

HOUSE BILL REPORT

HB 1428

As Reported by House Committee On:
Agriculture & Natural Resources

Title: An act relating to construction projects in state waters.

Brief Description: Concerning construction projects in state waters.

Sponsors: Representatives Blake, Fitzgibbon, Lytton, Morris and Tharinger; by request of Department of Fish and Wildlife.

Brief History:

Committee Activity:

Agriculture & Natural Resources: 2/2/17, 2/9/17, 2/16/17 [DPS].

Brief Summary of Substitute Bill

- Expands the scope of projects that qualify for expedited Hydraulic Project Approval (HPA) review and approval as fish habitat enhancement projects.
- Changes the fee structure for HPAs, from a flat fee for projects of all sizes to a variable fee based on, among other things, the complexity of the project.
- Requires the Washington Department of Fish and Wildlife (WDFW) to refund all or part of the permit processing fee under certain conditions.
- Describes the scope of hydraulic projects required to obtain the WDFW's approval.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Blake, Chair; Chapman, Vice Chair; Kretz, Lytton, Pettigrew, Robinson, Schmick, Springer and J. Walsh.

Minority Report: Do not pass. Signed by 5 members: Representatives Buys, Ranking Minority Member; Dent, Assistant Ranking Minority Member; Chandler, Orcutt and Stanford.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Minority Report: Without recommendation. Signed by 1 member: Representative Fitzgibbon.

Staff: Robert Hatfield (786-7117).

Background:

Hydraulic Project Approvals.

A person must obtain a Hydraulic Project Approval (HPA) prior to commencing any construction project that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state. Hydraulic Project Approvals are issued by the Washington Department of Fish and Wildlife (WDFW) to ensure the proper protection of fish life. To receive an HPA, the applicant must provide certain information to the WDFW. This information includes general plans for the overall project and complete plans for the proper protection of fish life.

Hydraulic Project Approval Fees.

Most applicants for an HPA are required to pay a \$150 application fee. The application fee is currently due to expire June 30, 2017.

Certain activities are exempt from the application fee requirement. These include, for example, projects located above the ordinary high water line, certain noxious weed control projects, mineral prospecting and mining projects, HPAs related to forest practices hydraulic projects, and HPAs occurring on farm or agricultural land.

The Joint Aquatic Resource Permit Application.

The Joint Aquatic Resource Permit Application (JARPA) process was developed by the Office for Regulatory Innovation and Assistance to assist in obtaining various local, state, and federal permits for activities associated with aquatic resources in Washington. The JARPA includes a standardized form application, but also requires submittal of additional documentation as necessary to meet the permitting requirements of each agency that uses the JARPA.

Hydraulic Project Approvals for Fish Habitat Enhancement.

Certain fish habitat enhancement projects may qualify for a streamlined administrative review and approval process by the WDFW. These projects are expected to result in beneficial impacts to the environment, and if they qualify for streamlined review, the projects will receive a decision regarding the associated HPA within 45 days. This streamlined review is available for projects of an adequate size or scale that either eliminate human made or caused fish passage barriers, restore eroded or unstable stream banks, or involve the placement of woody debris into the water.

Not all fish habitat enhancement projects are eligible for a streamlined review. To be eligible, the projects must also be approved for specific and limited purposes by the WDFW, a conservation district, the Washington State Department of Transportation, a city or county, or other formal review and approval processes.

In addition to a streamlined HPA process, projects that meet the criteria for fish habitat enhancement projects are eligible for exemption from the State Environmental Policy Act and exemption from local government permits and fees.

Applicants for fish habitat enhancement projects must submit a JARPA form. Applicants must also provide completed copies of the application to each appropriate local government.

Summary of Substitute Bill:

Fish Habitat Enhancement Projects.

The scope of projects that qualify for expedited HPA review and approval as fish habitat enhancement projects is expanded to include:

- the placement of spawning material or other habitat structures;
- restoration of marine and lake shorelines by removing armoring and other hard shoreline stabilization structures; and
- restoration of marine and lake shorelines by removing docks and other human-made structures.

A fish habitat enhancement project does not qualify for expedited HPA review and approval if the WDFW or the local government determines it raises environmental and public health and safety concerns, or if the WDFW determines that fish or fish habitat would be adversely impacted by the project.

In order to obtain the expedited HPA review and approval process for fish habitat enhancement projects, a project must be approved by one of a number of different entities, including a tribe as a tribal sponsored fish habitat enhancement or restoration project.

A project applicant must use either the WDFW's online permit application system or the JARPA form. Upon receipt of a complete application, the WDFW shall notify the local government that the application is available for review. The WDFW shall provide a 30-day comment period to receive comments regarding environmental and public health and safety impacts.

Fee-exempt Modifications.

Certain modifications to an HPA permit are exempt from all HPA fees, including minor modifications to the plans and specifications, minor modifications to the required work timing, and transfer of a permit.

Scope of Projects Required to Obtain Approval from the Washington Department of Fish and Wildlife.

A HPA is required for the following hydraulic projects:

- any hydraulic project conducted at or below the ordinary high water line, and associated upland components;
- shoreline or stream bank protection; bank alteration; dike or levee construction; avulsion prevention techniques; floodplain or tidal channel fill; channel creation or alteration; floodplain mining; or mineral prospecting; and

- new and replacement bridge construction; replacement, repair, and maintenance of substructure and superstructure; abutments; wing walls; piers; scour protection; and bridge painting and maintenance under certain circumstances, except where the work is conducted in compliance with a National Pollution Discharge Elimination System permit issued by the Washington Department of Ecology.

Hydraulic Project Approval Fees.

The WDFW must charge fees for HPAs in order to recover a portion of the cost for processing permit applications, including issuing decisions, administering fee collections, and compliance monitoring. The fees must be based on the scale and complexity of the project and the effort required by the WDFW staff to process the application. The fees vary based on the complexity of the project and whether the fee is for an initial application fee or for a modification to a project.

Beginning January 1, 2018, the WDFW is directed to charge a base application submittal fee, ranging from \$150 for a low complexity project, to \$250 for a medium complexity project, to \$500 for a high complexity project, to \$1,000 for a general HPA.

In addition to the base fees described above, the WDFW is directed to charge an additional modification fee, ranging from \$100 for modifications to low complexity projects, to \$125 for modifications to medium complexity projects, to \$250 for high complexity projects, to \$500 for modifications to general HPAs.

Certain hydraulic projects are exempt from all HPA fees, including fish habitat enhancement projects. The current exemption from HPA fees for projects above the ordinary high water line is removed.

The WDFW must refund 50 percent of the permit processing fee to any person that properly applies for a permit if the WDFW fails to process the application within the timelines required by the hydraulic code.

The WDFW must refund 100 percent of the permit processing fee under certain conditions, including where no permit is required for the proposed work.

The WDFW must report to the Legislature on the progress of the HPA program every two years before submitting its biennial operating budget to the Office of Financial Management.

Substitute Bill Compared to Original Bill:

Provisions regarding bulkheads, stop-work orders, notices to comply, civil penalties, and inspection warrants are eliminated. A description of the scope of hydraulic projects required to obtain the WDFW's approval is added.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 17, 2017.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This is an important bill to support the state's investments in salmon protection. Fisheries are important to Washington's local economies. It makes sense to reduce the extent to which the WDFW asks for different documentation than local permitting authorities, and to increase the extent to which the WDFW asks for similar documentation as local permitting authorities. The WDFW will work to achieve compliance with technical assistance first. One of the goals of the bill is to help people be in compliance with the law. The 2002 HPA task force suggested that civil compliance should be completed by different staff other than the staff who issued the permit. The WDFW would like to process permits faster than they currently do, which motivates the request for more funding through fee increases.

The purpose of this bill is to bring the HPA process into the twenty-first century. This bill will harmonize HPA requirements with requirements under the Shoreline Management Act, so that applicants do not get conflicting decisions. The WDFW is currently relying on criminal statutes to enforce violations of HPAs, and it makes more sense to use civil enforcement authority.

The bill increases the civil penalty considerably because the current \$100 fee can be seen as a cost of doing business. There needs to be an incentive to not damage critical habitat. The regulated community asked for a penalty schedule, and the bill calls for that. The program is currently critically underfunded.

The health of salmon stocks in Puget Sound is not good, and one key reason for that is loss of habitat. One of the key habitats in Puget Sound is the intertidal region, and bank armoring is one of the causes of the loss of the intertidal region in Puget Sound. We are installing bank armoring in Puget Sound at a rate faster than we are removing it, and that needs to change for the health of salmon populations. It is important to require that you need to show that you need a bulkhead before you are allowed to build a bulkhead. The bulkhead provisions would be very helpful for the restoration of Puget Sound salmon stocks. Habitat Project Approvals are one of the most important tools that the WDFW has to protect salmon habitat. Without funding, the WDFW will not have money to process HPAs, and that is not good for fish or people. The bill builds in oversight by the Legislature.

(Opposed) Members of the business community have had good experiences with the HPA process as it currently exists. The WDFW has sometimes applied HPA requirements inconsistently, sometimes above the ordinary high water line. There should be more predictability in the applicability of HPAs. The HPA process is sometimes the fastest part of the various permits needed to do work along shorelines. Rate increases are not needed to improve HPA processing times. The bill's proposed changes to the construction of bulkheads will make permitting projects much more difficult.

If the WDFW jurisdiction will be expanded, it is important to identify where that jurisdiction will start and stop in order to provide clarity and certainty to both the WDFW staff and the regulated community. A 2012 University of Washington report indicated that the ecological

consequences or armoring are poorly understood, and a 2010 study made a similar finding. Attorney fees should not be recoverable for the liability phase of any civil penalty. It is all right if attorney fees are available to recover on a civil penalty that has become final and past due. Attorney fees should be available to both sides. The bill does not appear to address sediment removal to improve the health of the water body, and there does not appear to be any move toward letting volunteers to participate in stream restoration without the impediment of the need to get a HPA. Citizen restoration groups should be allowed to go into a water body to remove the fine sediments and bring the gravel back. There should be a pamphlet HPA for sediment removal.

The fee for HPAs should stay at its current level. Bulkheads should be permitted as part of the Shoreline Management Act approval process, there should not be two separate processes. The bill's proposed fee increases come from good intentions gone awry, and it is not clear that the fees need to be increased. Avista biologists have a good working relationship with the WDFW employees. Avista understands the need to reauthorize the fee, but is disappointed to see a bill that goes well beyond that. Avista is not asking for the HPA program to be expanded or for more staff.

Persons Testifying: (In support) Representative Blake, prime sponsor; Jeff Davis, Department of Fish and Wildlife; Bruce Wishart, Sound Action; Jay Manning and Laura Blackmore, Puget Sound Partnership; and Dawn Vyvyan, Yakama, Puyallup, and Sauk-Suiattle Tribes.

(Opposed) Michael Ennis, Association of Washington Business; Logan Brown, Marine Floats Corporation; Jan Himebaugh, Building Industry Association of Washington; Stephen Whitehouse; Kurt Spingath; Jamie Stephens, Washington State Association of Counties; Christine Brewer, Avista Company; and Tom Davis, Washington Farm Bureau.

Persons Signed In To Testify But Not Testifying: None.