
**Agriculture & Natural
Resources Committee**

HB 1419

Brief Description: Providing for compensating property owners for damages caused by conditions in hydraulic project approvals.

Sponsors: Representatives Quall, Schoesler, Blake, Sump, Grant, Eickmeyer, Orcutt, Morris, Hatfield, Sehlin, Benson, Sullivan, Bailey, Pearson and Linville.

Brief Summary of Bill

- Creates a new cause of action for property owners harmed by a condition imposed in a hydraulic project approval resulting in a change in the operating characteristics of a tide gate.
- Requires the property owner to file a written complaint with the Department of Fish and Wildlife (DFW) before filing an action in court.
- Includes a process for the DFW to review the complaint and make a compensation offer if harm is determined.
- Requires the DFW to pay any compensation offers or damage awards from current funds of the DFW division imposing the condition.

Hearing Date: 2/5/03

Staff: Caroleen Dineen (786-7156).

Background:

Property Damages Claims

A property owner who has filed a permit application may bring an action for damages for an agency's failure to act on a permit application within the time limits prescribed by law. A property owner who has filed a permit application also may file an action for damages for agency acts that are arbitrary, capricious, unlawful, or exceed lawful authority. An action is "unlawful" or "in excess of lawful authority" if the agency's final decision was made with knowledge, or if the agency should have reasonably known, that the action was unlawful or

exceeded lawful authority.

For purposes of this cause of action, "agency" includes state and local governments. An agency "act" is an agency's final decision imposing requirements, limitations, or conditions on the use of real property exceeding those allowed by applicable regulations in effect on the date a permit application is filed. "Act" does not include any time extensions, conditions or limitations to which a property owner agrees in writing or to agency decisions designed to prevent conditions causing a threat to health, safety, welfare, or morals to area residents.

This cause of action does not exist for an agency's unintentional procedural or ministerial errors. In addition, invalidation of a regulation in effect before a permit application is filed does not create a cause of action. In a property owner's action for damages, an agency may assert a defense that the agency's act was required by a change in statute or state rule or regulation and that the change became effective after the permit application was filed.

The damages a property owner may recover include reasonable expenses and losses incurred between the time a cause of action arises and the time the property owner is granted relief. A property owner prevailing in this type of action may be entitled to reasonable costs and attorney fees.

Hydraulic Project Approvals

Hydraulic project approval (HPA) must be obtained from the Department of Fish and Wildlife (DFW) for any project or 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 HPA is intended to ensure the proper protection of fish life and must be obtained before beginning construction or work.

State law specifies the DFW may not unreasonably condition hydraulic projects. Any conditions imposed in a HPA must reasonably relate to the project. The DFW may not impose conditions attempting to optimize fish life that are out of proportion to the impact of the proposed project. The DFW's decision regarding or conditions included in a HPA may be challenged in an informal review process or through a formal appeal.

Tide Gates and HPAs

Some recent HPAs in Skagit County have included conditions on activities related to tide gates. A tide gate is a gate through which water flows when the tide is in one direction and that automatically closes when the tide is in the opposite direction. One is the DFW's September 2002 approval of Skagit County Dike District No. 22's application to replace an existing four foot pipe and tide gate. This HPA approval included a condition that the replacement culvert be fitted with a self-regulating tide gate (SRT), which includes a system of floats allowing salt water to flow into a drainage system until the tide reaches a certain height. Appeals of this HPA have been filed by the Skagit County Dike District No. 22, the Swinomish Indian Tribal Community, Sauk-Suiattle Indian Tribe, and Upper Skagit Indian Tribe.

The Skagit County Public Works Department applied for a HPA to alter an SRT that had

been installed on Edison Slough in 2000. The county proposed to disable the regulating float system and operate the gate as a standard tide gate for 24 months while it monitored water and salinity levels. On October 7, 2002, the DFW denied the request for the HPA. In a letter dated December 6, 2002, but stamped as received by the Mill Creek Office of the DFW on January 10, 2003, the Public Works Department requested an informal review of the denial.

Summary of Bill:

A cause of action for damages to property is created for property owners harmed by certain conditions imposed by the Department of Fish and Wildlife (DFW) in hydraulic project approvals (HPAs). The cause of action is available to an owner of a property interest in public or private property for harm resulting from a condition imposed by the DFW in a HPA if implementing the condition:

- is a requirement of the HPA issued for work on the owner's property or on property affected by operation of a tide gate;
- results in a change in the operating characteristics of a tide gate; and
- harms the property interest of the owner obtaining the HPA or the owner of property affected by operation of a tide gate.

For purposes of this action, "change in the operating characteristics of a tide gate" means any change in tide gate operation impacting the flow or bed of any salt or fresh waters of the state. The definition includes increasing the elevation of the water surface behind the tide gate, reducing the reservoir capacity behind the tide gate, decreasing the ability to drain the area behind the tide gate, and increasing the intrusion of saltwater into the area above the tide gate. "Harm" is defined for purposes of this new cause of action as negative impact to property, including:

- flooding;
- increased soil saturation or reduced drainage;
- loss in production of growing agricultural crops;
- change in characteristics or quality of ground water or surface water affecting the owner's ability to use the water;
- impediment to the operation of drain fields for septic systems;
- increase in soil toxicity; and
- reduction of soil productivity.

Before filing an action for damages, a property owner must file a written complaint with the DFW and the tide gate owner if owned by another person. The DFW must investigate the complaint and respond within 30 days of receipt. If the DFW finds that harm caused by a change in the operating characteristics of a tide gate has occurred on the owner's property, the DFW must make a compensation offer to the owner. The compensation offer must include compensation of future losses or a proposal to revise the HPA to eliminate the change in operating characteristics of the tide gate determined to be causing harm.

If the DFW fails to respond to the owner's complaint or if the owner believes the DFW's compensation offer is insufficient the owner is authorized to file an action in superior court.

The property owner may seek mandamus (i.e., requesting the court to issue an order requiring the DFW to respond to the complaint or to take some action regarding its decision to change the operating characteristics of the tide gate). The owner also may seek damages, including the damages allowed under the general property owners damages statutes, current or future decrease in property value, other current or future reasonable expenses and losses, and reasonable attorney fees and costs. Any offers of compensation and any damages related to this new cause of action must be paid from the current funds appropriated to the division of the DFW that imposed in the condition in the HPA.

The defense available to agencies in the general property owners damages action statutes regarding changes in statute or regulation after a permit application is filed does not apply to the new cause of action for harm caused by conditions mandating a change in the operating characteristics of a tide gate.

Appropriation: None.

Fiscal Note: Requested on January 31, 2003.

Effective Date: The bill contains an emergency clause and takes effect immediately.