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SECOND SUBSTITUTE SENATE BILL 6803

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State of Washington                      61st Legislature                      2010 Regular Session

By Senate Ways & Means (originally sponsored by Senator Rockefeller)

READ FIRST TIME 02/09/10.

1            AN ACT Relating to clarifying withdrawal of groundwater for stock  
2 watering purposes by a dairy farm; amending RCW 90.44.035 and  
3 90.44.050; adding new sections to chapter 90.44 RCW; and creating new  
4 sections.

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

6            NEW SECTION.    **Sec. 1.** The legislature finds that effective water  
7 resource management and a stable dairy industry are vital to the  
8 economic and environmental well-being of the state. The dairy industry  
9 is an important part of our state's economy and an important part of  
10 many communities in our state, and this industry should be treated  
11 fairly as with all other sectors of the economy seeking an assured  
12 water supply for its activities. The legislature further finds that  
13 achievement of these goals is hindered by uncertainty surrounding the  
14 exemption from water right permit requirements for withdrawals of  
15 public groundwater for "stock watering purposes." Attorney general  
16 opinion No. 17 from 2005 and the decision from the pollution control  
17 hearings board in *Dennis & DeVries v. Washington* (PCHB No. 01-073  
18 (2001)) are not in harmony. Therefore, in order to promote the clarity

1 needed for both a sustainable livestock industry and effective water  
2 resource management, the legislature intends to provide dairy farms  
3 with some certainty under the permit exemption.

4 **Sec. 2.** RCW 90.44.035 and 2000 c 98 s 2 are each amended to read  
5 as follows:

6 ~~((For purposes of this chapter:))~~ The definitions in this section  
7 apply throughout this chapter unless the context clearly requires  
8 otherwise.

9 (1) "Artificially stored groundwater" means water that is made  
10 available in underground storage artificially, either intentionally, or  
11 incidentally to irrigation and that otherwise would have been  
12 dissipated by natural processes.

13 (2) "Dairy farm" means any farm that is licensed to produce milk  
14 under chapter 15.36 RCW.

15 (3) "Department" means the department of ecology((+)).

16 ((+2)) (4) "Director" means the director of ecology((+)).

17 ((+3)) (5) "Groundwaters" means all waters that exist beneath the  
18 land surface or beneath the bed of any stream, lake or reservoir, or  
19 other body of surface water within the boundaries of this state,  
20 whatever may be the geological formation or structure in which such  
21 water stands or flows, percolates or otherwise moves. There is a  
22 recognized distinction between natural groundwater and artificially  
23 stored groundwater((+)).

24 ((+4)) (6) "Natural groundwater" means water that exists in  
25 underground storage owing wholly to natural processes((+)).

26 ~~((+5) "Artificially stored groundwater" means water that is made~~  
27 ~~available in underground storage artificially, either intentionally, or~~  
28 ~~incidentally to irrigation and that otherwise would have been~~  
29 ~~dissipated by natural processes; and~~

30 (+6)) (7) "Underground artificial storage and recovery project"  
31 means any project in which it is intended to artificially store water  
32 in the ground through injection, surface spreading and infiltration, or  
33 other department-approved method, and to make subsequent use of the  
34 stored water. However, (a) this subsection does not apply to  
35 irrigation return flow, or to operational and seepage losses that occur  
36 during the irrigation of land, or to water that is artificially stored  
37 due to the construction, operation, or maintenance of an irrigation

1 district project, or to projects involving water reclaimed in  
2 accordance with chapter 90.46 RCW; and (b) RCW 90.44.130 applies to  
3 those instances of claimed artificial recharge occurring due to the  
4 construction, operation, or maintenance of an irrigation district  
5 project or operational and seepage losses that occur during the  
6 irrigation of land, as well as other forms of claimed artificial  
7 recharge already existing at the time a groundwater subarea is  
8 established.

9 **Sec. 3.** RCW 90.44.050 and 2003 c 307 s 1 are each amended to read  
10 as follows:

11 After June 6, 1945, no withdrawal of public groundwaters of the  
12 state shall be begun, nor shall any well or other works for such  
13 withdrawal be constructed, unless an application to appropriate such  
14 waters has been made to the department and a permit has been granted by  
15 it as herein provided: EXCEPT, HOWEVER, That any withdrawal of public  
16 groundwaters for stock watering purposes except as provided in section  
17 4 of this act, or for the watering of a lawn or of a noncommercial  
18 garden not exceeding one-half acre in area, or for single or group  
19 domestic uses in an amount not exceeding five thousand gallons a day,  
20 or as provided in RCW 90.44.052, or for an industrial purpose in an  
21 amount not exceeding five thousand gallons a day, is and shall be  
22 exempt from the provisions of this section, but, to the extent that it  
23 is regularly used beneficially, shall be entitled to a right equal to  
24 that established by a permit issued under the provisions of this  
25 chapter: PROVIDED, HOWEVER, That the department from time to time may  
26 require the person or agency making any such small withdrawal to  
27 furnish information as to the means for and the quantity of that  
28 withdrawal: PROVIDED, FURTHER, That at the option of the party making  
29 withdrawals of groundwaters of the state not exceeding five thousand  
30 gallons per day, applications under this section or declarations under  
31 RCW 90.44.090 may be filed and permits and certificates obtained in the  
32 same manner and under the same requirements as is in this chapter  
33 provided in the case of withdrawals in excess of five thousand gallons  
34 a day.

35 NEW SECTION. **Sec. 4.** A new section is added to chapter 90.44 RCW  
36 to read as follows:

1 (1) Any existing withdrawal of water put to beneficial use for  
2 stock watering purposes under RCW 90.44.050 by a dairy farm before the  
3 effective date of this section that does not exceed 13.8 acre feet per  
4 year is and remains exempt from the water right permit requirements of  
5 this chapter.

6 (2) Any existing withdrawal of water put to beneficial use for  
7 stock watering purposes under RCW 90.44.050 by a dairy farm before the  
8 effective date of this section that does exceed 13.8 acre feet per year  
9 is and remains exempt from the water right permit requirements of this  
10 chapter if:

11 (a) By December 31, 2010, the dairy farm making the withdrawal  
12 files a registration with the department to document the quantity and  
13 priority of the withdrawal as provided in section 5 of this act;

14 (b) Water withdrawn under such a registration does not thereafter  
15 exceed the annual quantity withdrawal limits contained in such a  
16 registration; and

17 (c) By December 31, 2012, for existing dairy farms that, on or  
18 before the effective date of this section, are withdrawing water from  
19 a groundwater body that has been closed to further withdrawal by rule,  
20 that is in hydraulic continuity with surface waters that are closed to  
21 further appropriation by rule or have an established instream flow that  
22 is not regularly met, or that is in hydraulic continuity with surface  
23 waters with depressed or critical salmonid stock status as determined  
24 by the Washington department of fish and wildlife under RCW 90.03.360,  
25 the dairy farm begins to meter its withdrawals, retains records of the  
26 amounts withdrawn, and makes the records available to the department  
27 upon request.

28 (3)(a) A dairy farm that existed on or before the effective date of  
29 this section shall obtain a water right permit, certificate, or claim,  
30 a department-approved transfer of an existing water right, or a  
31 department-approved change or consolidation amendment as provided under  
32 sections 6 and 7 of this act for any amount of water use exceeding the  
33 registered annual quantity withdrawal limit contained in the  
34 registration required in section 5 of this act.

35 (b) A dairy farm that existed on or before the effective date of  
36 this section and had a withdrawal for stock watering purposes of less  
37 than 13.8 acre feet per year prior to the effective date of this  
38 section or a new dairy farm that begins operating after the effective

1 date of this section shall obtain a water right permit, certificate, or  
2 claim, a department-approved transfer of an existing water right, or a  
3 department-approved change or consolidation amendment as provided under  
4 sections 6 and 7 of this act for any amount of water use exceeding 13.8  
5 acre feet per year.

6 (4) Any new withdrawal of water put to beneficial use for stock  
7 watering purposes by a new dairy farm commenced after the effective  
8 date of this section is and remains exempt from the water right permit  
9 requirements of this chapter if the total withdrawal for stock watering  
10 purposes by the dairy farm does not exceed 13.8 acre feet per year, and  
11 annual withdrawal quantities are metered and recorded and metering  
12 records are retained and made available to the department upon request.

13 (5) Nothing in this act authorizes the impairment of, or operates  
14 to impair, any existing water right. Nothing in this act precludes an  
15 action, on the basis of priority date, in favor of senior water rights,  
16 whether such an action is brought by the holder of an existing water  
17 right or by the department which is authorized to use the authorities  
18 of RCW 90.03.605 to pursue such an action.

19 NEW SECTION. **Sec. 5.** A new section is added to chapter 90.44 RCW  
20 to read as follows:

21 (1)(a) A registration for a dairy farm that existed prior to the  
22 effective date of this section that uses over 13.8 acre feet per year  
23 for stock watering purposes must be on a form or electronic template  
24 provided by the department and must include:

25 (i) The name and address of either the water user or the dairy  
26 farm, or both;

27 (ii) The name and address of the owner of the land on which the  
28 well, wells, or other means used for the withdrawal are located;

29 (iii) The legal description of the location of the point of  
30 withdrawal and the place of use;

31 (iv) The depth, and any other pertinent specifications, of the  
32 well, wells, or other means used for the withdrawal that may reasonably  
33 be required by the department to determine the body of public  
34 groundwater being withdrawn from;

35 (v) The date or approximate date, to the best of the registrant's  
36 knowledge, of the first beneficial use of groundwater withdrawn;

1 (vi) A description of the stock watering purposes associated with  
2 such a withdrawal and use; and

3 (vii) A declaration of the highest annual quantity, estimated to  
4 the nearest acre foot, of water withdrawn and beneficially used by the  
5 dairy farm for stock watering purposes during the period of January 1,  
6 2005, through December 31, 2009.

7 (b) A registration under this section pertains to the quantity of  
8 permit-exempt groundwater withdrawn and not to quantities of water use  
9 authorized by an existing water right permit, certificate, or claim.  
10 However, where a dairy farm depends upon a mixture of permit-exempt  
11 withdrawals and other water rights authorized by a permit, certificate,  
12 or claim, the identifying number of the water rights and claims and a  
13 brief description of how they contribute to the daily water needs of  
14 the dairy farm must also be included in the registration.

15 (c) The department may return registrations for modification as  
16 needed, to correct ministerial errors, and to ensure that the  
17 information, including but not limited to the annual quantity withdrawn  
18 and the priority date, provided in the registration is accurate and  
19 consistent.

20 (d) A registration may be amended if the dairy farm increases the  
21 highest annual quantity, estimated to the nearest acre foot, of water  
22 withdrawn and beneficially used by the dairy farm for stock watering  
23 purposes from December 31, 2010, through December 31, 2015. The  
24 amendment must be submitted on a form or electronic template provided  
25 by the department.

26 (e) Causing a registration or an amendment to be filed with the  
27 department constitutes the affirmation or acknowledgment under penalty  
28 of perjury under the laws of the state of Washington that the  
29 registration is true and complete to the best of the registrant's  
30 knowledge.

31 (2) A dairy farm that, prior to the effective date of this section,  
32 has relied upon permit-exempt withdrawals that exceeded 13.8 acre feet  
33 per year for stock watering purposes, that fails to register by the  
34 December 31, 2010, deadline has a priority date as of the date of  
35 filing, except that a dairy farm retains their priority date if the  
36 dairy farm applies to the department by December 31, 2010, for an  
37 extension of time not to exceed December 31, 2012, that may be granted  
38 only upon a showing of good cause.

1 (3) A dairy farm that, prior to the effective date of this section,  
2 has relied upon permit-exempt withdrawals of 13.8 or fewer acre feet  
3 per year is not required to register under this section. However, a  
4 dairy farm may voluntarily register with the department at any time,  
5 consistent with the provisions of this chapter.

6 NEW SECTION. **Sec. 6.** A new section is added to chapter 90.44 RCW  
7 to read as follows:

8 A dairy farm that has registered under section 5 of this act may  
9 submit a request in writing to the department that the department  
10 undertake a review of the extent and validity of the water used for  
11 stock watering purposes described in the registration submitted under  
12 section 5 of this act. After such a review, dairy farms registered  
13 under section 5 of this act may be approved by the department for  
14 transfer and change or amendment to another place or purpose of use,  
15 consistent with the requirements of RCW 90.44.100. The department may  
16 also approve an expedited transfer and change or amendment to  
17 accommodate the expansion or consolidation of registered dairy farms  
18 consistent with section 7 of this act and RCW 90.44.100. For purposes  
19 of RCW 90.44.100, the department shall treat such registered permit-  
20 exempt withdrawals for stock watering purposes as an appropriate permit  
21 when considering an application for transfer and change or amendment.

22 NEW SECTION. **Sec. 7.** A new section is added to chapter 90.44 RCW  
23 to read as follows:

24 (1) A dairy farm that has registered under section 5 of this act  
25 may submit a request in writing to the department that the department  
26 undertake a review of the extent and validity of the water used for  
27 stock watering purposes described in the registration submitted under  
28 section 5 of this act. After such a review, the department shall  
29 expedite change and consolidation amendments under this section.

30 (2) Upon the issuance by the department of an amendment to the  
31 appropriate permit-exempt groundwater right registrations, claims,  
32 permits, or certificates of dairy farms registered under this chapter,  
33 the holder of such a valid water right to withdraw public groundwaters  
34 may use the expedited procedures provided under this section to change  
35 or consolidate water rights with consenting owners of other dairy farms  
36 registered under this chapter or water rights used for agricultural

1 purposes. Such an amendment does not affect the priority of any water  
2 rights involved in the change or consolidation, and may be issued only  
3 after a determination has been made by the department that all  
4 applicable criteria established under subsections (3) through (7) of  
5 this section have been satisfied.

6 (3) Any registered dairy farm that conserves water and reduces the  
7 water withdrawal quantities required by the farm may:

8 (a) Increase either the dairy farm's numbers or types, or both, of  
9 livestock without notice to the department as long as withdrawal  
10 quantities authorized under registration with the department are not  
11 exceeded; or

12 (b) Elect to protect the excess and unused portion of registered  
13 withdrawal quantities from relinquishment by submitting the excess and  
14 unused portion of the registered withdrawal quantities into the trust  
15 water rights program under RCW 90.42.080.

16 (4) The department may approve the consolidation of two or more  
17 registered stock water rights of dairy farms or a dairy farm and a  
18 water right used for agricultural purposes to accommodate the expansion  
19 or consolidation of dairy farms. A registered dairy farm may increase  
20 water withdrawal associated with a consolidation of livestock to be  
21 received from another registered dairy farm if the department first  
22 approves the consolidation application in accordance with RCW  
23 90.44.105. Prior to such a consolidation approval, the department  
24 shall amend the registrations of the sending and receiving dairy farms  
25 to appropriately reflect the corresponding reduction and increase of  
26 water withdrawal quantities available.

27 (5) Applications for a change or consolidation amendment under this  
28 section must:

29 (a) Use a change of water right application form provided by the  
30 department;

31 (b) Provide registration or water right identification numbers for  
32 the registered dairy farms proposing to receive conserved water under  
33 subsection (2) of this section or proposing to receive livestock and  
34 their associated water requirements under subsection (3) of this  
35 section;

36 (c) Provide registration or water right identification numbers for  
37 the registered dairy farm or the water right used for agricultural



1 purposes, if applicable, proposing to send water under subsection (2)  
2 of this section or proposing to send livestock and their associated  
3 water requirements under subsection (3) of this section;

4 (d) Provide the date or approximate date of the change or  
5 consolidation, or the date of deposit in the trust water rights program  
6 under chapter 90.38 or 90.42 RCW or a water bank established under RCW  
7 90.38.040, 90.42.100, or 90.92.070; and

8 (e) Provide the proposed increase and corresponding decrease in the  
9 amount of water to be withdrawn and beneficially used by each dairy  
10 farm, in gallons per day, following the change of conserved water or  
11 the consolidation and movement of animals, based on a prorated  
12 operational share of water associated with animals moved.

13 (6) Prior to the department making a determination on an  
14 application for a change or consolidation amendment under this section,  
15 the applicant seeking the consolidation must publish notice of the  
16 application in a newspaper of general circulation in the county or  
17 counties in which the proposed withdrawal or withdrawals for the water  
18 right or rights to be changed or consolidated are located once a week  
19 for two consecutive weeks. Preparation of the notice must be  
20 consistent with the provisions of RCW 90.03.280. The applicant shall  
21 provide evidence of the publication of notice to the department. There  
22 is a thirty-day comment period beginning on the date the second notice  
23 is published.

24 (7) The department may only approve expedited change and  
25 consolidation amendments under this section after:

26 (a) Conducting a tentative determination, based on the water  
27 right's full history, of the extent and validity of any water right  
28 registration, permit, certificate, or claim associated with a change or  
29 consolidation amendment under this section;

30 (b) Determining that:

31 (i) The sending dairy farm or water right for agricultural purposes  
32 and receiving dairy farm utilize withdrawals that tap the same body of  
33 public groundwater unless the department determines that withdrawing  
34 the water from a different body of public groundwater would improve the  
35 overall sustainability of groundwater resources;

36 (ii) Any increase in water legally withdrawn by the receiving dairy  
37 farm will be matched by an equal or greater reduction in water legally

1 withdrawn by the sending dairy farm or water right for agricultural  
2 purposes;

3 (iii) Other existing water rights, including groundwater and  
4 surface water rights and minimum stream flows adopted by rule, will not  
5 be impaired as a result of the change or consolidation amendment; and

6 (iv) The proposed change or consolidation amendment will not be  
7 detrimental to the public welfare; and

8 (c) Requiring that, if the withdrawals do tap different bodies of  
9 public groundwater, the priority date be subordinated to existing  
10 rights in order to protect existing water right holders from  
11 impairment.

12 NEW SECTION. **Sec. 8.** The department of ecology shall convene a  
13 dairy stock water advisory group that includes: Members representing  
14 the dairy industry; members representing environmental interests; the  
15 director of the department of ecology or the director's designee; and  
16 the director of the department of agriculture or the director's  
17 designee. Affected federally recognized tribes shall be invited to  
18 send participants. The group shall review issues surrounding the use  
19 of permit-exempt wells for stock watering purposes by dairy farms under  
20 this act and may develop recommendations for legislative action. The  
21 group shall meet periodically and report its activities and  
22 recommendations to the governor and the appropriate legislative  
23 committees by December 1, 2013.

24 NEW SECTION. **Sec. 9.** If any provision of this act or its  
25 application to any person or circumstance is held invalid, the  
26 remainder of the act or the application of the provision to other  
27 persons or circumstances is not affected.

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