

HOUSE BILL REPORT

E2SHB 1418

As Amended by the Senate

Title: An act relating to drainage infrastructure.

Brief Description: Exempting drainage infrastructure from certain environmental requirements.

Sponsors: By House Committee on Appropriations (originally sponsored by 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)].

Floor Activity:

Passed House: 3/17/03, 97-0.
Senate Amended.
Passed Senate: 4/14/03, 44-4.

Brief Summary of Engrossed Second Substitute Bill

- Prohibits the Department of Fish and Wildlife (DFW) from requiring the installation of a self-regulating tide gate (SRT) as a condition of hydraulic project approval (HPA) unless certain conditions are satisfied.
- Exempts tide gates or flood gates from statutory fish passage requirements.
- Establishes criteria the DFW must use when implementing fish passage requirements or imposing HPA conditions for any drainage infrastructure projects as agricultural lands of long-term commercial significance.
- Creates a task force to address issues related to agricultural drainage systems and provides for the task force to conduct specified assessments.
- Requires the DFW 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).

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).

Background:

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.

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 (DFW). 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 DFW 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 DFW may levy a civil penalty of up to \$100 per day for violations of this requirement.

Two recent HPA decisions involved installation of self-regulating tide gates (SRTs). 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 issued by the DFW required the replacement culvert to be fitted with a SRT. The HPA conditions have been appealed to the Hydraulic Appeals Board. The other decision involved Skagit County Public Works Department's request for a HPA to disable the regulating float system on a SRT installed on Edison Slough in 2000 and operate it as a standard tide gate for 24 months. The DFW denied the request, and the Skagit County Public Works Department requested an informal review of the denial.

Summary of Engrossed Second Substitute Bill:

Department of Fish and Wildlife Requirements

Provisions addressing the Department of Fish and Wildlife's (DFW's) authority related to agricultural drainage systems are added to the hydraulics code (chapter 77.55 RCW). The term "other obstruction" as used in the fish passage requirements does not include tide gates or flood gates originally installed as part of an agricultural drainage system on or before the effective date of the legislation or to the repair, replacement, or improvement of these gates. The DFW may not require the installation of a self-regulating tide gate (SRT) as a condition of hydraulic project approval (HPA) for maintenance or replacement of agricultural drainage systems unless:

- the condition is consistent with a salmon recovery plan adopted according to salmon recovery statutory requirements or the provisions of this legislation;
- the affected land owners and the associated diking and drainage district agree to the installation; and
- all impacts have been fully compensated.

Any condition requiring a SRT to achieve fish passage in an existing HPA may not be enforced.

The DFW is required to comply with a set of criteria when implementing fish passage requirements or when imposing HPA conditions for any projects or work on or related to drainage infrastructure on agricultural lands of long-term commercial significance designated according to the Growth Management Act (GMA). First, the DFW 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. Second, the DFW 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. Third, the DFW 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. Fourth, the DFW 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 DFW must identify sources to pay for financial impacts on designated agricultural lands.

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

Task Force Creation

A task force of 13 members is created. Members include legislators and representatives of the Fish and Wildlife Commission and the Governor. Members also include representatives of the agricultural industry, environmental organizations, a Skagit County diking and drainage district, 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 Conservation Commission must provide staff support to the task force.

The task force must perform specified duties, including review of enumerated issues as they relate to Skagit County and recommendation of statutory and policy changes. The task force also must identify and review appropriate demonstration projects on the Skagit River, Samish River, Carpenter Creek, and Colony Creek in Skagit County. Further, the task force must develop a strategy incorporating certain elements, including: (1) an inventory of existing tide gates in Skagit County; (2) an assessment of the role of tide gates and tidal fish habitat in Skagit County; and (3) a long-term proposal for fish habitat enhancement to meet the two goals of salmon recovery and no net loss of agricultural lands. The task force may contract with universities, private consultants, nonprofit groups, or other entities to assist it in developing this strategy. The task force also may propose pilot projects designed to test and measure the success of various proposed strategies.

The task force must hold its first meeting within 30 days of the effective date of these provisions. The task force also must make annual reports to the appropriate committees of the Legislature and submit a final report (with any legislative recommendations) by November 30, 2004.

Plan for Skagit County Public Lands

The DFW 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 DFW must make this plan a priority and complete it by November 30, 2004.

Voluntary Agreements

The existing voluntary habitat incentives agreement provisions do not abrogate the DFW's obligation to prioritize the use of public lands for fish habitat restoration projects. These provisions do not authorize the DFW 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 DFW 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 DFW and a private land owner or an associated diking and drainage district to enter into a voluntary agreement.

Definition

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

Findings and Intent

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 recognize agricultural losses associated with this implementation and the possibility of future damage. A legislative declaration is included that it is in the state's best interest to implement the hydraulics program and fish passage laws in ways that preserve the agricultural land base and that achieve mutual landowner and fish habitat goals. 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;
- establishing a task force and demonstration projects on specified streams; and
- prioritizing the use of public lands for fish habitat restoration.

Legislative intent to not appropriate additional funds to any affected state agencies for implementing these provisions is specified.

EFFECT OF SENATE AMENDMENT(S):

The Senate amendment adds "associated man-made agricultural drainage facilities" to the terms exempted from the "other obstruction" provisions in the fishway requirements. The Senate amendment replaces the hydraulic project approval (HPA) provisions in the two HPA sections with a prohibition against requiring a fishway on a tide gate, flood gate, or other associated man-made agricultural drainage facilities as a condition of HPA if not originally installed as part of the system before the effective date of these provisions within the general HPA section. The Senate amendment also removes provisions requiring the Department of Fish and Wildlife (DFW) to comply with a set of criteria when implementing fish passage requirements or when imposing HPA conditions for any projects or work on or related to drainage infrastructure on designated agricultural lands. In addition, the Senate amendment revises the requirement regarding removal of the self-regulating function of a tide gate by requiring the DFW to authorize and pay for the removal, applying it to adversely affected landowners, and removing the time limits for the removal. Further, the Senate amendment removes provisions relating to application of these provisions to voluntary habitat incentives agreements, the section regarding the DFW Director's authority to address inadequate fishways, and the section including a technical revision.

The Senate amendment also revises the task force provisions by: (1) moving the provisions to the salmon recovery statutes and providing for task force establishment for a specific geographic area when a limiting factors analysis demonstrates insufficient intertidal salmon habitat; (2) making the creation and the appointment of members of a task force a joint decision and responsibility of the DFW and affected county legislative authorities; (3) revising references specific to Skagit County, making them general references to a geographic area; (4) including encouragement for the federal fishery agencies to participate in any task force; and (5) revising some procedural provisions regarding task force operation and governance. In addition, the Senate amendment also requires any task force to report to the Fish and Wildlife Commission, involved county legislative authorities, and the lead entity for salmon recovery rather than to the Legislature. Further, the Senate amendment revises the duties of the task force and the assessments provisions to remove references to Skagit County, focus on intertidal salmon habitat enhancement, change the plan completion into a two-phase process, and consolidate the public lands plan requirements within these provisions. The Senate amendment also specifies the task force and assessment provisions must be initiated as soon as practicable in Skagit County. Finally, the Senate amendment removes the legislative findings and purposes.

Appropriation: None.

Fiscal Note: Requested on March 7, 2003.

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

Testimony For: (Agriculture & Natural Resources) (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 DFW 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 DFW 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 DFW 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 For: (Appropriations) The Department of Fish and Wildlife (DFW) 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 DFW has caused this problem. This proposed legislation is extremely important to agriculture in Skagit County and Western Washington.

Testimony Against: (Agriculture & Natural Resources) (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 DFW 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 DFW'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.

Testimony Against: (Appropriations) The DFW 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: (Agriculture & Natural Resources) (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.

Testified: (Appropriations) (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.