

CERTIFICATION OF ENROLLMENT

**ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1418**

Chapter 391, Laws of 2003

(partial veto)

58th Legislature  
2003 Regular Session

DRAINAGE INFRASTRUCTURE

EFFECTIVE DATE: 5/20/03

Passed by the House April 22, 2003  
Yeas 97 Nays 0

FRANK CHOPP

**Speaker of the House of Representatives**

Passed by the Senate April 14, 2003  
Yeas 44 Nays 4

BRAD OWEN

**President of the Senate**

Approved May 20, 2003, with the  
exception of section 3, 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 SECOND SUBSTITUTE HOUSE BILL 1418** as passed by the House of Representatives and the Senate on the dates hereon set forth.

CYNTHIA ZEHNDER

**Chief Clerk**

FILED

May 20, 2003 - 3:04 p.m.

**Secretary of State  
State of Washington**

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ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1418

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AS AMENDED BY THE SENATE

Passed Legislature - 2003 Regular Session

**State of Washington**                      **58th Legislature**                      **2003 Regular Session**

**By** House Committee on Appropriations (originally sponsored by Representatives Quall, Schoesler, Blake, Sump, Morris, Grant, Hatfield, Sehlin, Bailey and Linville)

READ FIRST TIME 03/10/03.

1            AN ACT Relating to drainage infrastructure; amending RCW 77.55.060  
2 and 77.55.100; adding new sections to chapter 77.55 RCW; adding new  
3 sections to chapter 77.85 RCW; creating a new section; and declaring an  
4 emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6            **Sec. 1.** RCW 77.55.060 and 1998 c 190 s 86 are each amended to read  
7 as follows:

8            (1) Subject to subsection (3) of this section, a dam or other  
9 obstruction across or in a stream shall be provided with a durable and  
10 efficient fishway approved by the director. Plans and specifications  
11 shall be provided to the department prior to the director's approval.  
12 The fishway shall be maintained in an effective condition and  
13 continuously supplied with sufficient water to freely pass fish.

14            (2) If a person fails to construct and maintain a fishway or to  
15 remove the dam or obstruction in a manner satisfactory to the director,  
16 then within thirty days after written notice to comply has been served  
17 upon the owner, his or her agent, or the person in charge, the director  
18 may construct a fishway or remove the dam or obstruction. Expenses  
19 incurred by the department constitute the value of a lien upon the dam

1 and upon the personal property of the person owning the dam. Notice of  
2 the lien shall be filed and recorded in the office of the county  
3 auditor of the county in which the dam or obstruction is situated. The  
4 lien may be foreclosed in an action brought in the name of the state.

5 If, within thirty days after notice to construct a fishway or  
6 remove a dam or obstruction, the owner, his or her agent, or the person  
7 in charge fails to do so, the dam or obstruction is a public nuisance  
8 and the director may take possession of the dam or obstruction and  
9 destroy it. No liability shall attach for the destruction.

10 (3) For the purposes of this section, "other obstruction" does not  
11 include tide gates, flood gates, and associated man-made agricultural  
12 drainage facilities that were originally installed as part of an  
13 agricultural drainage system on or before the effective date of this  
14 section or the repair, replacement, or improvement of such tide gates  
15 or flood gates.

16 **Sec. 2.** RCW 77.55.100 and 2002 c 368 s 2 are each amended to read  
17 as follows:

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

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

34 (b) The applicant may document receipt of application by filing in  
35 person or by registered mail. A complete application for approval  
36 shall contain general plans for the overall project, complete plans and  
37 specifications of the proposed construction or work within the mean

1 higher high water line in salt water or within the ordinary high water  
2 line in fresh water, and complete plans and specifications for the  
3 proper protection of fish life.

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

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

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

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

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

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

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

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

33 (d) The department or the county legislative authority may  
34 determine if an imminent danger exists. The county legislative  
35 authority shall notify the department, in writing, if it determines  
36 that an imminent danger exists.

37 (4) Approval of a standard permit is valid for a period of up to  
38 five years from date of issuance. The permittee must demonstrate

1 substantial progress on construction of that portion of the project  
2 relating to the approval within two years of the date of issuance. If  
3 the department denies approval, the department shall provide the  
4 applicant, in writing, a statement of the specific reasons why and how  
5 the proposed project would adversely affect fish life. Protection of  
6 fish life shall be the only ground upon which approval may be denied or  
7 conditioned. Chapter 34.05 RCW applies to any denial of project  
8 approval, conditional approval, or requirements for project  
9 modification upon which approval may be contingent.

10 (5)(a) 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 to protect fish life shall be established by the department  
18 and reduced to writing within thirty days and complied with as provided  
19 for in this section. Oral approval shall be granted immediately, upon  
20 request, for a stream crossing during an emergency situation.

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

24 (c) The department or the county legislative authority may declare  
25 and continue an emergency when one or more of the criteria under (b) of  
26 this subsection are met. The county legislative authority shall  
27 immediately notify the department if it declares an emergency under  
28 this subsection.

29 (6) The department shall, at the request of a county, develop five-  
30 year maintenance approval agreements, consistent with comprehensive  
31 flood control management plans adopted under the authority of RCW  
32 86.12.200, or other watershed plan approved by a county legislative  
33 authority, to allow for work on public and private property for bank  
34 stabilization, bridge repair, removal of sand bars and debris, channel  
35 maintenance, and other flood damage repair and reduction activity under  
36 agreed-upon conditions and times without obtaining permits for specific  
37 projects.

1 (7) This section shall not apply to the construction of any form of  
2 hydraulic project or other work which diverts water for agricultural  
3 irrigation or stock watering purposes authorized under or recognized as  
4 being valid by the state's water codes, or when such hydraulic project  
5 or other work is associated with streambank stabilization to protect  
6 farm and agricultural land as defined in RCW 84.34.020. These  
7 irrigation or stock watering diversion and streambank stabilization  
8 projects shall be governed by RCW 77.55.110.

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

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

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

24 (10) The department shall not require a fishway on a tide gate,  
25 flood gate, or other associated man-made agricultural drainage  
26 facilities as a condition of a hydraulic project approval if such  
27 fishway was not originally installed as part of an agricultural  
28 drainage system existing on or before the effective date of this  
29 section.

30 (11) Any condition requiring a self-regulating tide gate to achieve  
31 fish passage in an existing hydraulic project approval under this  
32 section may not be enforced.

33 ***\*NEW SECTION. Sec. 3. A new section is added to chapter 77.55 RCW***  
34 ***to read as follows:***

35 ***Upon written request of adversely affected landowners of land***  
36 ***designated as agricultural lands of long-term commercial significance***  
37 ***according to chapter 36.70A RCW or the associated special districts***

1 under RCW 85.38.180, the department shall authorize the removal of the  
2 self-regulating function of any self-regulating tide gate installed  
3 because of a condition imposed by the department in an approval issued  
4 according to RCW 77.55.100 or during implementation of fish passage  
5 requirements pursuant to RCW 77.55.060. The department shall make  
6 authorizing the removal of the self-regulating function of any self-  
7 regulating tide gate a priority. The department shall pay for any tide  
8 gate removal required by this section within existing resources.

\*Sec. 3 was vetoed. See message at end of chapter.

9 NEW SECTION. **Sec. 4.** A new section is added to chapter 77.85 RCW  
10 to read as follows:

11 (1) If a limiting factors analysis has been conducted under this  
12 chapter for a specific geographic area and that analysis shows  
13 insufficient intertidal salmon habitat, the department of fish and  
14 wildlife and the county legislative authorities of the affected  
15 counties may jointly initiate a salmon intertidal habitat restoration  
16 planning process to develop a plan that addresses the intertidal  
17 habitat goals contained in the limiting factors analysis. The fish and  
18 wildlife commission and the county legislative authorities of the  
19 geographic area shall jointly appoint a task force composed of the  
20 following members:

21 (a) One representative of the fish and wildlife commission,  
22 appointed by the chair of the commission;

23 (b) Two representatives of the agricultural industry familiar with  
24 agricultural issues in the geographic area, one appointed by an  
25 organization active in the geographic area and one appointed by a  
26 statewide organization representing the industry;

27 (c) Two representatives of environmental interest organizations  
28 with familiarity and expertise of salmon habitat, one appointed by an  
29 organization in the geographic area and one appointed by a statewide  
30 organization representing environmental interests;

31 (d) One representative of a diking and drainage district, appointed  
32 by the individual districts in the geographic area or by an association  
33 of diking and drainage districts;

34 (e) One representative of the lead entity for salmon recovery in  
35 the geographic area, appointed by the lead entity;

36 (f) One representative of each county in the geographic area,  
37 appointed by the respective county legislative authorities; and

1 (g) One representative from the office of the governor.

2 (2) Representatives of the United States environmental protection  
3 agency, the United States natural resources conservation service,  
4 federal fishery agencies, as appointed by their regional director, and  
5 tribes with interests in the geographic area shall be invited and  
6 encouraged to participate as members of the task force.

7 (3) The task force shall elect a chair and adopt rules for  
8 conducting the business of the task force. Staff support for the task  
9 force shall be provided by the Washington state conservation  
10 commission.

11 (4) The task force shall:

12 (a) Review and analyze the limiting factors analysis for the  
13 geographic area;

14 (b) Initiate and oversee intertidal salmon habitat studies for  
15 enhancement of the intertidal area as provided in section 5 of this  
16 act;

17 (c) Review and analyze the completed assessments listed in section  
18 5 of this act;

19 (d) Develop and draft an overall plan that addresses identified  
20 intertidal salmon habitat goals that has public support; and

21 (e) Identify appropriate demonstration projects and early  
22 implementation projects that are of high priority and should commence  
23 immediately within the geographic area.

24 (5) The task force may request briefings as needed on legal issues  
25 that may need to be considered when developing or implementing various  
26 plan options.

27 (6) Members of the task force shall be reimbursed by the  
28 conservation commission for travel expenses as provided in RCW  
29 43.03.050 and 43.03.060.

30 (7) The task force shall provide annual reports that provide an  
31 update on its activities to the fish and wildlife commission, to the  
32 involved county legislative authorities, and to the lead entity formed  
33 under this chapter.

34 NEW SECTION. **Sec. 5.** A new section is added to chapter 77.85 RCW  
35 to read as follows:

36 (1) In consultation with the task force, the conservation



1 commission may contract with universities, private consultants,  
2 nonprofit groups, or other entities to assist it in developing a plan  
3 incorporating the following elements:

4 (a) An inventory of existing tide gates located on streams in the  
5 county. The inventory shall include location, age, type, and  
6 maintenance history of the tide gates and other factors as determined  
7 by the task force in consultation with the county and diking and  
8 drainage districts;

9 (b) An assessment of the role of tide gates located on streams in  
10 the county; the role of intertidal fish habitat for various life stages  
11 of salmon; the quantity and characterization of intertidal fish habitat  
12 currently accessible to fish; the quantity and characterization of the  
13 present intertidal fish habitat created at the time the dikes and  
14 outlets were constructed; the quantity of potential intertidal fish  
15 habitat on public lands and alternatives to enhance this habitat; the  
16 effects of saltwater intrusion on agricultural land, including the  
17 effects of backfeeding of saltwater through the underground drainage  
18 system; the role of tide gates in drainage systems, including relieving  
19 excess water from saturated soil and providing reservoir functions  
20 between tides; the effect of saturated soils on production of crops;  
21 the characteristics of properly functioning intertidal fish habitat; a  
22 map of agricultural lands designated by the county as having long-term  
23 commercial significance and the effect of that designation; and the  
24 economic impacts to existing land uses for various alternatives for  
25 tide gate alteration; and

26 (c) A long-term plan for intertidal salmon habitat enhancement to  
27 meet the goals of salmon recovery and protection of agricultural lands.  
28 The proposal shall consider all other means to achieve salmon recovery  
29 without converting farmland. The proposal shall include methods to  
30 increase fish passage and otherwise enhance intertidal habitat on  
31 public lands pursuant to subsection (2) of this section, voluntary  
32 methods to increase fish passage on private lands, a priority list of  
33 intertidal salmon enhancement projects, and recommendations for funding  
34 of high priority projects. The task force also may propose pilot  
35 projects that will be designed to test and measure the success of  
36 various proposed strategies.

37 (2) In conjunction with other public landowners and the task force,  
38 the department shall develop an initial salmon intertidal habitat

1 enhancement plan for public lands in the county. The initial plan  
2 shall include a list of public properties in the intertidal zone that  
3 could be enhanced for salmon, a description of how those properties  
4 could be altered to support salmon, a description of costs and sources  
5 of funds to enhance the property, and a strategy and schedule for  
6 prioritizing the enhancement of public lands for intertidal salmon  
7 habitat. This initial plan shall be submitted to the task force at  
8 least six months before the deadline established in subsection (3) of  
9 this section.

10 (3) The final intertidal salmon enhancement plan shall be completed  
11 within two years from the date the task force is formed and funding has  
12 been secured. A final plan shall be submitted by the task force to the  
13 lead entity for the geographic area established under this chapter.

14 NEW SECTION. **Sec. 6.** A new section is added to chapter 77.55 RCW  
15 to read as follows:

16 As used in this chapter, "tide gate" means a one-way check valve  
17 that prevents the backflow of tidal water.

18 NEW SECTION. **Sec. 7.** The process established in sections 4 and 5  
19 of this act shall be initiated as soon as practicable in Skagit county.

20 NEW SECTION. **Sec. 8.** If any provision of this act or its  
21 application to any person or circumstance is held invalid, the  
22 remainder of the act or the application of the provision to other  
23 persons or circumstances is not affected.

24 NEW SECTION. **Sec. 9.** This act is necessary for the immediate  
25 preservation of the public peace, health, or safety, or support of the  
26 state government and its existing public institutions, and takes effect  
27 immediately.

Passed by the House April 22, 2003.

Passed by the Senate April 14, 2003.

Approved by the Governor May 20, 2003, with the exception of  
certain items that were vetoed.

Filed in Office of Secretary of State May 20, 2003.

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

"I am returning herewith, without my approval as to section 3,  
Engrossed Second Substitute House Bill No. 1418 entitled:

"AN ACT Relating to drainage infrastructure;"

This bill exempts tide gates and flood gates statewide from fish  
passage requirements, creates a task force to develop a plan for

intertidal habitat goals, and provides for a process to inventory and assess tide gates and their role in salmon recovery.

Section 3 of the bill requires the removal of the self-regulating function of any self-regulating tide gate installed because of a condition imposed by the Department of Fish and Wildlife pursuant to RCW 77.55.100, the hydraulics code, or as a requirement of fish passage pursuant to RCW 77.55.060. This section applies to any fish passage already installed on a tide gate.

I have vetoed section 3 because it applies where fish passage is already in place. It is counterproductive to our salmon recovery strategies to eliminate existing fish passage. The better approach is to use the task force process created in the bill, to analyze the role of tide gates, and habitat behind them, for salmon recovery.

I have concerns regarding the broad scope of the fish passage exemptions provided in sections 1 and 2. However, I have decided not to veto those sections because I believe the task force process in section 4 and the assessment process in section 5 will provide a scientific basis for determining the role of tide gates in particular ecosystems. The results of this study will allow us to address those tide gates that will enhance our ability to recover salmon.

My administration has strongly supported and is committed to continuing our efforts toward salmon recovery. Habitat is critical for salmon recovery for recreational and commercial fisheries. And, salmon are essential for the tribes in our state. Just as farmers rely on the land, tribes rely on the salmon. Unfortunately, we have seen an escalation in the tension between the parties on tide gates. It is my hope that in signing this bill, some of this tension will be eased so that we can begin to work together to resolve this issue.

A key approach in our salmon recovery strategy has been to focus on working with those impacted by our decisions. This was the approach used with Forest and Fish, the plan for the protection of salmon habitat in the forested environment. Forest and Fish addresses the impacts of protection decisions on forestland owners. However, this process also incorporates an aggressive adaptive management program that assesses the progress of our recovery strategies and adjusts them as we learn more.

Now, as we address the interaction between salmon recovery and agriculture, I believe that the same type of approach should be used. Recovery strategies that will necessitate using agricultural land should be based on an assessment and evaluation of the habitat needs, and on opportunities to recover the species with a minimal impact on private lands. Should it be necessary to include private lands, then the landowner should have a clear understanding of the plan for recovery, the role his or her land will play in the plan, and incentives for participation in the plan. This is the approach taken in sections 4 and 5 of this bill, which I support.

Although this bill is statewide in scope and effect, the focus of discussions in the Legislature have been on the Skagit River estuary. It is my hope that the forum created in this bill will lead to positive dialogue between the parties, and most importantly, will lead to a salmon recovery strategy for the Skagit River estuary. The system of dikes and drainage in the estuary is important for farmers, but there are also opportunities for restoration of lost estuarine habitat.

For these reasons, I have vetoed section 3 of Engrossed Second Substitute House Bill No. 1418.

With the exception of section 3, Engrossed Second Substitute House Bill No. 1418 is approved."