Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

Economic Development, Agriculture & Trade Committee

SSB 5602

Brief Description: Managing livestock nutrients.

Sponsors: Senate Committee on Agriculture & Rural Economic Development (originally sponsored by Senators Rasmussen and Schoesler; by request of Department of Agriculture).

Brief Summary of Substitute Bill

- Establishes authority for full administration of the dairy nutrient management program by the Department of Agriculture (WSDA).
- Establishes the components of and full authority to manage a livestock nutrient management program within the WSDA.
- Authorizes the WSDA to become the state authority for National Pollutant Discharge Elimination System permits for concentrated animal feeding operations upon delegation of authority by the United States Environmental Protection Agency and relinquishment by the Department of Ecology.
- Specifies requirements and responsibilities for various approvals and certifications, permits, inspections, compliance, enforcement actions, technical and financial assistance.
- Makes a number of technical changes to relevant statutes.

Hearing Date: 3/30/05

Staff: Meg Van Schoorl (786-7105).

Background:

In 1998, the Legislature enacted the Dairy Nutrient Management Act requiring dairies to develop by July 1, 2002, farm plans to protect water quality. The Department of Ecology (DOE) was given responsibility to regularly inspect dairies, and to develop and issue a Dairy General National Pollutant Discharge Elimination System (NPDES) permit. The Conservation Commission through conservation districts was charged with providing technical assistance and

cost share to dairy farms to develop and implement their nutrient management plans by December 31, 2003.

In February 2003, the United States Environmental Protection Agency (EPA) adopted a final rule regulating animal feeding operations (AFOs) and concentrated animal feeding operations (CAFOs) for the purpose of controlling water pollution. The rules expanded the type and number of CAFOs required to obtain NPDES permits by December 2006.

In 2003, the Legislature transferred to the Department of Agriculture (WSDA) the Dairy Nutrient Management Program that had been administered since 1998 by the DOE. The Legislature intended that there be a fully functioning state program for concentrated animal feeding operations by 2006 and a single program that would apply to all livestock sectors. Broadened beyond dairies, the Livestock Nutrient Management Program (LNMP) was to provide regulatory oversight and guidance to all livestock farms regarding their state and federal responsibilities to protect water quality while maintaining a healthy business climate for the farms. The program was expected to develop resources for financial and technical assistance, conduct periodic inspections and take enforcement action to ensure compliance with state and federal water quality laws.

The LNMP Development and Oversight Committee (DOC) was created to help the WSDA evaluate the new federal rules and develop a program that would meet EPA's requirements and time frames. Chaired by the WSDA, the DOC included representatives from the DOE, the EPA, a tribal government, an environmental interest organization, a commercial shellfish grower, an egg laying facility, a conservation district association, three dairy producers, two beef cattle producers, a poultry producer, a commercial cattle feed lot, and Washington State University.

Since 2003, the WSDA, the DOE, and the DOC have worked to develop the comprehensive LNMP and the draft legislation to implement it. The WSDA and DOE developed a Memorandum of Understanding (MOU) to clarify their respective and shared responsibilities during this transition period for site inspections, nutrient management plans, dairy and CAFO permit enforcement, and permit administration. Because the DOE has the delegated authority from the EPA to carry out the Clean Water Act in Washington, including the NPDES program for CAFOs, the DOE has retained responsibility for issuing water quality permits and coordinates with the WSDA in taking action on water quality issues for AFOs and CAFOs. Until the delegated authority is granted to the WSDA, the DOE will continue in that role. Other organizations such as the Natural Resources Conservation Service (NRCS), the state Conservation Commission and conservation districts, and Washington State University (WSU) Extension, are recognized as providing producer education and technical assistance.

The 2003 legislation required the DOC to develop draft legislation including:

- the statutory changes, including a time line, to phase in a program to comply with the minimum requirements of federal and state water quality laws;
- the statutory changes necessitated by the transfer of the Dairy Nutrient Management Act from the DOE to the WSDA;
- continued inspections of dairy operations at least once every two years;
- an outreach and education program; and
- annual reporting to the Legislature on the progress for implementing the program.

In 2004, the United States Court of Appeals for the Second Circuit (New York, Vermont, Connecticut) heard a consolidated case involving petitions against the EPA brought by both environmental and agricultural organizations. The petitioners challenged a number of the permitting requirements and effluent limitation guidelines contained in the February 2003 Final Rule for concentrated animal feeding operations.

On February 28, 2005, the Second Circuit vacated provisions of the CAFO Rule that (1) allow permitting authorities to issue permits without reviewing the terms of the nutrient management plans; (2) allow permitting authorities to issue permits that do not include the terms of the nutrient management plans; and (3) required CAFOs to apply for NPDES permits or otherwise demonstrate that they have no potential to discharge. The Second Circuit also determined the CAFO Rule violated the Clean Water Act's public participation requirements by failing to provide public access to nutrient management plans. The Second Circuit remanded other aspects of the CAFO Rule to the EPA for further clarification and analysis.

Summary of Bill:

Sections 1 and 2 - Applicability of Chapter and Findings

The Livestock Nutrient Management Program (Program) applies to all segments of the livestock industry. The goals of the Program are to provide guidance to animal feeding operations about their responsibilities under state and federal water quality laws and to implement requirements in a consistent manner that will maintain a healthy and productive livestock industry in Washington. Specific permit requirements created in the chapter are consistent with federal CAFO rules. All dairies must implement nutrient management plans and submit certain reports. The AFOs that are not CAFOs or dairies are not required to have permits or produce farm plans, but they cannot pollute the state's waters and may be inspected by the WSDA.

Sections 3 - 13 - Amendments to the Dairy Nutrient Management Act - RCW 90.64

Definitions
Definitions are added, deleted or changed to reflect: the transfer of authority from the DOE and conservation districts to the WSDA; expanded program applicability to all livestock operations, not only dairies; key terms such as "animal feeding operations," small, medium and large "concentrated animal feeding operations," "livestock nutrients," "nutrient management plans," "person," "permit," "pollution," and "waters of the state."

Designation as a CAFO through pollutant discharge
Consistent with federal CAFO rules, an AFO cannot be designated as a CAFO unless the WSDA Director (Director) has conducted an on-site inspection and determined that the operation should be regulated under the permit program. AFOs with numbers of animals below those designated for a medium CAFO cannot be designated as a CAFO unless pollutants are discharged into waters of the state through a man-made ditch, flushing system, or other man-made device or originate outside of the facility or in some way come into direct contact with the animals confined within and are determined to be a significant contributor of pollutants. When considering designating an AFO as a CAFO due to discharge of pollution to the waters of the state, the Director shall consider several factors including the effort by the AFO to stop the discharge.

Inspections

The WSDA is authorized to conduct inspections to: determine if an AFO is a CAFO; ensure compliance with state and federal water quality laws and rules; and determine if a CAFO is complying with its permit. The WSDA is required to inspect all CAFOs and dairies at least once every two years. Additional prioritization criteria for inspections include: proximity to shellfish beds, permit status, compliance history, and other relevant factors to be determined by the WSDA. During inspections, all CAFOs must make available those records required by permit. Those AFOs and dairies that are not covered by permit must make available records such as animal inventories to determine regulatory status, compliance, or qualification for special state programs. The WSDA may conduct follow-up inspections to ensure that corrective actions are being carried out.

Livestock Nutrient Management Plan

All CAFOs and dairies are required to develop a livestock nutrient management plan, have it approved by the WSDA and certified by the WSDA and the livestock producer. This eliminates the current role of the Conservation Commission and conservation districts in establishing elements of the plans, approving and certifying them. Livestock producers must develop plans using NRCS practice standards, although equivalent practices and standards may be used if the WSDA determines through a technical review process that they provide the same or better performance protection as NRCS standards.

Minimum elements and time frames for the plans are set out as specified in the federal rule for CAFOs. Requirements and time lines for dairy plans are continued. Any appeals by producers of the WSDA's decisions regarding nutrient management plans, including denial of the use of alternative standards and practices, must be made to the Pollution Control Hearings Board rather than the conservation districts. Producers may no longer request extensions of plan approval and certification timelines due to financial hardships or local permitting delays, but can use existing appeal processes.

Written complaints against livestock producers

Written complaints against livestock producers must be investigated within three working days. A report of findings will be provided to the livestock producer and, on request, to the complainant within 20 days after receiving the written complaint. The report of findings after inspections of either oral or written complaints will be placed in the WSDA's administrative records.

Authority for WSDA to implement LNMP

The WSDA is authorized to implement and administer a Livestock Nutrient Management Program including enforcement, compliance, inspection, technical assistance, approval and certification of livestock nutrient management plans, data management, communication and outreach, and coordination with agencies that provide education and technical or financial assistance.

Rulemaking and Funds

The WSDA may adopt rules to implement the chapter, including rules on the administration of permit programs. In addition, the WSDA is given authority to adopt in rule provisions in specified federal regulations, as well as rules that accommodate subsequent changes to EPA regulations.

The existing Livestock Nutrient Management Grant Account and its residual fund balance is moved to the Agricultural Local Fund.

Sections 14-36

Records and Disclosure
CAFOs must maintain certain records and reports as mandated by federal rule. Dairies that are not CAFOs must maintain certain records and reports as specified by the WSDA. Information from CAFOs and dairies is subject to public disclosure only to the extent required by specified federal rules.

Education, Technical and Financial Assistance
The WSDA may coordinate with WSU, the Conservation Commission and conservation districts, the DOE, or other agencies and organizations to implement an education program for nutrient management improvement, and may refer producers to these groups for technical or financial assistance.

At the request of a livestock producer, conservation districts may provide technical or financial assistance in developing, revising, or implementing the producer's livestock nutrient management plan, and may verify that the plan elements meet required standards. To the extent practical and that funding allows, the Conservation Commission and conservation districts shall provide technical and financial assistance to producers.

Advisory Committee
A Livestock Nutrient Management Program Advisory Committee is established including representatives of the livestock industry, environmental community, local, state and federal agencies, and others as determined by the WSDA.

NPDES Permitting and Fees
When EPA delegates authority under the federal Clean Water Act to the WSDA, and the DOE relinquishes its authority to administer CAFO NPDES permits and other related duties, the WSDA will be the state authority for the NPDES, AFO, and CAFO program. Until that time, the DOE will remain responsible for NPDES permit administration as described in the MOU between the WSDA and the DOE.

The requirements and processes for producers to obtain the NPDES permit once authority has been delegated to the WSDA are described. The permit will be a combined state waste disposal permit and federal NPDES permit, and will meet the requirements of both. A livestock operation which meets the definition of a large CAFO may seek a determination from the WSDA that they have no potential to discharge to the waters of the state. The Director will use a process and criteria from federal rule to make the determination within 60 days. If affirmative, the CAFO will not have to apply for permit coverage but is not relieved from liability should an actual discharge occur.

After receiving the delegation of authority from EPA, the WSDA must establish by rule annual NPDES permit administration fees to be used for costs the WSDA incurs for processing permit applications and modifications, monitoring and evaluating compliance, conducting inspections, securing laboratory analysis of samples, reviewing plans and documents, and supporting directly related overhead expenses. The WSDA's initial annual NPDES permit fee schedule will be the same as the existing DOE schedule, except that the fees may rise with the fiscal growth factor. Until the initial fee schedule is adopted, the fees established by DOE are in effect.

Pollutant Discharge, Violations

It is illegal for those regulated under the LNMP to discharge into the waters of the state organic or inorganic matter including livestock nutrients that shall cause or tend to cause pollution of the waters. Duties of CAFOs and dairies in the event of a discharge to waters of the state are specified.

The WSDA has the authority at any reasonable time to enter and conduct inspections of records and facilities at AFOs, CAFOs, and dairies. The WSDA may seek a search warrant if denied access and may bring legal action to carry out the purposes of the chapter.

Procedures are described for notification of violations and for the issuance of directives or orders by the WSDA. Penalties consistent with the Clean Water Act are prescribed for those found guilty of violating the chapter. Any enforcement action by the WSDA related to discharges must attempt to minimize the possibility of converting agricultural land to nonagricultural uses.

Sections 37-45

The authority of the Pollution Control Hearings Board is expanded to hear and decide appeals of decisions by the WSDA.

Section 17, establishing the Livestock Nutrient Management Advisory Committee, will take effect July 1, 2006, upon the expiration of an existing committee.

Amendments are made to various statutes updating definitions and references and repealing outdated sections.

Throughout the Bill

To execute the transfer of authority from the DOE to the WSDA, many references throughout the bill are changed from the DOE to the WSDA.

To execute the broadening of program applicability beyond dairies, many references throughout the bill are changed from "dairy" or "dairy farm" to "livestock," "AFO," or " CAFO."

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed, except for section 17, relating to establishment of a livestock nutrient management program advisory committee, which takes effect July 1, 2006.