

HOUSE BILL ANALYSIS

HB 2976

Title: An act relating to directing the Washington department of fish and wildlife to seek endangered species act compliance for hydraulic projects permitted by the department.

Brief Description: Concerning the development of an endangered species compliance agreement.

Sponsors: Representatives Regala and Buck.

HOUSE COMMITTEE ON NATURAL RESOURCES

Meeting Date: February 1, 2000.

Bill Analysis Prepared by: Josh Weiss, Counsel (786-7129)

Background:

Any person or government agency wishing to construct any form of hydraulic project or perform any other work that will use, divert, obstruct, or change the natural flow or bed of waters of the state must receive a permit from the Washington Department of Fish and Wildlife. A Hydraulic Project Approval (HPA) is a permit issued by the department for such activities, and may be approved, conditioned, or denied based solely on the protection of fish life. The department processes between 6,000 to 8,000 HPA applications a year.

Receipt of such an approval provides the applicant with assurance that the approved activities will comply with the state hydraulic code and other state laws. However, this state-issued permit does not ensure that the activities will comply with federal law. This is especially relevant considering the recent listing of several Washington salmon runs as endangered and threatened under the federal Endangered Species Act (ESA). A person is liable under the ESA for the "take" of any endangered species, regardless of whether the activity leading to the "take" has been permitted by state law. A person will be similarly liable for the "take" of threatened species, through a rule currently being proposed by the National Marine Fisheries Service (NMFS). There is considerable question as to whether the department could also be held liable for issuing permits which subsequently lead to the "take" of a listed species.

In an attempt to determine what, if any, action should be taken to address these issues, the department has gathered public input over a 74 day comment period through six public meetings. The department identified seven possible responses to the potential liability that exists for HPA applicants and the department. The department could take no action to address potential liability, or could submit the existing HPA program to the appropriate federal agencies for possible approval. The department could rely on the interagency consultations that federal agencies are required to make under the ESA. These consultations are required on projects that involve some level of federal activity, such as when a federal agency itself applies for an HPA.

The department could also apply with NMFS for an incidental take permit, which would allow a permittee to legally proceed with an activity that would otherwise result in the "take" of a listed species. In order to secure such a permit, the department would have to negotiate a habitat conservation plan that would mitigate the taking of the listed species. NMFS has indicated a willingness to issue incidental take permits for entire permitting programs where: 1) the agreement has a substantive component that will protect the listed species, 2) there is certainty of implementation of the program including adequate funding, and 3) the program includes a monitoring element such as adaptive management. NMFS agreed to issue such a permit for the Department of Natural Resources forest practices permitting program.

Finally, the department could combine some or all of the previously listed alternatives, or could complete a further study of the possible options.

Beyond gathering public input, the department has not pursued any of these alternatives, and has indicated a desire for legislative input.

Summary of Bill:

The Legislature makes a finding that there is a risk of liability for individuals performing activities that have an impact on salmon habitat, and that there is a potential that the department is liable for permitting such activities. The Legislature recognizes that the department has identified seven different options for addressing this risk, and directs the department to meet with NMFS and the U.S. Fish and Wildlife Service to discuss an endangered species compliance agreement.

The department is directed to enter into negotiations with NMFS to develop an endangered species compliance agreement for the HPA program. If required by NMFS, the department is authorized to enter into negotiations with other federal agencies, including the Environmental Protection Agency in order to obtain Clean Water Act assurances.

The department must ensure that the endangered species compliance agreement includes a process for streamlining and integrating the HPA program with other permitting programs, including forest practices.

The department is required to update existing rules and adopt new rules to implement the endangered species compliance agreement.

Appropriation: None.

Fiscal Note: Requested January 28, 2000.

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

Rulemaking Authority: Department of Fish and Wildlife.