

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 2866

Chapter 368, Laws of 2002

(partial veto)

57th Legislature
2002 Regular Session

HYDRAULIC PERMITS

EFFECTIVE DATE: 6/13/02

Passed by the House March 11, 2002
Yeas 61 Nays 35

FRANK CHOPP
Speaker of the House of Representatives

Passed by the Senate March 8, 2002
Yeas 30 Nays 18

BRAD OWEN
President of the Senate

Approved April 5, 2002, with the
exception of section 6, which is
vetoed.

GARY LOCKE
Governor of the State of Washington

CERTIFICATE

I, Cynthia Zehnder, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 2866** as passed by the House of Representatives and the Senate on the dates hereon set forth.

CYNTHIA ZEHNDER

Chief Clerk

FILED

April 5, 2002 - 12:06 p.m.

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE HOUSE BILL 2866

AS AMENDED BY THE SENATE

Passed Legislature - 2002 Regular Session

State of Washington

57th Legislature

2002 Regular Session

By House Committee on Natural Resources (originally sponsored by Representatives Doumit, Sump, Reardon, Schoesler, Linville, Kessler, Morris, Mulliken, Hatfield, Pearson, Grant, Armstrong and McMorris)

Read first time 02/08/2002. Referred to Committee on .

1 AN ACT Relating to hydraulic permits; amending RCW 77.55.100,
2 77.55.110, 77.55.170, and 77.55.220; adding new sections to chapter
3 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 hydraulic project
6 approvals should ensure that fish life is properly protected, but
7 conditions attached to the approval of these permits must reasonably
8 relate to the potential harm that the projects may produce. The
9 legislature is particularly concerned over the current overlap of
10 agency jurisdiction regarding storm water projects, and believes that
11 there is an immediate need to address this issue to ensure that project
12 applicants are not given conflicting directions over project design.
13 Requiring a major redesign of a project results in major delays,
14 produces exponentially rising costs for both public and private project
15 applicants, and frequently produces only marginal benefits for fish.

16 The legislature recognizes that the department of ecology is
17 primarily responsible for the approval of storm water projects. The
18 legislature believes that once the department of ecology approves a
19 proposed storm water project, it is inappropriate for the department of

1 fish and wildlife to require a major redesign of that project in order
2 for the applicant to obtain hydraulic project approval. The
3 legislature further believes that it is more appropriate for the
4 department of fish and wildlife to defer the design elements of a storm
5 water project to the department of ecology and focus its own efforts on
6 determining reasonable mitigation or conditions for the project based
7 upon the project's potential harm to fish. It is the intent of the
8 legislature to restore some balance over conditions attached to
9 hydraulic permits, and to minimize overlapping state regulatory
10 authority regarding storm water projects in order to reduce waste in
11 both time and money while still providing ample protection for fish
12 life.

13 **Sec. 2.** RCW 77.55.100 and 2000 c 107 s 16 are each amended to read
14 as follows:

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

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

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

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

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

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

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

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

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

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

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

29 (d) The department or the county legislative authority may
30 determine if an imminent danger exists. The county legislative
31 authority shall notify the department, in writing, if it determines
32 that an imminent danger exists.

33 (4) Approval of a standard permit is valid for a period of up to
34 five years from date of issuance. The permittee must demonstrate
35 substantial progress on construction of that portion of the project
36 relating to the approval within two years of the date of issuance. If
37 the department denies approval, the department shall provide the
38 applicant, in writing, a statement of the specific reasons why and how
39 the proposed project would adversely affect fish life. Protection of

1 fish life shall be the only ground upon which approval may be denied or
2 conditioned. Chapter 34.05 RCW applies to any denial of project
3 approval, conditional approval, or requirements for project
4 modification upon which approval may be contingent.

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

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

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

24 (6) The department shall, at the request of a county, develop five-
25 year maintenance approval agreements, consistent with comprehensive
26 flood control management plans adopted under the authority of RCW
27 86.12.200, or other watershed plan approved by a county legislative
28 authority, to allow for work on public and private property for bank
29 stabilization, bridge repair, removal of sand bars and debris, channel
30 maintenance, and other flood damage repair and reduction activity under
31 agreed-upon conditions and times without obtaining permits for specific
32 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
38 farm and agricultural land as defined in RCW 84.34.020. These

1 irrigation or stock watering diversion and streambank stabilization
2 projects shall be governed by RCW 77.55.110.

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

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

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

18 **Sec. 3.** RCW 77.55.110 and 1998 c 190 s 88 are each amended to read
19 as follows:

20 In the event that any person or government agency desires to
21 construct any form of hydraulic project or other work that diverts
22 water for agricultural irrigation or stock watering purposes, or when
23 such hydraulic project or other work is associated with streambank
24 stabilization to protect farm and agricultural land as defined in RCW
25 84.34.020, and when such diversion or streambank stabilization will
26 use, divert, obstruct, or change the natural flow or bed of any river
27 or stream or will utilize any waters of the state or materials from the
28 stream beds, the person or government agency shall, before commencing
29 construction or work thereon and to ensure the proper protection of
30 fish life, secure a written approval from the department as to the
31 adequacy of the means proposed for the protection of fish life. This
32 approval shall not be unreasonably withheld or unreasonably
33 conditioned. (~~(Except as provided in RCW 75.20.1001,)~~) The department
34 shall grant or deny the approval within forty-five calendar days of the
35 receipt of a complete application and notice of compliance with any
36 applicable requirements of the state environmental policy act, made in
37 the manner prescribed in this section. The permit must contain
38 provisions allowing for minor modifications to the plans and

1 specifications without requiring reissuance of the permit. The
2 applicant may document receipt of application by filing in person or by
3 registered mail. A complete application for an approval shall contain
4 general plans for the overall project, complete plans and
5 specifications of the proposed construction or work within ordinary
6 high water line, and complete plans and specifications for the proper
7 protection of fish life. The forty-five day requirement shall be
8 suspended if (1) after ten working days of receipt of the application,
9 the applicant remains unavailable or unable to arrange for a timely
10 field evaluation of the proposed project; (2) the site is physically
11 inaccessible for inspection; or (3) the applicant requests delay.

12 Immediately upon determination that the forty-five day period is
13 suspended, the department shall notify the applicant in writing of the
14 reasons for the delay.

15 An approval shall remain in effect without need for periodic
16 renewal for projects that divert water for agricultural irrigation or
17 stock watering purposes and that involve seasonal construction or other
18 work. Approval for streambank stabilization projects shall remain in
19 effect without need for periodic renewal if the problem causing the
20 need for the streambank stabilization occurs on an annual or more
21 frequent basis. The permittee must notify the appropriate agency
22 before commencing the construction or other work within the area
23 covered by the approval.

24 The permittee must demonstrate substantial progress on construction
25 of that portion of the project relating to the approval within two
26 years of the date of issuance. If the department denies approval, the
27 department shall provide the applicant, in writing, a statement of the
28 specific reasons why and how the proposed project would adversely
29 affect fish life. Protection of fish life shall be the only ground
30 upon which approval may be denied or conditioned. Issuance, denial,
31 conditioning, or modification shall be appealable to the hydraulic
32 appeals board established in RCW 43.21B.005 within thirty days of the
33 notice of decision. The burden shall be upon the department to show
34 that the denial or conditioning of an approval is solely aimed at the
35 protection of fish life.

36 The department may, after consultation with the permittee, modify
37 an approval due to changed conditions. The modifications shall become
38 effective unless appealed to the hydraulic appeals board within thirty
39 days from the notice of the proposed modification. The burden is on

1 the department to show that changed conditions warrant the modification
2 in order to protect fish life.

3 A permittee may request modification of an approval due to changed
4 conditions. The request shall be processed within forty-five calendar
5 days of receipt of the written request. A decision by the department
6 may be appealed to the hydraulic appeals board within thirty days of
7 the notice of the decision. The burden is on the permittee to show
8 that changed conditions warrant the requested modification and that
9 such modification will not impair fish life.

10 In case of an emergency arising from weather or stream flow
11 conditions or other natural conditions, the department, through its
12 authorized representatives, shall issue immediately upon request oral
13 approval for removing any obstructions, repairing existing structures,
14 restoring stream banks, or to protect property threatened by the stream
15 or a change in the stream flow without the necessity of obtaining a
16 written approval prior to commencing work. Conditions of an oral
17 approval shall be reduced to writing within thirty days and complied
18 with as provided for in this section.

19 For purposes of this chapter, "streambank stabilization" shall
20 include but not be limited to log and debris removal, bank protection
21 (including riprap, jetties, and groins), gravel removal and erosion
22 control.

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

25 (1) Notwithstanding any other provision of this chapter, all
26 hydraulic project approvals related to storm water discharges must
27 follow the provisions established in this section.

28 (2) Hydraulic project approvals issued in locations covered by a
29 national pollution discharge elimination system municipal storm water
30 general permit may not be conditioned or denied for water quality or
31 quantity impacts arising from storm water discharges. A hydraulic
32 project approval is required only for the actual construction of any
33 storm water outfall or associated structures pursuant to this chapter.

34 (3)(a) In locations not covered by a national pollution discharge
35 elimination system municipal storm water general permit, the department
36 may issue hydraulic project approvals that contain provisions that
37 protect fish life from adverse effects, such as scouring or erosion of

1 the bed of the water body, resulting from the direct hydraulic impacts
2 of the discharge.

3 (b) Prior to the issuance of a hydraulic project approval issued
4 under this subsection (3), the department must:

5 (i) Make a finding that the discharge from the outfall will cause
6 harmful effects to fish life;

7 (ii) Transmit the findings to the applicant and to the city or
8 county where the project is being proposed; and

9 (iii) Allow the applicant an opportunity to use local ordinances or
10 other mechanisms to avoid the adverse effects resulting from the direct
11 hydraulic discharge. The forty-five day requirement for hydraulic
12 project approval issuance pursuant to RCW 77.55.100 is suspended during
13 the time period the department is meeting the requirements of this
14 subsection (3)(b).

15 (c) After following the procedures set forth in (b) of this
16 subsection, the department may issue a hydraulic project approval that
17 prescribes the discharge rates from an outfall structure that will
18 prevent adverse effects to the bed or flow of the waterway. The
19 department may recommend, but not specify, the measures required to
20 meet these discharge rates. The department may not require changes to
21 the project design above the mean higher high water mark of marine
22 waters, or the ordinary high water mark of fresh waters of the state.
23 Nothing in this section alters any authority the department may have to
24 regulate other types of projects under this chapter.

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

27 Conditions imposed upon hydraulic project approvals must be
28 reasonably related to the project. The conditions must ensure that the
29 project provides proper protection for fish life, but the department
30 may not impose conditions that attempt to optimize conditions for fish
31 life that are out of proportion to the impact of the proposed project.

32 **Sec. 6. RCW 77.55.170 and 2000 c 107 s 20 are each amended to*
33 *read as follows:*

34 *(1) There is hereby created within the environmental hearings*
35 *office under RCW 43.21B.005 the hydraulic appeals board of the state of*
36 *Washington.*

1 (2) The hydraulic appeals board shall consist of (~~three~~) six
2 members: The director of the department of ecology or the director's
3 designee, the director of the department of agriculture or the
4 director's designee, (~~and~~) the director or the director's designee of
5 the department whose action is appealed under subsection (6) of this
6 section, and three local government members. One of the local
7 government members must be appointed by the Washington state
8 association of counties, one of the local government members must be
9 appointed by the association of Washington cities, and one of the local
10 government members must be appointed by the Washington public ports
11 association. The local government members serve at the pleasure of
12 their respective associations. A decision must be agreed to by at
13 least (~~two~~) four members of the board to be final.

14 (3) The board may adopt rules necessary for the conduct of its
15 powers and duties or for transacting other official business.

16 (4) The board shall make findings of fact and prepare a written
17 decision in each case decided by it, and that finding and decision
18 shall be effective upon being signed by (~~two~~) four or more board
19 members and upon being filed at the hydraulic appeals board's principal
20 office, and shall be open to public inspection at all reasonable times.

21 (5) The board has exclusive jurisdiction to hear appeals arising
22 from the approval, denial, conditioning, or modification of a hydraulic
23 approval issued by the department: (a) Under the authority granted in
24 RCW 77.55.110 for the diversion of water for agricultural irrigation or
25 stock watering purposes or when associated with streambank
26 stabilization to protect farm and agricultural land as defined in RCW
27 84.34.020; or (b) under the authority granted in RCW 77.55.230 for off-
28 site mitigation proposals.

29 (6)(a) Any person aggrieved by the approval, denial, conditioning,
30 or modification of a hydraulic approval pursuant to RCW 77.55.110 may
31 seek review from the board by filing a request for the same within
32 thirty days of notice of the approval, denial, conditioning, or
33 modification of such approval.

34 (b) The review proceedings authorized in (a) of this subsection are
35 subject to the provisions of chapter 34.05 RCW pertaining to procedures
36 in adjudicative proceedings.

37 *Sec. 6 was vetoed. See message at end of chapter.

1 **Sec. 7.** RCW 77.55.220 and 1996 c 192 s 2 are each amended to read
2 as follows:

3 (1) The definitions in this subsection apply throughout this
4 section unless the context clearly requires otherwise.

5 (a) "Marina" means a public or private facility providing boat
6 moorage space, fuel, or commercial services. Commercial services
7 include but are not limited to overnight or live-aboard boating
8 accommodations.

9 (b) "Marine terminal" means a public or private commercial wharf
10 located in the navigable water of the state and used, or intended to be
11 used, as a port or facility for the storing, handling, transferring, or
12 transporting of goods to and from vessels.

13 (2) For a marina or marine terminal in existence on June 6, 1996,
14 or a marina or marine terminal that has received a hydraulic project
15 approval for its initial construction, a renewable, five-year hydraulic
16 project approval shall be issued, upon request, for regular maintenance
17 activities of the marina or marine terminal.

18 (3) Upon construction of a new marina or marine terminal that has
19 received hydraulic project approval, a renewable, five-year hydraulic
20 project approval shall be issued, upon request, for regular maintenance
21 activities of the marina or marine terminal.

22 (4) For the purposes of this section, regular maintenance
23 activities are only those activities necessary to restore the marina or
24 marine terminal to the conditions approved in the initial hydraulic
25 project approval. These activities may include, but are not limited
26 to, dredging, piling replacement, and float replacement.

27 (5) The five-year permit must include a requirement that a
28 fourteen-day notice be given to the department before regular
29 maintenance activities begin.

Passed the House March 11, 2002.

Passed the Senate March 8, 2002.

Approved by the Governor April 5, 2002, with the exception of
certain items that were vetoed.

Filed in Office of Secretary of State April 5, 2002.

1 Note: Governor's explanation of partial veto is as follows:

2 "I am returning herewith, without my approval as to section 6,
3 Engrossed Substitute House Bill No. 2866 entitled:

4 "AN ACT Relating to hydraulic permits;"

1 Engrossed Substitute House Bill No. 2866 makes changes to the
2 hydraulic project approval (HPA) statute and adds members to the
3 Hydraulic Appeals Board.

4 Section 6 of the bill would have added three members to the
5 Hydraulics Appeals Board - one to be appointed by the Association of
6 Washington Cities, one by the Association of Washington Counties, and
7 one by the Washington Public Ports Association - to serve at the
8 pleasure of those associations. These associations should not control
9 half of a quasi-judicial board that hears appeals in which the
10 associations very often have a stake.

11 In reviewing the bill, I am also concerned about sections 4 and 5.
12 These sections address the relationship between HPA permits and general
13 storm water permits, and how the Department of Fish and Wildlife (WDFW)
14 may condition the issuance of an HPA permit.

15 Although I have decided not to veto sections 4 and 5, I am
16 concerned that these sections could limit the ability of WDFW to
17 provide protection for fish through the HPA process. There has not
18 been a sufficient examination of whether the storm water manual, local
19 ordinances, or "other mechanisms" would be adequate substitutes for the
20 conditions that the department would consider. The consequence could
21 be to tie the hands of the department in the implementation of one of
22 its only regulatory programs for fish habitat protection without
23 adequate assurance that the alternative will provide the necessary
24 level of protection.

25 The supplemental operating budget includes a provision requiring
26 WDFW to establish a hydraulic project approval (HPA) program technical
27 review task force. This task force is to conduct a thorough evaluation
28 of the HPA program and make recommendations to the legislature by
29 November of this year. I am requesting that this task force also
30 address the question of the overlap of state statutory requirements and
31 local programs, to determine whether they adequately address impacts
32 covered by the HPA process.

33 There is an opportunity to streamline these processes and clarify
34 regulatory authority. However, we must make these improvements in a
35 manner that will protect critical salmon habitat, and maintain the
36 ability of our state agencies to provide such protection. I expect
37 that the HPA task force will make recommendations to accomplish this.

38 For the reasons indicated above, I have vetoed section 6 of
39 Engrossed Substitute House Bill No. 2866.

40 With the exception of section 6, Engrossed Substitute House Bill
41 No. 2866 is approved."