

SENATE BILL REPORT

E2SHB 1418

As Reported By Senate Committee On:
Agriculture, April 3, 2003
Ways & Means, April 7, 2003

Title: An act relating to drainage infrastructure.

Brief Description: Regarding construction projects in state waters.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Quall, Schoesler, Blake, Sump, Morris, Grant, Hatfield, Sehlin, Bailey and Linville).

Brief History:

Committee Activity: Agriculture: 4/1/03, 4/3/03 [DPA-WM].
Ways & Means: 4/7/03 [DPA].

SENATE COMMITTEE ON AGRICULTURE

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.
Signed by Senators Swecker, Chair; Brandland, Vice Chair; Jacobsen, Rasmussen and Sheahan.

Staff: Bob Lee (786-7404)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended.
Signed by Senators Rossi, Chair; Hewitt, Vice Chair; Zarelli, Vice Chair; Doumit, Fairley, Fraser, Hale, Honeyford, Johnson, Parlette, Roach, Sheahan and B. Sheldon.

Staff: Richard Ramsey (786-7412)

Background: 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 Department of Fish and Wildlife (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.

In 1949, a requirement was enacted that any obstruction across or in a stream be provided with a durable and effective fishway approved by the Director of the Department of Fish and Wildlife. Plans and specifications are provided to the department prior to the director's approval. After certain notice, the director may remove an obstruction at the owner's expense or destroy it as a public nuisance.

In 1963, legislation was enacted that if the director determines that a fishway in existence on September 1, 1963, is inadequate, the director may reconstruct or modify the device without cost to the owner. In such cases, the director may not materially modify the amount of flow of water through the device.

There are issues of interpretation as to whether the requirement to install fishways applies only prospectively to new construction or also retroactively to existing development, and whether hydraulic project approval statutes that require protection can also require restoration.

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 WDFW on September 3, 2002, required that the replacement culvert be fitted with a self-regulating tide gate (SRT) or alternative device that allows fish passage through 90 percent of the tide cycle. An administration appeal of the HPA conditions have been filed. The Skagit County Public Works Department applied for a HPA to alter a SRT that had been installed on Edison Slough in 2000.

Summary of Amended Bill: Tide gates, flood gates, or other man-made agricultural drainage facilities originally installed as a part of an agricultural drainage system are excluded from the definition of a fish obstruction.

In any hydraulic project approval (HPA), WDFW may not require the installation of a self-regulating tide gate as a condition of an HPA for maintenance or replacement of agricultural drainage systems.

Upon the request of a landowner, the WDFW is required to authorize the removal of a self-regulating tide gate and is required to pay for removal from existing funds.

In a geographic area in which a limiting factors analysis indicates insufficient intertidal habitat for salmon, the Fish and Wildlife Commission and the county legislative authority may convene a task force to develop an intertidal salmon enhancement plan. The task force is required to include representatives of the Fish and Wildlife Commission and the Governor, and representatives of the agricultural industry, environmental organizations, diking and drainage districts, the local lead entity for salmon recovery, and the county legislative authority. Tribal representatives with interests in the county and representatives of certain federal agencies are invited to participate in the task force as members. The task force must provide oversight and review of assessments of opportunities to enhance intertidal salmon habitat.

Through the state Conservation Commission, the task force may contract with universities, private consultants, nonprofit groups, or other entities to assist it in the inventory of existing tide gates, assessment of the role of tide gates and intertidal salmon habitat, and a long-term proposal for enhancement to address the goals of salmon recovery and protection of agricultural lands. The task force must make annual reports to the Fish and Wildlife Commission and submit a final report in two years.

WDFW must create, in conjunction with other public land owners, an intertidal salmon habitat enhancement plan for public lands in the geographic area. The plan must include a list of public properties that could be enhanced for salmon, a description of how properties

can be altered to support salmon, and a description of the costs and funding sources. WDFW must provide the public lands intertidal salmon habitat enhancement plan to the task force at least six months prior to the end of the two-year period for developing a final plan. A final plan is to be submitted to the lead entity for salmon restoration in the geographic area.

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

The planning process established in this bill shall be initiated as soon as practicable in Skagit County.

Ways & Means Amended Bill Compared to Agriculture Amended Bill: The appropriation is deleted.

Agriculture Amended Bill Compared to Second Substitute Bill: The planning process in the House version specific to Skagit was modified to be a generic process that could be used in other regions of the state. To activate the process, the Fish and Wildlife Commission and the county legislative authorities must jointly convene a task force to develop an intertidal salmon enhancement plan.

The composition of the task force is the same as the House version except required participation by legislators is deleted. In addition to other federal agencies, federal fishery agencies may be invited to participate, appointed by their regional directors. To initiate the process for a geographic area, a limiting factors analysis for salmon recovery needs to indicate an insufficient amount of intertidal habitat exists to meet salmon recovery goals.

The House version requires staffing of the task force by the State Conservation Commission and also requires studies to be conducted but indicates that no additional funding would be provided. The Senate striking amendment specifically requires the process to be initiated in Skagit County as soon as practicable and appropriates \$200,000 for that purpose. A final plan is to be completed within two years from the date that the task force is formed and funding is secured.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For (Agriculture): The economy and jobs in Skagit County are dependent on farms, which are dependent on the preservation of farmland. In recent decades, people have seen the transformation of the Kent/Auburn area from a fertile farmland that provided an over-wintering home to large flocks of migratory birds to an area without farms nor flocks of migratory birds. Skagit's rich farmland, which still supports large flocks of migratory birds, relies on its drainage system. The Skagit Valley is largely a sub-tidal delta whose existence depends on tide gates to drain water and not let salt water in. Salt water and crops do not mix. The federal fishery agency and Shared Strategies have indicated to Skagit farmers they have no intention to require tide gates to be opened to allow fish passage into the drainage system. The department has not previously required tide gates, some of which

have been in existence for 50 to 100 years, to be equipped with a fishway. Questions exist about the department's alleged authority.

Testimony Against (Agriculture): The concern about loss of farmland and the birds is shared. No net loss of farmland may be too restrictive to allow salmon habitat to be successfully restored. Support was expressed for the collaborative approach, but there is concern about the permanent nature of eliminating the department's authority. The agency needs to begin looking at fish habitat issues more on a watershed basis than on a site by site basis. There may be some federal mandates that affect the question of fish passage on tide gates.

Testified (Agriculture): PRO: Representative Quall; Curtis Johnson, Skagit County Farmland Legacy Program; Mike Shelby, Western Washington Agricultural Association; John Roozer, Washington Bulb Co. Inc; Lyle Ween, Western Washington Ag. Assn.; Loren Stern, DNR (concerns); Mike Schwisow, WA State Water Resources Assn.; Nina Carter, Audubon Society (concerns); CON: Greg Hueckel, WDFW.

Testimony For (Ways & Means): This bill is about maintaining the farm economy in Skagit County. Conversion of agricultural land to residential and commercial uses poses a significantly greater threat to salmon than agricultural practices.

Testimony Against (Ways & Means): The definition of exemption of tide gates should be tied to the work of the task force created by the bill.

Testified (Ways & Means): Representative Dave Quall, prime sponsor (pro); Chris Cheney, Western WA Agricultural Assn. (pro); Nina Carter, Audubon (pro w/concerns).