

# SENATE BILL REPORT

## SB 5346

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As Passed Senate, March 19, 2003

**Title:** An act relating to damage to property.

**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 History:**

**Committee Activity:** Agriculture: 2/6/03, 2/11/03 [DP].

Ways & Means: 2/18/03, 2/25/03 [DP].

Passed Senate: 3/19/03, 43-6.

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### SENATE COMMITTEE ON AGRICULTURE

**Majority Report:** Do pass.

Signed by Senators Swecker, Chair; Brandland, Vice Chair; Rasmussen and Sheahan.

**Staff:** Evan Sheffels (786-7486)

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### SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** Do pass.

Signed by Senators Rossi, Chair; Hewitt, Vice Chair; Zarelli, Vice Chair; Doumit, Fairley, Hale, Honeyford, Johnson, Roach, Sheahan, B. Sheldon and Winsley.

**Staff:** Richard Ramsey (786-7412)

**Background:** A person must obtain hydraulic project approval (HPA) 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 before beginning the construction or work. The Department of Fish and Wildlife (WDFW) administers the HPA process.

Protection of fish life is the only basis on which an HPA application can be conditioned or denied. Any denial of an HPA by the department must specify, in writing, why the project was denied. The department may not unreasonably withhold approval of the project or work. Some concerns have been expressed that the conditions being attached to hydraulic permits are not in proportion to the impact of the proposed project.

In the 19th century dikes and tide gates were constructed to convert tidal areas and estuaries to agricultural land. Tide gates allow water to drain from these lands, while preventing the inflow of tidal saltwater. Section 16 of the Washington Constitution provides eminent domain

powers for the construction of drains, flumes, or ditches on or across the lands of others for agricultural purposes.

**Summary of Bill:** The Department of Fish and Wildlife (WDFW) is made responsible for damages to public or private property resulting from department-imposed HPA or permit conditions on the operation of existing tide gates. An adversely affected party must provide a written description of damages to both the department and the owner of the tide gate. The department is given 30 days to respond.

If the department determines that damages will be ongoing, the department must either require the tide gate owner to reestablish original tide gate operation or enter into an agreement to compensate all damaged parties. If the department fails to either remove tide gate conditions or enter a compensation agreement within 90 days, an adversely affected party may bring a claim requesting the superior court to nullify the conditions and award damages. Damages are to be taken from departmental funds.

Damages for which compensation may be required include, but are not limited to, adverse effects to septic drain field operation, and loss of crop production resulting from flooding, saltwater intrusion, soil saturation, or soil toxicity caused by department-imposed tide gate conditions.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For (Agriculture):** NMPS has stated it is not interested in requiring fish passage through tidegates. The most recent Pomeroy Skagit County decision says the GMA requires protection only, not restoration. A WDFW letter from 1984 states that HPAs are not required on tidegates. The worst farm is better than the best development, and relief from HPA conditions is critically important for farming to continue in Skagit County. If not, Skagit farmland will be the most endangered species in the state, and pavement will go up in its place. These drain systems drain water from developments and other imperious surfaces built around farmlands, not just farmland. Self-regulating tidegates will make the system unworkable. In California, drainage district fee payers sued the district for a failure to maintain the system. Drainage districts have a legal duty to drain the land. Get fish in the river first before you worry about fish in ditches.

**Testimony Against (Agriculture):** Piecemeal, HPA by HPA approach, is probably not the best approach to salmon recovery. The WDFW has developed a five-step plan for Skagit Valley similar to pilot programs in southwest Washington and with the WSDOT. No passage through current tidegates will be required until the comprehensive plan is finished. We don't anticipate WDFW requiring passage that would cause any economic harm to landowners. Maybe we could design a tidegate that passes fish but doesn't let in saltwater. WDFW engineers are working on that; 70 to 90 percent of our estuaries have been lost due to diking, draining, and other development activities. Look for middle ground, first expanding efforts to restore salmon on public lands, for instance. Skagit Valley farmlands are critical to

birders. Maybe we could declare a six or 12-month moratorium on all actions so a third party with legislative oversight can mediate and seek solutions.

**Testified (Agriculture):** Nina Carter, Audubon Washington (concerns); Chris Cheney, Mike Shelby, Curtis Johnson, John Rooten, W Wash Ag Assoc. (pro); Bob Rose, SPF; Greg Hueckel (con); Bruce Wishart, People for Puget Sound (con); Willy O’Neil, AGC of Wash (pro).

**Testimony For (Ways & Means):** The fiscal note is testimony for why the Department of Fish and Wildlife must change their practice of placing conditions on the operations of tide gates. The intent of the bill is to get the department out of this business.

**Testimony Against (Ways & Means):** The department issued 62 HPAs over five years for the maintenance of tide gates. It’s difficult to determine the fiscal exposure to the state. The department perhaps was liberal in its use of examples in the fiscal note.

**Testified (Ways & Means):** PRO: Senator Mary Margaret Haugen, prime sponsor; Greg Hueckel, Department of Fish and Wildlife (neutral w/concerns).