

HOUSE BILL REPORT

E2SHB 1418

As Passed Legislature

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.
House Concurred.
Passed House: 4/22/03, 97-0.
Passed Legislature.

Brief Summary of Engrossed Second Substitute Bill

- Prohibits the Department of Fish and Wildlife (DFW) from requiring a fishway on a tide gate, flood gate, or associated agricultural drainage facilities if not originally installed as part of the drainage system.
- Requires removal upon request of the self-regulating function of any tide gate installed based on a requirement by the DFW for fish passage.
- Exempts tide gates, flood gates, and associated agricultural drainage facilities from statutory fish passage requirements.
- Authorizes initiation of and includes provisions for a salmon intertidal habitat planning process for geographic areas in which a limiting factors analysis shows insufficient habitat.

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 a hydraulic project approval (HPA) from the DFW regarding the adequacy of the means proposed for the protection of fish life. The DFW may levy a civil penalty of up to \$100 per day for a violation 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, flood gates, and associated man-made agricultural drainage facilities that were originally installed as part of an agricultural drainage system on or before the effective date of the legislation. The term also does not apply to the repair, replacement, or improvement of these facilities. In addition, the DFW is prohibited from requiring a fishway on a tide gate, flood gate, or other associated man-made agricultural drainage facilities as a condition of hydraulic project approval (HPA) if the fishway was not originally installed as part of the drainage system before the effective date of these provisions. Further, any condition requiring a self-regulating tide gate (SRT) to achieve fish passage in an existing HPA may not be enforced.

Upon request of either an adversely affected owner of land designated as agricultural land of long-term commercial significance according to the Growth Management Act (GMA) or the associated diking and drainage district, the DFW must authorize 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 the authorization a priority and pay for the removal within existing resources.

Salmon Intertidal Habitat Restoration Planning

The Fish and Wildlife Commission and county legislative authorities for a geographic area in which a limiting factors analysis demonstrates insufficient intertidal salmon habitat may jointly initiate a salmon intertidal habitat restoration planning process. The purpose of this process is to develop a plan addressing intertidal habitat goals in the limiting factors analysis.

The Fish and Wildlife Commission and the geographic area's county legislative authorities must jointly appoint a task force with representatives of the Governor, Fish

and Wildlife Commission, agricultural industry, environmental organizations, appropriate diking and drainage district, lead entity for salmon recovery, and of each county in the geographic area. Representatives of the United States Environmental Protection Agency, Natural Resources Conservation Service, and fishery agencies and tribes with interests in the geographic area must be invited and encouraged to participate in any such task force. Provisions are included for operations and governance of a task force and for annual reports to the Fish and Wildlife Commission, county legislative authorities, and the appropriate lead entity for salmon recovery. A planning process and task force must be initiated as soon as practicable in Skagit County.

A task force established pursuant to this authority must: (1) review and analyze the geographic area's limiting factors analysis; (2) initiate and oversee intertidal salmon habitat studies; (3) review and analyze completed assessments; (4) develop and draft an overall plan to address intertidal salmon habitat goals; and (5) identify appropriate demonstration projects and early implementation projects for the geographic area. The plan must incorporate certain elements, including:

- an inventory of existing tide gates with specified information on these gates;
- an assessment of the role of tide gates and intertidal fish habitat addressing numerous issues; and
- a long-term plan for intertidal salmon enhancement to meet the goals of salmon recovery and agricultural lands protection.

The state Conservation Commission must staff any task force created according to these provisions and may contract with universities, private consultants, nonprofit groups, or other entities to assist with plan development. The final intertidal salmon enhancement plan must be completed within two years after task force formation and funding. An initial salmon intertidal habitat enhancement plan for public lands meeting certain requirements must be developed by the DFW in conjunction with public land owners and the task force. This initial public lands plan must be submitted to the task force at least six months before the deadline for the final plan.

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.

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.