

HOUSE BILL REPORT

HB 1418

As Reported by House Committee On:
Agriculture & Natural Resources
Appropriations

Title: An act relating to drainage infrastructure.

Brief Description: Exempting drainage infrastructure from certain environmental requirements.

Sponsors: Representatives Quall, Schoesler, Blake, Sump, Morris, Grant, Hatfield, Sehlin, Bailey and Linville.

Brief History:

Committee Activity:

Agriculture & Natural Resources: 2/5/03, 3/4/03 [DPS];
Appropriations: 3/8/03 [DP2S(w/o sub AGNR)].

Brief Summary of Second Substitute Bill

- Prohibits the Department of Fish and Wildlife (WDFW) from requiring the installation of a self-regulating tide gate (SRT) as a condition of hydraulic project approval (HPA) without the land owner's consent and unless impacts are fully compensated.
- Prohibits enforcement of any existing HPA condition requiring SRT installation and requires the WDFW to remove (upon request) any SRT installed because of a HPA condition.
- Exempts tide gates or flood gates from the statutory fish passage requirements.
- Establishes a set of criteria the WDFW must use when implementing fish passage requirements or imposing HPA conditions for any drainage infrastructure projects on lands designated as agricultural land of long-term commercial significance under the Growth Management Act (GMA).
- Creates a task force of 13 members to address issues related to agricultural drainage systems and provides for the task force to conduct specified assessments.

- Requires the WDFW to create a salmon habitat restoration plan for all public lands in Skagit County.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Linville, Chair; Rockefeller, Vice Chair; Schoesler, Ranking Minority Member; Holmquist, Assistant Ranking Minority Member; Kristiansen, Assistant Ranking Minority Member; Chandler, Eickmeyer, Grant, Orcutt, Quall and Sump.

Minority Report: Do not pass. Signed by 2 members: Representatives Hunt and McDermott.

Staff: Caroleen Dineen (786-7156).

Background:

Growth Management Act

The Growth Management Act (GMA) requires counties and cities meeting certain population and growth criteria to plan under its major requirements. All counties and cities must satisfy certain GMA requirements, including identification and protection of critical areas and designation of natural resource lands of long-term commercial significance. "Natural resource lands" for purposes of the GMA includes agricultural, forest, and mineral resource lands.

Hydraulic Project Approval

The hydraulics code requires any obstruction across or in a stream to be provided with a durable and effective fishway approved by the Director of the Department of Fish and Wildlife (WDFW). A failure to provide, maintain, or operate such a fishway is a gross misdemeanor. After certain notice, the Director may remove an obstruction at the owner's expense or destroy it as a public nuisance.

If a person or agency wishes to construct any form of hydraulic project or perform other work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state, the person must secure the approval of the WDFW regarding the adequacy of the means proposed for the protection of fish life. This approval is generally referred to as a hydraulic project approval or HPA. The WDFW may levy a civil penalty of up to \$100 per day for violations of this requirement.

Skagit County Dike District No. 22 applied for a HPA to replace an existing four-foot pipe and tide gate on Dry Slough. The HPA approved by the DFW on September 3, 2002, required that the replacement culvert be fitted with a self-regulating tide gate (SRT). Appeals of the HPA conditions have been filed with the Hydraulic Appeals Board.

The Skagit County Public Works Department applied for a HPA to alter a SRT that had been installed on Edison Slough in 2000. The county proposed to disable the regulating float system and operate the gate as a standard tide gate for 24 months while it monitored water and salinity levels. The Skagit County Public Works Department requested an informal review of the denial.

Summary of Substitute Bill:

Provisions addressing the Department of Fish and Wildlife's (WDFW's) authority related to agricultural drainage systems are added to the hydraulics code (chapter 77.55 RCW). For purposes of the WDFW's authority to establish fish passage requirements, the term "other obstruction" as used in statute does not include tide gates or flood gates originally installed on or before the effective date of the legislation or to the repair, replacement, or improvement of these tide gates or flood gates. Further, in any hydraulic project approval (HPA), the WDFW may not require the installation of a self-regulating tide gate (SRT) as a condition of HPA for maintenance or replacement of agricultural drainage systems unless: (1) the affected land owners and the associated diking and drainage district agree to the installation; and (2) all impacts have been fully compensated. Any condition requiring a SRT to achieve fish passage in an existing HPA may not be enforced.

The WDFW is required to comply with a set of criteria when implementing fish passage requirements or when imposing HPA conditions for any projects or work related to drainage infrastructure on lands designated as agricultural land of long-term commercial significance according to the Growth Management Act (GMA). The WDFW must employ a standard of no net loss of agricultural activity on designated agricultural land and establish mechanisms, create conditions, and design strategies to effectuate this standard. The WDFW also must consider the quantity and quality of habitat needed to ensure fish protection within the particular watershed and determine the potential for voluntary agreements to provide needed fish protection. In addition, the WDFW must prepare an environmental assessment of the fish protection benefits and the impacts to drainage infrastructure on designated agricultural lands and on public or private drainage or other infrastructure. Further, the WDFW must prepare an economic assessment on impacts to drainage infrastructure on designated agricultural lands and impact to public or private drainage or other infrastructure. Finally, the WDFW must identify funding sources to pay for any financial impacts on designated agricultural lands.

Upon request of an affected owner of designated agricultural land or the associated diking and drainage district, the WDFW must provide and pay for the removal of any SRT installed because of a condition imposed by the WDFW in a HPA or during implementation of fish passage requirements. The WDFW must make any such removal a priority and must complete the work within 90 days of the written request. The WDFW's payment of removal costs is to be from existing WDFW resources.

A task force of 13 members is created. Members include legislators, representatives of the Fish and Wildlife Commission and the Governor, and representatives of the agricultural industry, environmental organizations, diking and drainage districts, the Skagit lead entity for salmon recovery, and Skagit County. Tribal representatives with interests in Skagit County and representatives of certain federal agencies are invited to participate in the task force as members. The task force must perform specified duties, including review of enumerated issues, recommendation of statutory and policy changes, identification and review of demonstration projects and definition and review of required assessments.

The task force may contract with universities, private consultants, nonprofit groups, or other entities to assist it in developing a strategy to include an inventory of existing tide gates, assessment of the role of tide gates and tidal fish habitat, and a long-term proposal for fish habitat enhancement to meet the goals of salmon recovery and no net loss of agricultural lands. The task force must make annual reports to the appropriate committees of the Legislature and submit a final report (with any legislative recommendations) by November 30, 2004.

The WDFW is required to create, in conjunction with other public land owners, a salmon habitat restoration plan for all public lands in Skagit County. The plan must include a list of public properties that must be restored for salmon, a description of how properties can be altered to support salmon, a description of the costs and funding sources, and a strategy and schedule. The WDFW must make the Skagit public lands salmon habitat restoration plan a priority and complete it by November 30, 2004.

The existing voluntary habitat incentives agreement provisions do not abrogate the WDFW's obligation to prioritize the use of public lands for fish habitat restoration projects. These provisions do not authorize the WDFW to impose conditions requiring fish habitat restoration either on or affecting designated agricultural lands in any HPA or during implementation of fish passage requirements in the absence of a voluntary agreement. In addition, the WDFW Director's authority to authorize removal or changes to obstructions in streams does not authorize him or her to impose fish habitat restoration on or affecting designated agricultural lands except as authorized under a voluntary habitat incentives agreement. However, the provisions of the legislation do not limit the ability of the WDFW or a private land owner to enter into a voluntary habitat incentives agreement.

For the purposes of the hydraulics code, "tide gate" is defined as a one-way check valve that prevents the backflow of tidal water.

Legislative findings are included regarding the importance of the agricultural industry in Washington and of salmon recovery to the state as well as the role agricultural lands play in salmon recovery. Legislative findings also specify circumstances leading to loss of agricultural lands, and legislative declarations are included regarding agricultural

productivity and the state's agricultural land base. In addition, legislative findings are made regarding implementation of the HPA requirements in ways that require salmon habitat restoration by conversion of agricultural land, and legislative findings specify the agricultural losses associated with this implementation and the possibility of future damage from failure to reconcile the goals of agricultural land protection and fish passage requirements. Further, legislative findings indicate that efforts to restore salmon habitat should look first to opportunities existing on public lands. Finally, legislative purposes are specified, including:

- clarifying the purposes of the fishway and HPA provisions related to drainage infrastructure;
- creating a statutory process for imposing conditions on drainage infrastructure;
- establishing demonstration projects and a task force; and
- prioritizing the use of public lands for fish habitat restoration.

Substitute Bill Compared to Original Bill:

The substitute replaces the exemption of drainage infrastructure from the fish passage requirements with provisions: (1) limiting the authority of the WDFW related to agricultural drainage infrastructure when implementing fish passage requirements or imposing conditions on HPAs; (2) specifying criteria the WDFW must employ when implementing fish passage requirements or imposing HPA conditions on designated agricultural lands; (3) requiring removal of SRTs required as a condition of HPA upon request; (4) establishing the task force; (5) requiring the WDFW to complete a salmon habitat restoration plan for all public lands in Skagit County; (6) relating to voluntary habitat incentives agreements; (7) defining "tide gate"; and (8) specifying legislative findings and purposes.

Appropriation: None.

Fiscal Note: Requested on March 4, 2003.

Effective Date of Substitute Bill: The bill contains an emergency clause and takes effect immediately.

Testimony For: (Original bill) (1) A woman's cucumber crop was threatened by the saltwater from a leaking tide gate. When she requested approval to repair the tide gate she was told by the WDFW that she could do the repairs only if she signed a contract to install a SRT gate within one year, which would let in the saltwater. Saltwater and farm land do not mix. These farms provide a great deal of money to the local economy. (2) Installing an SRT gate is like cutting a hole in your roof to keep out the rain. (3) Tide gates on Fir Island remove water that is available only when it rains; fish do not use those waters. The WDFW wants the tide gates there left open during 90 percent of the

tide cycle; Fir Island would no longer be an island under that requirement. The Growth Management Act says that farmland is to be protected. (4) The drainage systems keep the water from drowning the farmland, which could happen in a matter of hours. By removing the water, they also lengthen the growing season, which is necessary for crops such as potatoes. (5) The ditches and works on the landward side must be actively maintained to ensure that they can act as the storage areas for rain water during storm events, while the tide is in. The dirt removed is spread back on the fields. (6) If the system had not been maintained, the farmland would have silted in. (7) The WDFW has stated that a malfunctioning tide gate does not qualify for the emergency repair provisions of the hydraulics code. (8) In California, drainage district officials have been sued by their ratepayers for not maintaining their tide gates. The bill allows the officials to do the work needed. (9) The Federal Emergency Management Agency and the U.S. Army Corps of Engineers have informed the drainage districts that they must maintain their drainage systems or lose federal assistance. (10) Ironically, the same areas that are being protected by tide gates for farmland also support vast amounts of migratory birds. (11) Ninety diking and drainage districts could benefit from this legislation. (12) The bill is a means of stabilizing the permit process regarding tide gates rather than imposing fish restoration requirements on the farms. (13) The goal of the Federal Endangered Species Act is recovery, not restoration. A cooperative program is working elsewhere; here, emphasis should be on spartina control to protect wildlife.

Testimony Against: (Original bill) 1) Farms are preferred to strip malls, but we have serious salmon problems, leading to serious orca problems, that must be addressed. 2) If state authority is eliminated for tide gates as in the bill, the solutions will be worked out in federal court. 3) A balance must be struck. The tide gates should be prioritized in terms of habitat value and public land opportunities need to be explored. 4) The DFW's goal is to preserve agricultural land and industry and to recover fish. On the fish side: the Skagit River area has the greatest diversity of fish runs; and a major contributor to fish declines has been the loss of estuarine areas. 5) The WDFW is interested in the sloughs that shut off watercourses, but not in facilities that just drain fields. All of the barriers to fish passage should not be exempted from being addressed if agricultural lands are involved. Consistency with other groups with regard to fish passage is important. The WDFW's four-point plan includes taking no action in the Skagit until the watershed is evaluated. 6) The bill represents a piece-meal approach to one part of the problem.

Testified: (In support) (Original bill) Representative Quall, prime sponsor; Chris Cheney and Mike Shelby, Western Washington Agricultural Association; John Roozen; Lyle Wesen; Curtis Johnson; Dan Wood and Larry Jensen, Washington State Farm Bureau; Bob Hart; Bob Rose, Skagitonians to Preserve Farmland; and Willy O'Neil; Associated General Contractors.

(Opposed) (Original bill) Steve Robinson, Northwest Indian Fisheries Commission and Swinomish Tribe; Bruce Wishart, People for Puget Sound; Nina Carter, Audubon Society; and Greg Hueckel, Washington Department of Fish and Wildlife.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Agriculture & Natural Resources. Signed by 27 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Sehlin, Ranking Minority Member; Pearson, Assistant Ranking Minority Member; Alexander, Boldt, Buck, Clements, Cody, Conway, Cox, DeBolt, Dunshee, Grant, Hunter, Kagi, Kenney, Kessler, Linville, McDonald, McIntire, Miloscia, Pflug, Ruderman, Schual-Berke, Sump and Talcott.

Staff: Patricia Linehan (786-7178).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Agriculture & Natural Resources:

The second substitute bill requires the agency to absorb the cost of implementing this legislation.

Appropriation: None.

Fiscal Note: Requested on March 7, 2003.

Effective Date of Second Substitute Bill: The bill contains an emergency clause and takes effect immediately.

Testimony For: The Department of Fish and Wildlife (WDFW) seems to think that the fish recovery statutes may severely impact private property, specifically in Skagit County, which is protected by tide gates. This drain system has been in place since 1860. If the tide gates are taken out, the entire infrastructure of the Skagit Valley will be completely ruined.

Unless you can keep the salt out of the Skagit Valley, you will lose agricultural land. Tulips and salt simply don't mix. This new theory of enforcement by the WDFW has caused this problem. This proposed legislation is extremely important to agriculture in Skagit County and Western Washington.

Testimony Against: The WDFW is working with the U.S. Fish and Wildlife Service to identify available federal funding for this legislation. This funding could reduce the fiscal impact to the WDFW and reduce the cost estimate to \$120,000.

Testified: (In support) Chris Cheney, Western Washington Agriculture Association; Duke Schaub, Association of General Contractors; and Hertha Lund, Washington Farm Bureau.

(Opposed) Peter Birch, Department of Fish and Wildlife.