

# HOUSE BILL REPORT

## SSB 5345

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**As Reported by House Committee On:**  
Agriculture & Natural Resources  
Appropriations

**Title:** An act relating to drainage infrastructure.

**Brief Description:** Excluding certain drainage infrastructure from fishway provisions.

**Sponsors:** Senate Committee on Agriculture (originally sponsored by Senators Haugen, Swecker, Doumit, Morton, Rasmussen, Hargrove and Horn).

**Brief History:**

**Committee Activity:**

Agriculture & Natural Resources: 4/2/03, 4/4/03 [DPA];  
Appropriations: 4/5/03, 4/7/03 [DPA(AGNR)].

**Brief Summary of Substitute Bill  
(As Amended by House Committee)**

- Prohibits the Department of Fish and Wildlife (DFW) from requiring the installation of a self-regulating tide gate (SRT) as a condition of hydraulic project approval (HPA) unless certain conditions are satisfied.
- Exempts tide gates or flood gates from statutory fish passage requirements.
- Establishes criteria the DFW must use when implementing fish passage requirements or imposing HPA conditions for any drainage infrastructure projects on agricultural lands of long-term commercial significance.
- Creates a task force to address issues related to agricultural drainage systems and provides for the task force to conduct specified assessments.
- Requires the DFW to create a salmon habitat restoration plan for all public lands in Skagit County.

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### HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

**Majority Report:** Do pass as amended. Signed by 13 members: Representatives Linville, Chair; Rockefeller, Vice Chair; Schoesler, Ranking Minority Member; Holmquist, Assistant Ranking Minority Member; Kristiansen, Assistant Ranking Minority

Member; Chandler, Eickmeyer, Grant, Hunt, McDermott, Orcutt, Quall and Sump.

**Staff:** Caroleen Dineen (786-7156).

**Background:**

The Growth Management Act (GMA) requires counties and cities meeting certain population and growth criteria to plan under its major requirements. All counties and cities must satisfy certain GMA requirements, including identification and protection of critical areas and designation of natural resource lands of long-term commercial significance. The term "natural resource lands" for purposes of the GMA includes agricultural, forest, and mineral resource lands.

The hydraulics code requires any obstruction across or in a stream to be provided with a durable and effective fishway approved by the Director of the Department of Fish and Wildlife (DFW). A failure to provide, maintain, or operate a fishway is a gross misdemeanor. After notice, the Director may remove an obstruction at the owner's expense or destroy it as a public nuisance.

If a person or agency wishes to construct any form of hydraulic project or perform other work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state, the person must secure hydraulic project approval (HPA) from the DFW regarding the adequacy of the means proposed for the protection of fish life. The DFW may levy a civil penalty of up to \$100 per day for violation of this requirement.

Two recent HPA decisions involved installation of self-regulating tide gates (SRTs). Skagit County Dike District No. 22 applied for a HPA to replace an existing four-foot pipe and tide gate on Dry Slough. The HPA issued by the DFW required the replacement culvert to be fitted with a SRT. The HPA conditions have been appealed to the Hydraulic Appeals Board. The other decision involved Skagit County Public Works Department's request for a HPA to disable the regulating float system on a SRT installed on Edison Slough in 2000 and operate it as a standard tide gate for 24 months. The DFW denied the request, and the Skagit County Public Works Department requested an informal review of the denial.

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**Summary of Amended Bill:**

Department of Fish and Wildlife Requirements

Provisions addressing the Department of Fish and Wildlife's (DFW's) authority related to agricultural drainage systems are added to the hydraulics code (chapter 77.55 RCW). The term "other obstruction" as used in the fish passage requirements does not include

tide gates or flood gates originally installed as part of an agricultural drainage system on or before the effective date of the legislation or to the repair, replacement, or improvement of these gates. The DFW may not require the installation of a self-regulating tide gate (SRT) as a condition of hydraulic project approval (HPA) for maintenance or replacement of agricultural drainage systems unless:

- the condition is consistent with a salmon recovery plan adopted according to salmon recovery statutory requirements or the provisions of this legislation;
- the affected land owners and the associated diking and drainage district agree to the installation; and
- all impacts have been fully compensated.

Any existing HPA condition requiring a SRT to achieve fish passage may not be enforced.

The DFW is required to comply with a set of criteria when implementing fish passage requirements or when imposing HPA conditions for any projects or work on or related to drainage infrastructure on agricultural lands of long-term commercial significance designated according to the Growth Management Act (GMA). First, the DFW must employ a standard of no net loss of agricultural activity on designated agricultural land and establish mechanisms, create conditions, and design strategies to effectuate this standard. Second, the DFW must consider the quantity and quality of habitat needed to ensure fish protection within the particular watershed and determine the potential for voluntary agreements to provide needed fish protection. Third, the DFW must prepare an environmental assessment of the fish protection benefits and the impacts to drainage infrastructure on designated agricultural lands and on public or private drainage or other infrastructure. Fourth, the DFW must prepare an economic assessment of impacts to drainage infrastructure on designated agricultural lands and impacts to public or private drainage or other infrastructure. Finally, the DFW must identify sources to pay for financial impacts on designated agricultural lands.

Upon request of an affected owner of designated agricultural land or the associated diking and drainage district, the DFW must provide and pay for the removal of the self-regulating function of any SRT installed because of a condition imposed by the DFW in a HPA or during implementation of fish passage requirements. The DFW must make this work a priority and complete it within 90 days of request. The DFW's payment for this work must be from existing DFW resources.

#### Task Force Creation

A task force of 13 members is created. Members include legislators and representatives of the Fish and Wildlife Commission and the Governor. Members also include representatives of the agricultural industry, environmental organizations, a Skagit County diking and drainage district, the Skagit lead entity for salmon recovery, and Skagit

County. Tribal representatives with interests in Skagit County and representatives of certain federal agencies are invited to participate in the task force as members. The Conservation Commission must provide staff support to the task force.

The task force must perform specified duties, including review of enumerated issues as they relate to Skagit County and recommendation of statutory and policy changes. The task force also must identify and review appropriate demonstration projects on the Skagit River, Samish River, Carpenter Creek, and Colony Creek in Skagit County. Further, the task force must develop a strategy incorporating certain elements, including: (1) an inventory of existing tide gates in Skagit County; (2) an assessment of the role of tide gates and tidal fish habitat in Skagit County; and (3) a long-term proposal for fish habitat enhancement to meet the two goals of salmon recovery and no net loss of agricultural lands. The task force may contract with universities, private consultants, nonprofit groups, or other entities to assist it in developing this strategy. The task force also may propose pilot projects designed to test and measure the success of various proposed strategies.

The task force must hold its first meeting within 30 days of the effective date of these provisions. The task force also must make annual reports to the appropriate committees of the Legislature and submit a final report (with any legislative recommendations) by November 30, 2004.

#### Plan for Skagit County Public Lands

The DFW is required to create, in conjunction with other public land owners, a salmon habitat restoration plan for all public lands in Skagit County. The plan must include a list of public properties that must be restored for salmon, a description of how properties can be altered to support salmon, a description of the costs and funding sources, and a strategy and schedule. The DFW must make this plan a priority and complete it by November 30, 2004.

#### Voluntary Agreements

The existing voluntary habitat incentives agreement provisions do not abrogate the DFW's obligation to prioritize the use of public lands for fish habitat restoration projects. These provisions do not authorize the DFW to impose conditions requiring fish habitat restoration either on or affecting designated agricultural lands in any HPA or during implementation of fish passage requirements in the absence of a voluntary agreement. In addition, the DFW Director's authority to authorize removal or changes to obstructions in streams does not authorize him or her to impose fish habitat restoration on or affecting designated agricultural lands except as authorized under a voluntary habitat incentives agreement. However, the provisions of the legislation do not limit the ability of the DFW and a private land owner or an associated diking and drainage district to enter into a voluntary agreement.

## Definition

For the purposes of the hydraulics code, "tide gate" is defined as a one-way check valve that prevents the backflow of tidal water.

## Findings and Intent

Legislative findings are included regarding the importance of the agricultural industry in Washington and of salmon recovery to the state as well as the role agricultural lands play in salmon recovery. Legislative findings also specify circumstances leading to loss of agricultural lands, and legislative declarations are included regarding agricultural productivity and the state's agricultural land base. In addition, legislative findings are made regarding implementation of the HPA requirements in ways that require salmon habitat restoration by conversion of agricultural land, and legislative findings recognize agricultural losses associated with this implementation and the possibility of future damage. A legislative declaration is included that it is in the state's best interest to implement the hydraulics program and fish passage laws in ways that preserve the agricultural land base and that achieve mutual landowner and fish habitat goals. Further, legislative findings indicate that efforts to restore salmon habitat should look first to opportunities existing on public lands. Finally, legislative purposes are specified, including:

- clarifying purposes of the fishway and HPA provisions related to drainage infrastructure;
- establishing a task force and demonstration projects on specified streams; and
- prioritizing the use of public lands for fish habitat restoration.

Legislative intent is specified to not appropriate additional funds to any affected state agencies for implementing these provisions.

## **Amended Bill Compared to Substitute Bill:**

The striking amendment replaces provisions regarding application of fish passage provisions under the hydraulics code with provisions: (1) specifying the term "other obstruction" in fish passage provisions does not include tide gates or flood gates originally installed as part of an agricultural drainage system on or before the effective date of the legislation or to the repair, replacement, or improvement of these gates; (2) prohibiting the DFW from requiring the installation of a SRT as a condition of HPA for maintenance or replacement of agricultural drainage systems unless: (a) the condition is consistent with a salmon recovery plan adopted according to salmon recovery statutes or provisions of this legislation; (b) affected land owners and the associated diking and drainage district agree to the installation; and (c) all impacts have been fully compensated; (3) prohibiting any condition requiring a SRT to achieve fish passage in an existing HPA from being enforced and requiring the DFW to pay for the removal of the

self-regulating function of any SRT installed because of such a condition; (4) requiring the DFW to comply with a set of criteria when implementing fish passage requirements or when imposing HPA conditions for any projects or work on or related to drainage infrastructure on designated agricultural lands; (5) creating a 13-member task force to perform specified duties; (6) requiring the DFW to create a salmon habitat restoration plan for all public lands in Skagit county; (7) interpreting the new requirement with respect to existing voluntary habitat incentives agreement provisions; (8) defining "tide gate;" and (9) adding legislative findings.

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**Appropriation:** None.

**Fiscal Note:** Requested April 4, 2003.

**Effective Date of Amended Bill:** The bill contains an emergency clause and takes effect immediately.

**Testimony For:** The bill provides needed clarification regarding the application of the hydraulics code to tide gates and gives control of tide gates to diking and drainage districts. Tide gates are not dams, and the fish passage requirements were never intended to apply to tide gates. Fish passage mandates compromise the drainage system and put the diking and drainage district commissioners at risk of liability. The drainage infrastructure needs to be maintained; there are other ways to restore and enhance salmon habitat.

This bill will prevent saltwater intrusion on farm lands, which allows farmers to keep farming. Farm land in the Skagit valley has decreased from 130,000 acres to fewer than 80,000 acres in the last 30 years. We need to protect the existing farm land in this area.

**Testimony Against:** This bill will impact the fisheries resources and will preclude salmon recovery. All parties--including agriculture--need to ensure that salmon are recovered.

**Testified:** (In support) Senator Haugen, prime sponsor; Curtis Johnson, Lyle Wesen, and Mike Shelby, Western Washington Agricultural Association; John Roozen, Washington Bulb Company, Inc.; and Robin Meenach, Washington Farm Bureau.

(With concerns) Greg Hueckel, Department of Fish and Wildlife.

(Opposed) Steve Robinson, Northwest Indian Fisheries Commission; and Marty Loesch, Swinomish Tribe.

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** Do pass as amended by Committee on Agriculture & Natural Resources. Signed by 27 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Sehlin, Ranking Minority Member; Pearson, Assistant Ranking Minority Member; Alexander, Boldt, Buck, Clements, Cody, Conway, Cox, DeBolt, Dunshee, Grant, Hunter, Kagi, Kenney, Kessler, Linville, McDonald, McIntire, Miloscia, Pflug, Ruderman, Schual-Berke, Sump and Talcott.

**Staff:** Patricia Linehan (786-7178).

**Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Agriculture & Natural Resources:**

No new changes were recommended.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Amended Bill:** The bill contains an emergency clause and takes effect immediately.

**Testimony For:** One of the primary functions of the task force is to look at all of the tide gates in the Skagit area and determine which ones will be involved in salmon restoration. We know that self regulating tide gates are the same as putting a hole in the dike. This bill recognizes the competing needs of salmon recovery and the protection of long term commercially significant agricultural land.

Ongoing negotiations with the Department of Fish and Wildlife have been productive and there may be less need for the assessments than originally anticipated. For this reason, the final cost negotiations should be lower than indicated in the fiscal note.

**Testimony Against:** None.

**Testified:** Chris Cheney, Western Washington Agricultural Association.