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**SUBSTITUTE SENATE BILL 6152**

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**State of Washington**

**62nd Legislature**

**2012 Regular Session**

**By** Senate Agriculture, Water & Rural Economic Development (originally sponsored by Senators Hatfield and Honeyford)

READ FIRST TIME 02/03/12.

1       AN ACT Relating to streamlining water right permitting and appeals;  
2 amending RCW 90.03.320, 90.80.070, 90.80.080, 90.80.090, and  
3 43.21B.305; adding a new section to chapter 90.80 RCW; creating a new  
4 section; and providing an expiration date.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6       NEW SECTION.   **Sec. 1.** The legislature finds that the ongoing  
7 economic recession has prevented water right holders from completing  
8 projects with existing water right permits, and that existing law  
9 allows such permits to be extended without increasing or decreasing the  
10 quantity of water authorized. The legislature also finds that the  
11 ongoing economic recession has impacted state agency budgets, including  
12 the department of ecology's water resource program and environmental  
13 and land use hearings office.

14       Therefore, it is the intent of the legislature to enact temporary  
15 water rights permitting reforms to enable the department of ecology's  
16 water permitting staff to focus on substantive permitting matters that  
17 do not duplicate other permit review procedures.

1       **Sec. 2.** RCW 90.03.320 and 1999 c 400 s 1 are each amended to read  
2 as follows:

3       (1) Actual construction work shall be commenced on any project for  
4 which permit has been granted within such reasonable time as shall be  
5 prescribed by the department, and shall thereafter be prosecuted with  
6 diligence and completed within the time prescribed by the department.  
7 The department, in fixing the time for the commencement of the work, or  
8 for the completion thereof and the application of the water to the  
9 beneficial use prescribed in the permit, shall take into consideration  
10 the cost and magnitude of the project and the engineering and physical  
11 features to be encountered, and shall allow such time as shall be  
12 reasonable and just under the conditions then existing, having due  
13 regard for the public welfare and public interests affected. For good  
14 cause shown, the department shall extend the time or times fixed as  
15 aforesaid, and shall grant such further period or periods as may be  
16 reasonably necessary, having due regard to the good faith of the  
17 applicant and the public interests affected. Good cause includes  
18 prevention or restriction of water use by operation of federal laws for  
19 the time or times fixed for commencing work, completing work, and  
20 applying water to beneficial use otherwise authorized under a water  
21 right permit issued for a federal reclamation project. In fixing  
22 construction schedules and the time, or extension of time, for  
23 application of water to beneficial use for municipal water supply  
24 purposes, the department shall also take into consideration the term  
25 and amount of financing required to complete the project, delays that  
26 may result from planned and existing conservation and water use  
27 efficiency measures implemented by the public water system, and the  
28 supply needs of the public water system's service area, consistent with  
29 an approved comprehensive plan under chapter 36.70A RCW, or in the  
30 absence of such a plan, a county-approved comprehensive plan under  
31 chapter 36.70 RCW or a plan approved under chapter 35.63 RCW, and  
32 related water demand projections prepared by public water systems in  
33 accordance with state law. An existing comprehensive plan under  
34 chapter 36.70A or 36.70 RCW, plan under chapter 35.63 RCW, or demand  
35 projection may be used. If the terms of the permit or extension  
36 thereof, are not complied with the department shall give notice by  
37 registered mail that such permit will be canceled unless the holders

1 thereof shall show cause within sixty days why the same should not be  
2 so canceled. If cause is not shown, the permit shall be canceled.

3 (2) Notwithstanding the provisions of subsections (1) and (3) of  
4 this section, for any water right permit, previously approved permit  
5 extension, or water right change or transfer with a development  
6 schedule requiring construction or application of water to beneficial  
7 use between the effective date of this section and December 31, 2016,  
8 the times for construction and the application of water to beneficial  
9 use are both extended for five years. The extension must be issued by  
10 the department after payment of the fee required by RCW 90.03.470. In  
11 connection with the ministerial permit extension authorized in this  
12 subsection, the department shall not increase or decrease the quantity  
13 of water authorized under the permit or modify any other terms or  
14 conditions of the permit. As an alternative to the ministerial permit  
15 extension authorized in this subsection, a water right permit holder  
16 may apply for a permit extension under subsection (1) of this section.

17 (3) The provisions of this section do not apply to the Quincy  
18 groundwater subarea as defined in WAC 173-134A-040(8) as it existed on  
19 the effective date of this section.

20 **Sec. 3.** RCW 90.80.070 and 2004 c 10 s 4 are each amended to read  
21 as follows:

22 (1) A person proposing a transfer of a water right may elect to  
23 file an application with a water conservancy board, if a board has been  
24 established for the geographic area where the water is or would be  
25 diverted, withdrawn, or used. If the person has already filed an  
26 application with the department, the person may request that the  
27 department convey the application to the conservancy board with  
28 jurisdiction and the department must promptly forward the application.  
29 A board is not required to process an application filed with the board.  
30 If a board decides that it will not process an application, it must  
31 return the application to the applicant and must inform the applicant  
32 that the application may be filed with the department. An application  
33 to the board for a transfer shall be made on a form provided by the  
34 department. A board may require an applicant to submit within a  
35 reasonable time additional information as may be required by the board  
36 in order to review and act upon the application. At a minimum, the  
37 application shall include information sufficient to establish to the

1 board's satisfaction that a right to the quantity of water being  
2 transferred exists, and a description of any applicable limitations on  
3 the right to use water, including the point of diversion or withdrawal,  
4 place of use, source of supply, purpose of use, quantity of use  
5 permitted, time of use, period of use, and the place of storage.

6 (2) The applicant for any proposed water right transfer may apply  
7 to a board for a record of decision on a transfer if the water proposed  
8 to be transferred is currently diverted, withdrawn, or used within the  
9 geographic area in which the board has jurisdiction, or would be  
10 diverted, withdrawn, or used within the geographic area in which the  
11 board has jurisdiction if the transfer is approved. In the case of a  
12 proposed water right transfer in which the water is currently diverted  
13 or withdrawn or would be diverted or withdrawn outside the geographic  
14 boundaries of the county or the water resource inventory area where the  
15 use is proposed to be made, the board shall hold a public hearing in  
16 the county of the diversion or withdrawal or proposed diversion or  
17 withdrawal. The board shall provide for prominent publication of  
18 notice of the hearing in a newspaper of general circulation published  
19 in the county in which the hearing is to be held for the purpose of  
20 affording an opportunity for interested persons to comment upon the  
21 application. If an application is for a transfer of water out of the  
22 water resource inventory area that is the source of the water, the  
23 board shall consult with the department regarding the application.

24 (3) After an application for a transfer is filed with the board,  
25 the board shall publish notice of the application and send notice to  
26 state agencies in accordance with the requirements of RCW 90.03.280.  
27 In addition, the board shall send notice of the application to any  
28 Indian tribe with reservation lands that would be, but for RCW  
29 90.80.055(2), within the area in which the board has jurisdiction. The  
30 board shall also provide notice of the application to any Indian tribe  
31 that has requested that it be notified of applications. Any person may  
32 submit comments and other information to the board regarding the  
33 application. The comments and information may be submitted in writing  
34 or verbally at any public meeting of the board to discuss or decide on  
35 the application. The comments must be considered by the board in  
36 making its record of decision.

37 (4) If a majority of the board determines that the application is  
38 complete, and that the transfer is in accordance with RCW 90.03.380,

1 90.03.390, or 90.44.100, the board must issue a record of decision  
2 approving the transfer, subject to review by the director unless the  
3 board elects to issue the decision as a final decision under section 5  
4 of this act. In making its record of decision, the board must consider  
5 among other things whether the proposed transfer can be made without  
6 detriment or injury to existing water rights, including rights  
7 established for instream flows. The board must include in its record  
8 of decision any conditions that are deemed necessary for the transfer  
9 to qualify for approval under the applicable laws of the state. The  
10 basis for the record of decision of the board must be documented in a  
11 report of examination. The board's proposed approval must clearly  
12 state that the applicant is not permitted to proceed to effect the  
13 proposed transfer until a final decision is made by the director unless  
14 the board elects to issue the decision as a final decision under  
15 section 5 of this act. (~~In making its record of decision, the board~~  
16 ~~must consider among other things whether the proposed transfer can be~~  
17 ~~made without detriment or injury to existing water rights, including~~  
18 ~~rights established for instream flows.))~~

19 (5) If a majority of the board determines that the application  
20 cannot be approved under the applicable laws of the state of  
21 Washington, the board must make a record of decision denying the  
22 application together with its report of examination documenting its  
23 record of decision. The board's record of decision is subject to  
24 review by the director under RCW 90.80.080 unless the board elects to  
25 issue the decision as a final decision under section 5 of this act.

26 (6) When alternates appointed under the provisions of RCW  
27 90.80.050(3) are serving as commissioners on a board, a majority vote  
28 of the board must include at least one commissioner appointed under the  
29 provisions of RCW 90.80.050(1).

30 (7) An alternate when serving as a commissioner in the review of an  
31 application before the board shall:

32 (a) Review the written record before the board and any exhibits  
33 provided for the review or provided at the hearing if a hearing was  
34 held;

35 (b) Review any audio or video recordings made of the proceedings on  
36 the application; and

37 (c) Conduct a site visit if a site visit by other commissioners  
38 acting on the application has been previously conducted.

1 (8) An alternate serving as a commissioner shall be guided by the  
2 conflict of interest standards applicable to all commissioners under  
3 RCW 90.80.120. The board shall provide notice of an alternate sitting  
4 as a commissioner to the applicant and other participants in  
5 proceedings before the board in a timely manner to provide sufficient  
6 time for any challenges for conflict of interest to be made prior to  
7 the board's decision on the application.

8 **Sec. 4.** RCW 90.80.080 and 2001 c 237 s 12 are each amended to read  
9 as follows:

10 (1) The board must provide a copy of its record of decision to the  
11 applicant and to the department. The board shall submit its record of  
12 decision on the transfer application to the department for review. The  
13 board shall also submit its report of examination to the department  
14 summarizing factual findings on which the board relied in reaching its  
15 record of decision and a copy of the files and records upon which the  
16 board's record of decision is based. The board shall also promptly  
17 transmit notice by mail to any person who objected to the transfer or  
18 who requested notice of the board's record of decision.

19 (2) Upon receipt of a board's record of decision, the department  
20 shall promptly post the text of the record of decision transmittal form  
21 on the department's internet site. The director shall review each  
22 record of decision made by a board for compliance with applicable state  
23 water law.

24 (3) Any party to a transfer, third party who alleges his or her  
25 water right will be impaired by the proposed transfer, or other person  
26 may file a letter of concern or support with the department and the  
27 department may consider the concern or support expressed in the letter.  
28 Such letters must be received by the department within thirty days of  
29 the department's receipt of the board's record of decision.

30 (4) The director shall review the record of decision of the board  
31 and shall affirm, reverse, or modify the action of the board within  
32 forty-five days of receipt. The forty-five day time period may be  
33 extended for an additional thirty days by the director or at the  
34 request of the board or applicant. If the director fails to act within  
35 the prescribed time period, the board's record of decision becomes the  
36 decision of the department and is appealable as provided by RCW  
37 90.80.090. If the director acts within the prescribed time period, the

1 director's decision to affirm, modify, or reverse is appealable as  
2 provided by RCW 90.80.090, and the director's decision to remand is  
3 appealable as provided by RCW 90.80.120(2)(b).

4 (5) This section applies unless the board elects to issue the  
5 decision as a final decision under section 5 of this act.

6 NEW SECTION. **Sec. 5.** A new section is added to chapter 90.80 RCW  
7 to read as follows:

8 (1) Notwithstanding the provisions in this chapter calling for  
9 review of the board's record of decision by the director, the board  
10 may, in its sole discretion and upon request by the applicant, elect to  
11 issue a final decision if the applicant and the board agree in advance  
12 of the board's election that the party defending the board's decision  
13 in case of appeal will be either:

- 14 (a) The board;
- 15 (b) The applicant; or
- 16 (c) The board and applicant jointly.

17 (2)(a) In the event of the board's election to issue a final  
18 decision under subsection (1) of the section, the board must provide a  
19 copy of its record of decision to the applicant and to the department.  
20 The board shall also promptly transmit notice by mail to any person who  
21 objected to the transfer or who requested notice of the board's record  
22 of decision.

23 (b) Upon receipt of a board's record of decision under this  
24 subsection (2), the department shall promptly post the record of  
25 decision on the department's internet site.

26 (c) The board's decision is appealable in the same manner as other  
27 water right decisions made pursuant to chapters 90.03 and 90.44 RCW.  
28 The director has the same right of appeal as any other aggrieved  
29 person. If a board decision is appealed to the pollution control  
30 hearings board, the board may, but is not required to, participate in  
31 the appeal.

32 **Sec. 6.** RCW 90.80.090 and 2001 c 237 s 13 are each amended to read  
33 as follows:

34 The decision of the director to approve or deny an action to create  
35 a board(~~(, or to approve, deny, or modify a water right transfer either~~

1 ~~by action or inaction~~) is appealable in the same manner as other water  
2 right decisions made pursuant to chapters 90.03 and 90.44 RCW.

3 **Sec. 7.** RCW 43.21B.305 and 2005 c 34 s 2 are each amended to read  
4 as follows:

5 In an appeal that involves a penalty of fifteen thousand dollars or  
6 less, the appeal may be heard by one member of the board or by an  
7 administrative law judge employed by the board, whose decision shall be  
8 the final decision of the board. The board shall define by rule  
9 alternative procedures to expedite appeals involving penalties of  
10 fifteen thousand dollars or less. These alternatives may include:  
11 Mediation, upon agreement of all parties; submission of testimony by  
12 affidavit; or other forms that may lead to less formal and faster  
13 resolution of appeals.

14 NEW SECTION. **Sec. 8.** Sections 3 through 6 of this act expire  
15 December 31, 2016.

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