
ENGROSSED SUBSTITUTE SENATE BILL 5375

State of Washington

58th Legislature

2003 Regular Session

By Senate Committee on Parks, Fish & Wildlife (originally sponsored by Senators Doumit, Oke, Haugen, Swecker, Prentice, Hale, Reardon and Rasmussen)

READ FIRST TIME 03/04/03.

1 AN ACT Relating to regulatory reform of the hydraulic project
2 approval program; amending RCW 77.55.100; adding new sections to
3 chapter 77.55 RCW; and creating a new section.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** The legislature finds that one of the
6 state's primary fish habitat protection statutes is the hydraulic
7 project approval program. This program is one of the state's oldest
8 environmental regulatory programs, and as a consequence it has been
9 developed in an incremental manner over many decades.

10 The legislature further finds that federal review of proposed in-
11 water projects under provisions of the endangered species act are in
12 most conditions the equivalent of requirements under the state's
13 hydraulic project approval process, and that requiring projects to
14 receive dual approvals causes project delays, is redundant, and may
15 lead to conflicting project conditions.

16 The legislature further finds that it would benefit the department
17 of fish and wildlife, the regulated community, and the fisheries
18 resources of the state if this important regulatory program were
19 improved with measures to improve its efficiency and predictability, as

1 well as its coordination with the many local, state, and federal fish
2 and habitat protection statutes and regulatory programs that have been
3 created since the inception of the hydraulic project approval program.

4 The legislature therefore intends to improve the process of
5 regulating construction in state waters with policy measures that
6 improve predictability for entities that work in state waters, and make
7 the best use of limited state resources by ensuring that regulatory
8 reviews of in-water construction are made in an efficient manner.

9 NEW SECTION. **Sec. 2.** A new section is added to chapter 77.55 RCW
10 to read as follows:

11 (1)(a) The department must develop general permits for common or
12 routine activities to improve the predictability and efficiency of the
13 hydraulic project approval program. At a minimum, the department must,
14 by December 2004, develop general permits for the following activities:

- 15 (i) Routine repair and maintenance of existing over-water
16 serviceable structures, including replacement of up to sixty pilings;
- 17 (ii) Minor dredging of up to ten yards of sediment from an existing
18 channel, berthing area, or boat ramp;
- 19 (iii) Routine repair and maintenance of tide gates;
- 20 (iv) Construction of mooring dolphins and fender pilings;
- 21 (v) Routine repair, maintenance, or replacement of road and highway
22 structures such as culverts and ditches;
- 23 (vi) Routine repair and maintenance of bridges; and
- 24 (vii) Geotechnical or exploratory work conducted as part of project
25 planning or development.

26 (b) The department may develop additional general permits for in-
27 water construction activities as available resources allow.

28 (2) General permits must contain conditions necessary to protect
29 fish life, and must clearly delineate predictable conditions and
30 restrictions that project applicants may incorporate into project
31 design and construction. The department must develop, in consultation
32 with an advisory committee, common technical provisions that must be
33 incorporated into general conditions for each general permit.

34 (3) The department shall post electronically and otherwise make
35 generally available the following information for each general permit:

- 36 (a) A description of activities covered;

1 (b) The conditions and practices a project applicant must follow to
2 receive coverage under the permit; and

3 (c) A notice of intent form for use by applicants to include
4 information on project location and habitat types affected.

5 (4) To receive coverage under a general permit, a project applicant
6 must:

7 (a) Send a notice of intent to follow the conditions of a general
8 permit to the department twenty-one days before construction is to
9 begin; and

10 (b) Post the general permit prominently at the worksite.

11 (5) Within ten days of receipt of a notice of intent from a project
12 applicant, the department must notify the applicant of the status of
13 general permit coverage.

14 NEW SECTION. **Sec. 3.** A new section is added to chapter 77.55 RCW
15 to read as follows:

16 (1) Certain federal, state, and local regulatory review processes
17 may provide review and protection of fish life that is equivalent to
18 the review provided by the department under this chapter. This may
19 include, among other permits, federal review of a project under the
20 endangered species act (16 U.S.C. Sec. 1531 et seq.), a federal permit
21 under section 404 of the federal water pollution control act (33 U.S.C.
22 Sec. 1251 et seq.), state review of a project under section 401 of the
23 federal water pollution control act (33 U.S.C. Sec. 1251 et seq.), or
24 local government review of a project to protect critical areas under
25 RCW 36.70A.060 or shorelines under chapter 90.58 RCW.

26 (2) At any point in project development or permitting, an applicant
27 may submit to the department a notice of intent to proceed under an
28 equivalent regulatory review. The notice must include a description of
29 the project, the habitat impacted, and the equivalent permits required
30 for the project. The department's regional manager of the hydraulic
31 project approval program shall make a determination regarding the
32 equivalency of other regulatory permits within fifteen days of
33 receiving the notice. If the notice of equivalency is approved, the
34 project is exempt from the requirement to receive hydraulic project
35 approval under this chapter. If the notice of equivalency is denied,
36 the department must provide the applicant, in writing, specific reasons
37 why the other regulatory reviews will not adequately protect fish life.

1 (3) Upon request by a county or city, the department shall certify
2 that a county or city, through its implementation of critical areas
3 protections, including fish and wildlife habitat conservation areas,
4 under RCW 36.70A.060, or development regulations implementing an
5 adopted and approved shoreline master program under chapter 90.58 RCW,
6 provides equivalent review and protection for fish life to that
7 otherwise provided by the department through issuance of a hydraulic
8 project approval. A city or county may request certification for all
9 hydraulic projects or certain hydraulic project types. If
10 certification is approved, project types specified in the certification
11 and within the jurisdiction of the city or county are exempt from the
12 requirement to receive hydraulic project approval under this chapter.
13 If the department rejects the request for certification, it shall
14 provide in writing a statement of how and why the regulations do not
15 provide equivalent protection for fish life, and provide
16 recommendations that would result in equivalency.

17 (4) Any person aggrieved by a decision under subsection (2) or (3)
18 of this section may appeal the decision according to the provisions of
19 chapter 34.05 RCW.

20 NEW SECTION. **Sec. 4.** A new section is added to chapter 77.55 RCW
21 to read as follows:

22 The department must develop procedures to ensure consistency of
23 application of hydraulic project approval conditions, to include the
24 following:

25 (1) Common technical conditions for saltwater and freshwater
26 projects. These common technical conditions must, at a minimum,
27 address allowable in-water work periods, and must recognize the need to
28 maintain an economically competitive waterfront business and port
29 community, and must meet the needs of infrastructure development as
30 defined in RCW 90.74.010;

31 (2) Internal departmental permit review procedures that promote
32 consistency within and between regions; and

33 (3) Habitat protection guidance for regional staff that result in
34 predictable permit conditions for project applicants.

35 NEW SECTION. **Sec. 5.** A new section is added to chapter 77.55 RCW
36 to read as follows:

1 (1) An expedited dispute resolution process is created to resolve
2 disputes regarding hydraulic project approvals issued under this
3 chapter. The expedited dispute resolution process may be initiated by
4 a project applicant at any point prior to issuance of the final
5 hydraulic project approval. When a project applicant requests review
6 under the expedited dispute resolution process, the forty-five day
7 period for permit issuance is suspended until the review process is
8 complete.

9 (2) When a project applicant requests the expedited dispute
10 resolution process, the department must convene an expedited dispute
11 resolution process committee within fourteen days. The expedited
12 dispute resolution process committee consists of four members:

13 (a) The project contractor or engineer;

14 (b) A department engineer;

15 (c) The department's regional program manager; and

16 (d) An engineer or public works official designated by the local
17 government with jurisdiction over the project.

18 (3) The expedited dispute resolution process committee must conduct
19 a project review to determine whether the conditions in the proposed
20 hydraulic project approval are reasonable and necessary to protect fish
21 life. By majority vote, the committee may accept the permit
22 conditions, reject the permit conditions and return the permit to the
23 department for subsequent review, or determine alternative conditions
24 to be included in the final hydraulic project approval permit.
25 Decisions of the committee are binding on the department.

26 (4) The department must provide to each project applicant notice of
27 the applicant's right to an expedited dispute resolution conference,
28 and the procedures for informal and formal appeal. This information
29 must also include:

30 (a) Contact information for the department employee who will be
31 reviewing the project;

32 (b) Contact information for the department's regional program
33 manager responsible for overseeing the regional hydraulic project
34 activities at any point prior to the approval or denial of a hydraulic
35 project approval;

36 (c) The proper address to which requests for expedited dispute
37 resolution must be sent; and

1 (d) The proper address to which informal or formal appeals must be
2 sent.

3 **Sec. 6.** RCW 77.55.100 and 2002 c 368 s 2 are each amended to read
4 as follows:

5 (1) In the event that any person or government agency desires to
6 construct any form of hydraulic project or perform other work within
7 the bed of any state waters that will use, divert, obstruct, or change
8 the natural flow or bed of any of the salt or fresh waters of the
9 state, such person or government agency shall, before commencing
10 construction or work thereon and to ensure the proper protection of
11 fish life, secure the approval of the department as to the adequacy of
12 the means proposed for the protection of fish life. This approval
13 shall not be unreasonably withheld or unreasonably conditioned.

14 (2)(a) The department shall grant or deny approval of a standard
15 permit within forty-five calendar days of the receipt of a complete
16 application and notice of compliance with any applicable requirements
17 of the state environmental policy act, made in the manner prescribed in
18 this section. The permit must contain provisions allowing for minor
19 modifications to the plans and specifications without requiring
20 reissuance of the permit.

21 (b) The applicant may document receipt of application by filing in
22 person or by registered mail. A complete application for approval
23 shall contain general plans for the overall project, complete plans and
24 specifications of the proposed construction or work within the mean
25 higher high water line in salt water or within the ordinary high water
26 line in fresh water, and complete plans and specifications for the
27 proper protection of fish life.

28 (c) The forty-five day requirement shall be suspended if:

29 (i) After ten working days of receipt of the application, the
30 applicant remains unavailable or unable to arrange for a timely field
31 evaluation of the proposed project;

32 (ii) The site is physically inaccessible for inspection; or

33 (iii) The applicant requests delay. Immediately upon determination
34 that the forty-five day period is suspended, the department shall
35 notify the applicant in writing of the reasons for the delay.

36 (d) For purposes of this section, "standard permit" means a written

1 permit issued by the department when the conditions under subsections
2 (3) and (5)(b) of this section are not met.

3 (3)(a) The department may issue an expedited written permit in
4 those instances where normal permit processing would result in
5 significant hardship for the applicant or unacceptable damage to the
6 environment. In cases of imminent danger, the department shall issue
7 an expedited written permit, upon request, for work to repair existing
8 structures, move obstructions, restore banks, protect property, or
9 protect fish resources. Expedited permit requests require a complete
10 written application as provided in subsection (2)(b) of this section
11 and shall be issued within fifteen calendar days of the receipt of a
12 complete written application. Approval of an expedited permit is valid
13 for up to sixty days from the date of issuance.

14 (b) For the purposes of this subsection, "imminent danger" means a
15 threat by weather, water flow, or other natural conditions that is
16 likely to occur within sixty days of a request for a permit
17 application.

18 (c) The department may not require the provisions of the state
19 environmental policy act, chapter 43.21C RCW, to be met as a condition
20 of issuing a permit under this subsection.

21 (d) The department or the county legislative authority may
22 determine if an imminent danger exists. The county legislative
23 authority shall notify the department, in writing, if it determines
24 that an imminent danger exists.

25 (4) Approval of a standard permit is valid for a period of up to
26 five years from date of issuance. The permittee must demonstrate
27 substantial progress on construction of that portion of the project
28 relating to the approval within two years of the date of issuance. If
29 the department denies approval, the department shall provide the
30 applicant, in writing, a statement of the specific reasons why and how
31 the proposed project would adversely affect fish life. Protection of
32 fish life shall be the only ground upon which approval may be denied or
33 conditioned. Chapter 34.05 RCW applies to any denial of project
34 approval, conditional approval, or requirements for project
35 modification upon which approval may be contingent.

36 (5)(a) In case of an emergency arising from weather or stream flow
37 conditions or other natural conditions, the department, through its
38 authorized representatives, shall issue immediately, upon request, oral

1 approval for removing any obstructions, repairing existing structures,
2 restoring stream banks, or to protect property threatened by the stream
3 or a change in the stream flow without the necessity of obtaining a
4 written approval prior to commencing work. Conditions of an oral
5 approval to protect fish life shall be established by the department
6 and reduced to writing within thirty days and complied with as provided
7 for in this section. Oral approval shall be granted immediately, upon
8 request, for a stream crossing during an emergency situation.

9 (b) For purposes of this section and RCW 77.55.110, "emergency"
10 means an immediate threat to life, the public, property, or of
11 environmental degradation.

12 (c) The department or the county legislative authority may declare
13 and continue an emergency when one or more of the criteria under (b) of
14 this subsection are met. The county legislative authority shall
15 immediately notify the department if it declares an emergency under
16 this subsection.

17 (6)(a) The department shall, at the request of a county, develop
18 renewable five-year maintenance approval agreements, consistent with
19 comprehensive flood control management plans adopted under the
20 authority of RCW 86.12.200, or other watershed plan approved by a
21 county legislative authority, to allow for work on public and private
22 property for bank stabilization, bridge repair, removal of sand bars
23 and debris, channel maintenance, and other flood damage repair and
24 reduction activity under agreed-upon conditions and times without
25 obtaining permits for specific projects.

26 (b) The department shall, at the request of any person or
27 government agency, develop a renewable five-year maintenance approval
28 agreement or a hydraulic project approval mitigation agreement to allow
29 for work on public and private property for bank stabilization, bridge
30 repair, removal of sandbars and debris, channel maintenance, and other
31 flood damage repair and reduction activity under reasonable agreed-upon
32 conditions and times without obtaining permits for specific projects.

33 (7) This section shall not apply to the construction of any form of
34 hydraulic project or other work which diverts water for agricultural
35 irrigation or stock watering purposes authorized under or recognized as
36 being valid by the state's water codes, or when such hydraulic project
37 or other work is associated with streambank stabilization to protect

1 farm and agricultural land as defined in RCW 84.34.020. These
2 irrigation or stock watering diversion and streambank stabilization
3 projects shall be governed by RCW 77.55.110.

4 A landscape management plan approved by the department and the
5 department of natural resources under RCW 76.09.350(2), shall serve as
6 a hydraulic project approval for the life of the plan if fish are
7 selected as one of the public resources for coverage under such a plan.

8 (8) For the purposes of this section and RCW 77.55.110, "bed" means
9 the land below the ordinary high water lines of state waters. This
10 definition does not include irrigation ditches, canals, storm water
11 run-off devices, or other artificial watercourses except where they
12 exist in a natural watercourse that has been altered by man.

13 (9) The phrase "to construct any form of hydraulic project or
14 perform other work" does not include the act of driving across an
15 established ford. Driving across streams or on wetted stream beds at
16 areas other than established fords requires approval. Work within the
17 ordinary high water line of state waters to construct or repair a ford
18 or crossing requires approval.

19 (10) For the purposes of this section, "sandbars" includes, but is
20 not limited to, sand, gravel, rock, silt, and sediments.

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