

HOUSE BILL REPORT

ESSB 5375

As Reported by House Committee On:

Fisheries, Ecology & Parks
Appropriations

Title: An act relating to regulatory reform of the hydraulic project approval program.

Brief Description: Improving the efficiency and predictability of the hydraulic project approval program.

Sponsors: Senate Committee on Parks, Fish & Wildlife (originally sponsored by Senators Doumit, Oke, Haugen, Swecker, Prentice, Hale, Reardon and Rasmussen).

Brief History:

Committee Activity:

Fisheries, Ecology & Parks: 4/3/03, 4/4/03 [DPA];
Appropriations: 4/5/03, 4/7/03 [DPA(APP w/o FEP)s].

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

- Directs the Department of Fish and Wildlife to develop general permits for common activities including minor dredging projects, replacement of pilings, and routine maintenance and repair of existing structures.
- Establishes an expedited dispute resolution process and a review committee to review hydraulic permit decisions and accept, reject, or determine alternative permit conditions.
- Authorizes permit applicants to submit certain existing regulatory permits as equivalent to requirements for hydraulic permits.
- Repeals, recodifies and reorganizes Chapter 77.55 RCW, the Hydraulics Code, and creates a definition section and an intent section.

HOUSE COMMITTEE ON FISHERIES, ECOLOGY & PARKS

Majority Report: Do pass as amended. Signed by 7 members: Representatives Cooper, Chair; Berkey, Vice Chair; Sump, Ranking Minority Member; Hinkle, Assistant Ranking Minority Member; Buck, Hatfield and Pearson.

Minority Report: Do not pass. Signed by 2 members: Representatives O'Brien and Upthegrove.

Staff: Jeff Olsen (786-7157).

Background:

A person must obtain a hydraulic project approval (HPA) for any project that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state before beginning construction. HPAs are issued by the Department of Fish and Wildlife (WDFW) to ensure the proper protection of fish life.

The WDFW is statutorily authorized to issue programmatic HPAs for small scale mining and prospecting, and for activities or projects conducted solely for the removal or control of certain aquatic weeds. The programmatic approval is in lieu of an applicant obtaining an individual HPA. Under the programmatic approval process, the WDFW publishes a pamphlet that states the rules for that activity.

Engrossed Substitute Senate Bill 6387, Section 307 (23) passed by the 2002 Legislature created the Hydraulic Project Approval Task Force (Task Force). The Task Force was directed to conduct an evaluation of the HPA program and make recommendations to the Legislature by November 30, 2002. The Task Force recommended all formal HPA appeals should be the jurisdiction of the Hydraulic Appeals Board (Board). The Task Force also recommended that the WDFW cooperate with other regulatory agencies to avoid duplicative reviews and project delays.

HPA decisions may be appealed to the Director of the WDFW (Director) under the provisions of the Administrative Procedure Act. The appeal may be heard by the Director or an administrative law judge, but final appeal decisions are made by the Director. Certain projects related to agriculture or off-site mitigation are heard by the Board, consisting of the directors of the WDFW, the Department of Ecology, and the Department of Agriculture.

Summary of Amended Bill:

The WDFW must develop general hydraulic permits for common or routine activities by December 2004. The permits must contain conditions necessary to protect fish life. The WDFW must publish a description of activities covered by each general permit, the conditions a project applicant must follow to receive coverage under the permit, and a notice of intent form for use by project applicants. A project applicant may receive coverage under a general permit by sending the notice of intent to the WDFW 21 days before construction is to begin.

Project applicants may request exemption from permit requirements if equivalent review is provided through other federal and state regulatory permits. The Director or the Director's designee shall make a determination regarding equivalency within 15 days. If the WDFW denies the request, the WDFW must identify why the other regulatory reviews do not adequately protect fish life.

At the request of a city, county, or private party, the WDFW must develop five-year renewable maintenance or mitigation agreements for flood damage repair or reduction under agreed-upon conditions. The hydraulic permit must allow for bank stabilization, bridge repair, removal of sandbars, channel maintenance, and other flood damage repair and reduction activities. Individual hydraulic permits are not required for specific projects covered by the maintenance agreement.

An expedited dispute resolution process is created. An applicant may request dispute resolution at any point prior to permit issuance. The WDFW must convene a review committee including the project applicant's engineer, a WDFW engineer, the WDFW regional program manager, and an engineer from the local government with jurisdiction over the project. The review committee may accept the hydraulic permit conditions, propose alternative conditions, or return the hydraulic permit to the WDFW for further review.

Chapter 77.55 RCW is recodified and three sections are repealed and rewritten as new sections. A legislative intent section and definitions for the chapter are established. A new chapter is created for sections relating to fishways, flow, and screening.

Amended Bill Compared to Engrossed Substitute Bill:

The amended bill removes specific provisions that the WDFW develop general permits for routine repair and maintenance of existing over-water structures. Authority for local governments to apply for certification of critical areas or shoreline regulations as equivalent to hydraulic permit requirements is removed in the amended bill. The requirement that the WDFW must develop procedures to ensure consistency of hydraulic permit conditions is removed. Language restricting other work to "within the bed of any state waters" for the purpose of obtaining a hydraulic permit is removed.

General hydraulic permits for routine repair and maintenance of bridges are restricted to activities below the ordinary high water line in the amended bill. State review of shorelines under RCW 90.58 is added as a regulatory review process to be considered by the WDFW as equivalent to a hydraulic permit. The 45 day period for hydraulic permit issuance is not suspended when a project applicant requests review under the expedited dispute resolution process.

The amended bill recodifies Chapter 77.55 RCW and creates a legislative intent section and a definition section.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: There have been concerns and frustrations regarding the implementation and consistency of the HPA program. The hydraulics statute is ambiguous and confusing and needs to be reorganized and rewritten. The hydraulic permit is an important program, and the WDFW needs better clarity and management tools to more consistently implement the HPA program.

The reorganization of the chapter is easier to read. General permits will streamline the HPA program, save money, and allow the WDFW to focus on higher priority projects. The equivalency provisions in the bill provide the WDFW with discretion to accept or reject current regulatory permits. Dispute resolution provides an opportunity for the project applicant and the WDFW to work out their differences. The five-year maintenance agreements will allow persons to maintain their facilities to prevent flooding. The WDFW should also be directed to update their rules for hydraulic permits.

Since the passage of the hydraulics code, several other habitat protection measures have passed including the Shorelines Management Act, the Growth Management Act, and the State Environmental Policy Act (SEPA). Local governments already review projects, such as bulkheads, before the WDFW issues a hydraulic permit

(In support with amendments) The WDFW is supportive of efforts to work on the HPA program including permit streamlining, consistency, and equivalency. Proposed changes to the permit requirements for bulkheads and the definition for streambank stabilization need to be clarified. The Department of Natural Resources (DNR) uses the hydraulic permit when reviewing leases for state aquatic lands. If the WDFW does not review projects, the DNR will need to spend more time looking at site specific issues.

Testimony Against: Improvements to the HPA program should also include program effectiveness in addition to efficiency. Program efficiencies should not undermine protection of fish and fish habitat, while there are currently Endangered Species Act listing. The current scope of authority for the hydraulic permit should be maintained. General permits should be limited in scope to those projects having minor impacts to habitat. There are not many instances where permit equivalency will occur. The federal government, local governments, and other regulatory agencies rely on the hydraulic permit. Changes to the current bulkhead requirements for mitigation will result in the permanent loss of habitat. The HPA would not be a meaningful program if these changes are made. The state must maintain its responsibility to co-manage the resource with the

tribes.

Testified: (In support) Representative Buck; Senator Doumit, prime sponsor; Eric Johnson, Washington Public Ports Association; Jim Zimmerman, Troutlodge; Robyn Meenach, Farm Bureau; Willy O'Neil, Association of General Contractors; Paul Parker, Washington State Association of Counties; Phil Bakke, Island County; and Kristen Sawin, Association of Washington Business.

(In support with amendments) Greg Hueckel, Department of Fish and Wildlife; and Loren Stern, Department of Natural Resources.

(Opposed) Lea Mitchell, Washington Public Employees for Environmental Responsibility; Bruce Wishart, People for Puget Sound; and Steve Robinson, Northwest Indian Fisheries Commission.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass as amended by Committee on Appropriations and without amendment by Committee on Fisheries, Ecology & Parks. Signed by 23 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Sehlin, Ranking Minority Member; Pearson, Assistant Ranking Minority Member; Alexander, Boldt, Buck, Clements, Cody, Cox, DeBolt, Grant, Hunter, Kagi, Kessler, Linville, McDonald, Miloscia, Pflug, Ruderman, Schual-Berke, Sump and Talcott.

Minority Report: Do not pass. Signed by 4 members: Representatives Conway, Dunshee, Kenney and McIntire.

Staff: Patricia Linehan (786-7178).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Fisheries, Ecology & Parks:

A null and void clause was added, making the bill null and void unless funded in the budget.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of session in which bill is passed. However, the bill is null and void if not funded in the budget.

Testimony For: The hydraulic project approval program is the primary fish habitat

permit issued by the Department of Fish and Wildlife (Department) for in-water construction projects. This bill establishes some regulatory efficiency measures for the Department to use as they put together an improved regulatory program. We urge your support of the bill.

We support giving the Department equivalency and general permitting authority, so the process can be streamlined and the Department can use their resources where they are needed. There will be savings to local governments and to the state in the long run. The bill as passed out of the House Committee on Fisheries, Ecology and Parks makes the Hydraulic Project Approval Program more understandable and more likely to be complied with. The changes proposed in the bill will improve the consistency and effectiveness of this regulatory activity and will not lessen environmental protection. We ask that you move the bill out of your committee.

Testimony Against: We are opposed to this bill, because it undermines the protection of salmon and other natural and cultural resources that are the very foundation of the economy and the quality of life in Washington. The tribes know the rivers and streams better than anyone and are working hard to protect them every single day. The tribal notification schedule for projects in this bill is inadequate and the general approval of hydraulic projects is still bothersome. There should be more enforcement presence, not less. The funds provided to implement this program are counter productive to the tens of millions being invested to try to restore and protect salmon in the Northwest.

Our general concern is the bill is advancing policies that years from now will come back to bite us in terms of habitat degradation and public costs. Four key concerns include: 1) Reduced oversight; 2) perpetuating a \$10 million drain on the state general fund; 3) failure to provide a civil compliance mechanism for the Department; and 4) provisions that contribute to the degradation of fish habitat. We are willing to work to improve this bill, so we ask that you not pass it out of committee until that work is done.

Testified: (In support) Kristen Sawin, Association of Washington Business; Paul Parker, Washington State Association of Counties; Eric Johnson, Washington Public Ports Association; and Rick Slunaker, Associated General Contractors.

(Opposed) Lea Mitchell, Public Employees for Environmental Responsibility; and Steve Robinson, Northwest Indian Fisheries Commission.