application will require a disproportionately greater amount of time and effort to process due to its complexity.

The processing fee must be collected by the DOE prior to processing the application. Prior to collecting the processing fee, the DOE is required to provide an initial assessment that estimates the cost and scope of issues likely involved in processing the application. The DOE's initial assessment does not constitute an appealable action or final decision by the DOE. An applicant may choose to withdraw their application from further consideration based on the initial assessment and no further costs will accrue to the applicant.

An applicant for municipal supply or community domestic supply may request that processing of an application be deferred. A request to defer must be accompanied by a statement of the reason that deferral is necessary, including the projected timing for development of the water under the application. A deferred application retains its priority date if an annual fee is paid that is equal to 10 percent of the estimated cost to process the application.

If the DOE does not have sufficient technical staff or expertise, it may elect to use a contractor from its cost-reimbursement consultant list. The cost of the consultant must be included in the processing fees. The DOE must also fully recover its costs related to providing water users mitigation credits issued as a result of water banking.

Reporting. By September 1, 2011, the DOE must explore ways to make the state's Water Resources Program self-sufficient and submit a report to the Office of Financial Management and the Legislature. The DOE must submit a report to the Governor and the Legislature on the status of water rights processing by November 30, 2012 and every even-numbered year

thereafter through 2020. The goal of the DOE is to process all pending applications by July 30, 2017.

Other.

The Water Rights Tracking System Account, which may be used by the DOE for the development, implementation, and management of a water rights tracking system, is repealed.

Nothing in the bill may be interpreted or administered in a manner that impairs or diminishes a valid water right, including rights established under state and federal law.

The bill contains an intent section and a severability clause.

Appropriation: None.

Fiscal Note: Requested on 1/26/11.

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