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SENATE BILL 5095

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State of Washington

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2005 Regular Session

By Senators Doumit, Morton, Berkey, Swecker, Haugen, Mulliken, Rasmussen, Hargrove and Sheldon

Read first time 01/13/2005. Referred to Committee on Natural Resources, Ocean & Recreation.

1 AN ACT Relating to regulatory reform of the hydraulic project  
2 approval program; amending RCW 77.55.100; adding new sections to  
3 chapter 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 one of the  
6 state's primary fish habitat protection statutes is the hydraulic  
7 project approval program. This program is one of the state's oldest  
8 environmental regulatory programs, and as a consequence it has been  
9 developed in an incremental manner over many decades.

10 The legislature further finds that federal review of proposed in-  
11 water projects under provisions of the endangered species act are in  
12 most conditions the equivalent of requirements under the state's  
13 hydraulic project approval process, and that requiring projects to  
14 receive dual approvals causes project delays, is redundant, and may  
15 lead to conflicting project conditions.

16 The legislature further finds that it would benefit the department  
17 of fish and wildlife, the regulated community, and the fisheries  
18 resources of the state if this important regulatory program were  
19 improved with measures to improve its efficiency and predictability, as

1 well as its coordination with the many local, state, and federal fish  
2 and habitat protection statutes and regulatory programs that have been  
3 created since the inception of the hydraulic project approval program.

4 The legislature therefore intends to improve the process of  
5 regulating construction in state waters with policy measures that  
6 improve predictability for entities that work in state waters, and make  
7 the best use of limited state resources by ensuring that regulatory  
8 reviews of in-water construction are made in an efficient manner.

9 NEW SECTION. **Sec. 2.** A new section is added to chapter 77.55 RCW  
10 to read as follows:

11 (1)(a) The department must develop general permits for common or  
12 routine activities to improve the predictability and efficiency of the  
13 hydraulic project approval program. At a minimum, the department must,  
14 by December 2006, develop general permits for the following activities:

15 (i) Routine repair and maintenance of existing over-water  
16 serviceable structures, including replacement of up to sixty pilings;

17 (ii) Minor dredging of up to ten yards of sediment from an existing  
18 channel, berthing area, or boat ramp;

19 (iii) Routine repair and maintenance of tide gates;

20 (iv) Construction of mooring dolphins and fender pilings;

21 (v) Routine repair, maintenance, or replacement of road and highway  
22 structures such as culverts and ditches;

23 (vi) Routine repair and maintenance of bridges; and

24 (vii) Geotechnical or exploratory work conducted as part of project  
25 planning or development.

26 (b) The department may develop additional general permits for in-  
27 water construction activities as available resources allow.

28 (2) General permits must contain conditions necessary to protect  
29 fish life, and must clearly delineate predictable conditions and  
30 restrictions that project applicants may incorporate into project  
31 design and construction. The department must develop, in consultation  
32 with an advisory committee, common technical provisions that must be  
33 incorporated into general conditions for each general permit.

34 (3) The department shall post electronically and otherwise make  
35 generally available the following information for each general permit:

36 (a) A description of activities covered;

1 (b) The conditions and practices a project applicant must follow to  
2 receive coverage under the permit; and

3 (c) A notice of intent form for use by applicants to include  
4 information on project location and habitat types affected.

5 (4) To receive coverage under a general permit, a project applicant  
6 must:

7 (a) Send a notice of intent to follow the conditions of a general  
8 permit to the department twenty-one days before construction is to  
9 begin; and

10 (b) Post the general permit prominently at the worksite.

11 (5) Within ten days of receipt of a notice of intent from a project  
12 applicant, the department must notify the applicant of the status of  
13 general permit coverage.

14 NEW SECTION. **Sec. 3.** A new section is added to chapter 77.55 RCW  
15 to read as follows:

16 (1) Certain federal, state, and local regulatory review processes  
17 may provide review and protection of fish life that is equivalent to  
18 the review provided by the department under this chapter. This may  
19 include, among other permits, federal review of a project under the  
20 endangered species act (16 U.S.C. Sec. 1531 et seq.), a federal permit  
21 under section 404 of the federal water pollution control act (33 U.S.C.  
22 Sec. 1251 et seq.), state review of a project under section 401 of the  
23 federal water pollution control act (33 U.S.C. Sec. 1251 et seq.), or  
24 local government review of a project to protect critical areas under  
25 RCW 36.70A.060 or shorelines under chapter 90.58 RCW.

26 (2) At any point in project development or permitting, an applicant  
27 may submit to the department a notice of intent to proceed under an  
28 equivalent regulatory review. The notice must include a description of  
29 the project, the habitat impacted, and the equivalent permits required  
30 for the project. The department's regional manager of the hydraulic  
31 project approval program shall make a determination regarding the  
32 equivalency of other regulatory permits within fifteen days of  
33 receiving the notice. If the notice of equivalency is approved, the  
34 project is exempt from the requirement to receive hydraulic project  
35 approval under this chapter. If the notice of equivalency is denied,  
36 the department must provide the applicant, in writing, specific reasons  
37 why the other regulatory reviews will not adequately protect fish life.

1 (3) Upon request by a county or city, the department shall certify  
2 that a county or city, through its implementation of critical areas  
3 protections, including fish and wildlife habitat conservation areas,  
4 under RCW 36.70A.060, or development regulations implementing an  
5 adopted and approved shoreline master program under chapter 90.58 RCW,  
6 provides equivalent review and protection for fish life to that  
7 otherwise provided by the department through issuance of a hydraulic  
8 project approval. A city or county may request certification for all  
9 hydraulic projects or certain hydraulic project types. If  
10 certification is approved, project types specified in the certification  
11 and within the jurisdiction of the city or county are exempt from the  
12 requirement to receive hydraulic project approval under this chapter.  
13 If the department rejects the request for certification, it shall  
14 provide in writing a statement of how and why the regulations do not  
15 provide equivalent protection for fish life, and provide  
16 recommendations that would result in equivalency.

17 (4) Any person aggrieved by a decision under subsection (2) or (3)  
18 of this section may appeal the decision according to the provisions of  
19 chapter 34.05 RCW.

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

22 The department must develop procedures to ensure consistency of  
23 application of hydraulic project approval conditions, to include the  
24 following:

25 (1) Common technical conditions for saltwater and freshwater  
26 projects. These common technical conditions must, at a minimum,  
27 address allowable in-water work periods, and must recognize the need to  
28 maintain an economically competitive waterfront business and port  
29 community, and must meet the needs of infrastructure development as  
30 defined in RCW 90.74.010;

31 (2) Internal departmental permit review procedures that promote  
32 consistency within and between regions; and

33 (3) Habitat protection guidance for regional staff that result in  
34 predictable permit conditions for project applicants.

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

1 (1) An expedited dispute resolution process is created to resolve  
2 disputes regarding hydraulic project approvals issued under this  
3 chapter. The expedited dispute resolution process may be initiated by  
4 a project applicant at any point prior to issuance of the final  
5 hydraulic project approval. When a project applicant requests review  
6 under the expedited dispute resolution process, the forty-five day  
7 period for permit issuance is suspended until the review process is  
8 complete.

9 (2) When a project applicant requests the expedited dispute  
10 resolution process, the department must convene an expedited dispute  
11 resolution process committee within fourteen days. The expedited  
12 dispute resolution process committee consists of four members:

- 13 (a) The project contractor or engineer;
- 14 (b) A department engineer;
- 15 (c) The department's regional program manager; and
- 16 (d) An engineer or public works official designated by the local  
17 government with jurisdiction over the project.

18 (3) The expedited dispute resolution process committee must conduct  
19 a project review to determine whether the conditions in the proposed  
20 hydraulic project approval are reasonable and necessary to protect fish  
21 life. By majority vote, the committee may accept the permit  
22 conditions, reject the permit conditions and return the permit to the  
23 department for subsequent review, or determine alternative conditions  
24 to be included in the final hydraulic project approval permit.  
25 Decisions of the committee are binding on the department.

26 (4) The department must provide to each project applicant notice of  
27 the applicant's right to an expedited dispute resolution conference,  
28 and the procedures for informal and formal appeal. This information  
29 must also include:

- 30 (a) Contact information for the department employee who will be  
31 reviewing the project;
- 32 (b) Contact information for the department's regional program  
33 manager responsible for overseeing the regional hydraulic project  
34 activities at any point prior to the approval or denial of a hydraulic  
35 project approval;
- 36 (c) The proper address to which requests for expedited dispute  
37 resolution must be sent; and

1 (d) The proper address to which informal or formal appeals must be  
2 sent.

3 **Sec. 6.** RCW 77.55.100 and 2004 c 32 s 2 are each amended to read  
4 as follows:

5 (1) In the event that any person or government agency desires to  
6 construct any form of hydraulic project or perform other work within  
7 the bed of any state waters that will use, divert, obstruct, or change  
8 the natural flow or bed of any of the salt or fresh waters of the  
9 state, such person or government agency shall, before commencing  
10 construction or work thereon and to ensure the proper protection of  
11 fish life, secure the approval of the department as to the adequacy of  
12 the means proposed for the protection of fish life. This approval  
13 shall not be unreasonably withheld or unreasonably conditioned.

14 (2)(a) The department shall grant or deny approval of a standard  
15 permit within forty-five calendar days of the receipt of a complete  
16 application and notice of compliance with any applicable requirements  
17 of the state environmental policy act, made in the manner prescribed in  
18 this section. The period of forty-five calendar days may be extended,  
19 if the permit is part of a multiagency permit streamlining effort and  
20 all participating permitting agencies and the permit applicant agree to  
21 an extended timeline longer than forty-five calendar days. The permit  
22 must contain provisions allowing for minor modifications to the plans  
23 and specifications without requiring reissuance of the permit.

24 (b) The applicant may document receipt of application by filing in  
25 person or by registered mail. A complete application for approval  
26 shall contain general plans for the overall project, complete plans and  
27 specifications of the proposed construction or work within the mean  
28 higher high water line in salt water or within the ordinary high water  
29 line in fresh water, and complete plans and specifications for the  
30 proper protection of fish life.

31 (c) The forty-five day requirement shall be suspended if:  
32 (i) After ten working days of receipt of the application, the  
33 applicant remains unavailable or unable to arrange for a timely field  
34 evaluation of the proposed project;  
35 (ii) The site is physically inaccessible for inspection; or  
36 (iii) The applicant requests delay. Immediately upon determination

1 that the forty-five day period is suspended, the department shall  
2 notify the applicant in writing of the reasons for the delay.

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

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

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

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

24 (d) The department or the county legislative authority may  
25 determine if an imminent danger exists. The county legislative  
26 authority shall notify the department, in writing, if it determines  
27 that an imminent danger exists.

28 (4) Approval of a standard permit is valid for a period of up to  
29 five years from date of issuance. The permittee must demonstrate  
30 substantial progress on construction of that portion of the project  
31 relating to the approval within two years of the date of issuance. If  
32 the department denies approval, the department shall provide the  
33 applicant, in writing, a statement of the specific reasons why and how  
34 the proposed project would adversely affect fish life. Protection of  
35 fish life shall be the only ground upon which approval may be denied or  
36 conditioned. Chapter 34.05 RCW applies to any denial of project  
37 approval, conditional approval, or requirements for project  
38 modification upon which approval may be contingent.

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

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

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

20 (6)(a) The department shall, at the request of a county, develop  
21 renewable five-year maintenance approval agreements, consistent with  
22 comprehensive flood control management plans adopted under the  
23 authority of RCW 86.12.200, or other watershed plan approved by a  
24 county legislative authority, to allow for work on public and private  
25 property for bank stabilization, bridge repair, removal of sand bars  
26 and debris, channel maintenance, and other flood damage repair and  
27 reduction activity under agreed-upon conditions and times without  
28 obtaining permits for specific projects.

29 (b) The department shall, at the request of any person or  
30 government agency, develop a renewable five-year maintenance approval  
31 agreement or a hydraulic project approval mitigation agreement to allow  
32 for work on public and private property for bank stabilization, bridge  
33 repair, removal of sandbars and debris, channel maintenance, and other  
34 flood damage repair and reduction activity under reasonable agreed-upon  
35 conditions and times without obtaining permits for specific projects.

36 (7) This section shall not apply to the construction of any form of  
37 hydraulic project or other work which diverts water for agricultural  
38 irrigation or stock watering purposes authorized under or recognized as



1 being valid by the state's water codes, or when such hydraulic project  
2 or other work is associated with streambank stabilization to protect  
3 farm and agricultural land as defined in RCW 84.34.020. These  
4 irrigation or stock watering diversion and streambank stabilization  
5 projects shall be governed by RCW 77.55.110.

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

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

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

21 (10) The department shall not require a fishway on a tide gate,  
22 flood gate, or other associated man-made agricultural drainage  
23 facilities as a condition of a hydraulic project approval if such  
24 fishway was not originally installed as part of an agricultural  
25 drainage system existing on or before May 20, 2003.

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

29 (12) For the purposes of this section, "sandbars" includes, but is  
30 not limited to, sand, gravel, rock, silt, and sediments.

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