
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 the state's
6 primary fish habitat protection statute is the hydraulic project
7 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 installation 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, ditches, and bridges;

23 (vi) Geotechnical or exploratory work conducted as part of project
24 planning or development; and

25 (vii) Removal of beaver dams.

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) The procedural requirements of this chapter do not apply to a
17 project that receives equivalent review by federal agencies under the
18 federal endangered species act (16 U.S.C. Sec. 1531 et seq.) that meets
19 the following conditions:

20 (a)(i) The project is reviewed by the national marine fisheries
21 service or the United States fish and wildlife service for a federal
22 permit under section 7 of the federal endangered species act (16 U.S.C.
23 Sec. 1536); or (ii) the project is covered by a biological opinion,
24 letter of concurrence, or other decision document that authorizes an
25 activity under the federal endangered species act by the national
26 marine fisheries service or the United States fish and wildlife
27 service; and

28 (b) The project does not impact critical food fish habitats such as
29 Pacific herring, surf smelt, Pacific sand lance and rock sole spawning
30 beds, eelgrass, kelp, lingcod settlement and nursery areas, and
31 rockfish settlement and nursery areas.

32 (2) A project applicant must notify the department fourteen days
33 prior to beginning construction of its intent to proceed under the
34 provisions of this section. This notice must include a description of
35 the project being permitted, the habitat impacted, and the federal
36 decision documentation referenced in subsection (1)(a)(i) or (ii) of
37 this section.

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

3 The department must develop procedures to ensure consistency of
4 application of hydraulic project approval conditions, to include the
5 following:

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

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

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

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

18 (1) An expedited dispute resolution process is created to resolve
19 disputes regarding hydraulic project approvals issued under this
20 chapter. The expedited dispute resolution process may be initiated by
21 a project applicant at any point prior to issuance of the final
22 hydraulic project approval. When a project applicant requests review
23 under the expedited dispute resolution process, the forty-five day
24 period for permit issuance is suspended until the review process is
25 complete.

26 (2) When a project applicant requests the expedited dispute
27 resolution process, the department must convene an expedited dispute
28 resolution process committee within fourteen days. The expedited
29 dispute resolution process committee consists of five members:

- 30 (a) The project applicant;
31 (b) The project contractor or engineer;
32 (c) A department engineer;
33 (d) The department's regional program manager; and
34 (e) An engineer from the local government with jurisdiction over
35 the project.

36 (3) The expedited dispute resolution process committee must conduct
37 a project review to determine whether the conditions in the proposed

1 hydraulic project approval are reasonable and necessary to protect fish
2 life. By majority vote, the committee may accept the permit
3 conditions, reject the permit conditions and return the permit to the
4 department for subsequent review, or determine alternative conditions
5 to be included in the final hydraulic project approval permit.
6 Decisions of the committee are binding on the department.

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

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

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

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

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

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

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

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

4 (d) For purposes of this section, "standard permit" means a written
5 permit issued by the department when the conditions under subsections
6 (3) and (5)(b) of this section are not met.

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

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

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

25 (d) The department or the county legislative authority may
26 determine if an imminent danger exists. The county legislative
27 authority shall notify the department, in writing, if it determines
28 that an imminent danger exists.

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

1 approval, conditional approval, or requirements for project
2 modification upon which approval may be contingent.

3 (5)(a) In case of an emergency arising from weather or stream flow
4 conditions or other natural conditions, the department, through its
5 authorized representatives, shall issue immediately, upon request, oral
6 approval for removing any obstructions, repairing existing structures,
7 restoring stream banks, or to protect property threatened by the stream
8 or a change in the stream flow without the necessity of obtaining a
9 written approval prior to commencing work. Conditions of an oral
10 approval to protect fish life shall be established by the department
11 and reduced to writing within thirty days and complied with as provided
12 for in this section. Oral approval shall be granted immediately, upon
13 request, for a stream crossing during an emergency situation.

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

17 (c) The department or the county legislative authority may declare
18 and continue an emergency when one or more of the criteria under (b) of
19 this subsection are met. The county legislative authority shall
20 immediately notify the department if it declares an emergency under
21 this subsection.

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

31 (b) The department shall, at the request of a county, city, or
32 private party, develop a renewable five-year maintenance approval
33 agreement or a hydraulic project approval mitigation agreement to allow
34 for work on public and private property for bank stabilization, bridge
35 repair, removal of sandbars and debris, channel maintenance, and other
36 flood damage repair and reduction activity under reasonable agreed-upon
37 conditions and times without obtaining permits for specific projects.

1 (7) This section shall not apply to the construction of any form of
2 hydraulic project or other work which diverts water for agricultural
3 irrigation or stock watering purposes authorized under or recognized as
4 being valid by the state's water codes, or when such hydraulic project
5 or other work is associated with streambank stabilization to protect
6 farm and agricultural land as defined in RCW 84.34.020. These
7 irrigation or stock watering diversion and streambank stabilization
8 projects shall be governed by RCW 77.55.110.

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

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

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

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

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