
**Agriculture & Natural
Resources Committee**

SB 5346

Brief Description: Requiring compensation for damage by required changes to tide gate operation.

Sponsors: Senators Haugen, Swecker, Doumit, Morton, Rasmussen, Hargrove, Horn and Spanel.

Brief Summary of Bill

- Creates a new cause of action for property owners harmed by a condition imposed in a hydraulic project approval that results in a change in the operating characteristics of a tide gate.

Hearing Date: 4/2/03

Staff: Caroleen Dineen (786-7156).

Background:

Property Damages Claims

A property owner who has filed a permit application may bring an action for damages for an agency's failure to act on a permit application within the time limits prescribed by law. A property owner who has filed a permit application also may file an action for damages for agency acts that are arbitrary, capricious, unlawful, or exceed lawful authority. An action is "unlawful" or "in excess of lawful authority" if the agency's final decision was made with knowledge, or if the agency should have reasonably known, that the action was unlawful or exceeded lawful authority. For purposes of this cause of action, "agency" includes state and local governments.

The damages a property owner may recover include reasonable expenses and losses incurred between the time a cause of action arises and the time the property owner is granted relief. A property owner prevailing in this type of action may be entitled to reasonable costs and attorney fees.

Hydraulic Project Approvals

Hydraulic project approval (HPA) must be obtained from the Department of Fish and Wildlife (DFW) for any project or 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 HPA is intended to ensure the proper protection of fish life and must be obtained before beginning construction or work.

State law specifies the DFW may not unreasonably condition hydraulic projects. Any conditions imposed in a HPA must reasonably relate to the project. The DFW may not impose conditions attempting to optimize fish life that are out of proportion to the impact of the proposed project. The DFW's decision regarding or conditions included in a HPA may be challenged in an informal review process or through a formal appeal.

Tide Gates and HPAs

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 Bill:

The Department of Fish and Wildlife (DFW) is responsible for any damage to public or private property resulting from any requirement imposed as a condition of hydraulic project approval (HPA) that changes the operating characteristics of a tide gate. Persons affected by changes must notify the DFW and the owner of the tide gate in writing and provide a description of the damage. The DFW must investigate all complaints and respond within 30 days of the complaint. If damage is determined to be ongoing, the DFW must either immediately require the return of the tide gate to its original operating characteristics or enter into an agreement with all damaged parties to provide compensation for the loss.

A person claiming damage may file a damage claim in superior court if the DFW fails to take action within 90 days of the submission of a written complaint. The claim may include a request to nullify any permit conditions causing damage. The superior court may require the DFW to compensate damaged parties and may nullify any permit conditions causing damage. Payment of damages must be from within current funds appropriated to the DFW division that imposed the permit condition.

For purposes of this damage claim, a change in the operating characteristics of a tide gate includes:

- increasing elevation of the water surface behind the tide gate;
- reducing the reservoir capacity behind the tide gate;
- decreasing the ability to drain the area behind the tide gate; or

- increasing the intrusion of salt water into the area above the tide gate.

The term "damage" is specified to include adversely affecting the operation of drain fields for septic systems. Damage also includes increasing the elevation of water behind the tide gate, causing flooding, increased soil saturation, or reduce drainage and resulting in loss of production of growing agricultural crops. In addition, damage includes increasing the intrusion of salt water into areas above the tide gate that increases soil toxicity and reduces soil productivity and allowing an increase in salt water intrusion that adversely affects ground or surface waters.

Appropriation: None.

Fiscal Note: Available.

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