
HOUSE BILL 1163

State of Washington 61st Legislature 2009 Regular Session

By Representatives Blake, Morrell, McCune, and Hinkle

Read first time 01/14/09. Referred to Committee on Agriculture & Natural Resources.

1 AN ACT Relating to creating incentives for the construction of
2 improved fish passage projects; amending RCW 19.285.030, 77.57.010,
3 77.57.030, and 77.55.021; adding new sections to chapter 77.85 RCW; and
4 adding a new section to chapter 77.55 RCW.

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

6 NEW SECTION. **Sec. 1.** A new section is added to chapter 77.85 RCW
7 to read as follows:

8 (1) The department shall analyze and, when appropriate, certify
9 qualifying plans for fish passage improvement projects submitted by
10 eligible applicants. Only fish passage improvement projects certified
11 under this section may be publicized by the applicant as department-
12 certified.

13 (2) The department shall certify plans for fish passage improvement
14 projects if:

15 (a) The plans are submitted by an eligible applicant under this
16 section;

17 (b) The plans provide for the best achievable outbound juvenile
18 salmon passage technology for the facility under review;

1 (c) The plans provide for a level of fish passage and survivorship
2 for outbound juvenile salmon superior to the minimum regulatory
3 standards applicable to the facility under review;

4 (d) The proposed installation and construction elements of the
5 project are designed in a manner and during a time that maximizes the
6 protection of fish life;

7 (e) The construction and materials cost envisioned in the plan
8 represents a more than insignificant investment given the revenue
9 generating capacity of the facility under review, and in no case is
10 estimated to be less than five million dollars.

11 (3) The department must identify a time to accept public comments
12 on any submitted plans prior to issuing a formal certification of an
13 applicant fish passage project. Any comments related to the decision
14 criteria identified in this section must be considered as part of the
15 decision process.

16 (4) Applicants for department certification under this section must
17 submit their plans for review after the finalization of the plans and
18 prior to beginning construction on the fish passage improvement
19 projects. The applicant may contact the department for input during
20 the plan's development. However, input provided by the department
21 during the plan development stage is not binding during the plan's
22 formal evaluation.

23 (5) All costs incurred by the department in the implementation of
24 this section must be reimbursed by the applicant for certification. At
25 the discretion of the department, funds may be collected from the
26 applicant at the time of application based on estimated expenses or
27 after the certification decision based on actual accountable costs. In
28 no case may the department retain payments in excess of actual costs.

29 (6) Plans for fish passage improvement projects may be submitted
30 under this section for department certification only from an electric
31 utility, as defined in RCW 19.29A.010, and only for projects proposed
32 to be part of a hydroelectric generating facility or complex that is
33 rated to generate less than thirty megawatts and generates electricity
34 by diverting water from a river that is habitat to a run or runs of a
35 salmonid species listed for protection under the federal endangered
36 species act.

37 (7) If a submitted plan is not certified by the department, the
38 applicant may redesign elements of the plan and resubmit the plan to

1 the department. The department may, but is not required to, provide
2 information to the applicant as to what changes would increase the
3 plan's likelihood of future certification.

4 NEW SECTION. **Sec. 2.** A new section is added to chapter 77.85 RCW
5 to read as follows:

6 Nothing in section 1 of this act creates new regulatory
7 requirements, or changes the existing regulatory requirements, for any
8 facility in regards to minimum fish passage requirements. Conversely,
9 section 1 of this act is intended to provide an incentive for eligible
10 applicants to design fish passage facilities that are more significant
11 than state and federal law requires. Participation in the department
12 fish passage certification program created in section 1 of this act is
13 strictly voluntary and has no bearing on any other state program except
14 where expressly identified by law.

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

17 The construction and installation of a fish passage improvement
18 project does not require a permit under this chapter if the project is
19 certified by the department under section 1 of this act.

20 **Sec. 4.** RCW 19.285.030 and 2007 c 1 s 3 are each amended to read
21 as follows:

22 The definitions in this section apply throughout this chapter
23 unless the context clearly requires otherwise.

24 (1) "Attorney general" means the Washington state office of the
25 attorney general.

26 (2) "Auditor" means: (a) The Washington state auditor's office or
27 its designee for qualifying utilities under its jurisdiction that are
28 not investor-owned utilities; or (b) an independent auditor selected by
29 a qualifying utility that is not under the jurisdiction of the state
30 auditor and is not an investor-owned utility.

31 (3) "Commission" means the Washington state utilities and
32 transportation commission.

33 (4) "Conservation" means any reduction in electric power
34 consumption resulting from increases in the efficiency of energy use,
35 production, or distribution.

1 (5) "Cost-effective" has the same meaning as defined in RCW
2 80.52.030.

3 (6) "Council" means the Washington state apprenticeship and
4 training council within the department of labor and industries.

5 (7) "Customer" means a person or entity that purchases electricity
6 for ultimate consumption and not for resale.

7 (8) "Department" means the department of community, trade, and
8 economic development or its successor.

9 (9) "Distributed generation" means an eligible renewable resource
10 where the generation facility or any integrated cluster of such
11 facilities has a generating capacity of not more than five megawatts.

12 (10) "Eligible renewable resource" means:

13 (a) Electricity from a generation facility powered by a renewable
14 resource other than fresh water that commences operation after March
15 31, 1999, where: (i) The facility is located in the Pacific Northwest;
16 or (ii) the electricity from the facility is delivered into Washington
17 state on a real-time basis without shaping, storage, or integration
18 services; (~~or~~)

19 (b) Incremental electricity produced as a result of efficiency
20 improvements completed after March 31, 1999, to hydroelectric
21 generation projects owned by a qualifying utility and located in the
22 Pacific Northwest or to hydroelectric generation in irrigation pipes
23 and canals located in the Pacific Northwest, where the additional
24 generation in either case does not result in new water diversions or
25 impoundments; or

26 (c) Electricity from a generation facility at which the owner or
27 manager has fully constructed and installed fish passage improvement
28 projects certified by the department of fish and wildlife under section
29 1 of this act.

30 (11) "Investor-owned utility" has the same meaning as defined in
31 RCW 19.29A.010.

32 (12) "Load" means the amount of kilowatt-hours of electricity
33 delivered in the most recently completed year by a qualifying utility
34 to its Washington retail customers.

35 (13) "Nonpower attributes" means all environmentally related
36 characteristics, exclusive of energy, capacity reliability, and other
37 electrical power service attributes, that are associated with the
38 generation of electricity from a renewable resource, including but not

1 limited to the facility's fuel type, geographic location, vintage,
2 qualification as an eligible renewable resource, and avoided emissions
3 of pollutants to the air, soil, or water, and avoided emissions of
4 carbon dioxide and other greenhouse gases.

5 (14) "Pacific Northwest" has the same meaning as defined for the
6 Bonneville power administration in section 3 of the Pacific Northwest
7 electric power planning and conservation act (94 Stat. 2698; 16 U.S.C.
8 Sec. 839a).

9 (15) "Public facility" has the same meaning as defined in RCW
10 39.35C.010.

11 (16) "Qualifying utility" means an electric utility, as the term
12 "electric utility" is defined in RCW 19.29A.010, that serves more than
13 twenty-five thousand customers in the state of Washington. The number
14 of customers served may be based on data reported by a utility in form
15 861, "annual electric utility report," filed with the energy
16 information administration, United States department of energy.

17 (17) "Renewable energy credit" means a tradable certificate of
18 proof of at least one megawatt-hour of an eligible renewable resource
19 where the generation facility is not powered by fresh water, the
20 certificate includes all of the nonpower attributes associated with
21 that one megawatt-hour of electricity, and the certificate is verified
22 by a renewable energy credit tracking system selected by the
23 department.

24 (18) "Renewable resource" means: (a) Water; (b) wind; (c) solar
25 energy; (d) geothermal energy; (e) landfill gas; (f) wave, ocean, or
26 tidal power; (g) gas from sewage treatment facilities; (h) biodiesel
27 fuel as defined in RCW 82.29A.135 that is not derived from crops raised
28 on land cleared from old growth or first-growth forests where the
29 clearing occurred after December 7, 2006; and (i) biomass energy based
30 on animal waste or solid organic fuels from wood, forest, or field
31 residues, or dedicated energy crops that do not include (i) wood pieces
32 that have been treated with chemical preservatives such as creosote,
33 pentachlorophenol, or copper-chrome-arsenic; (ii) black liquor
34 byproduct from paper production; (iii) wood from old growth forests; or
35 (iv) municipal solid waste.

36 (19) "Rule" means rules adopted by an agency or other entity of
37 Washington state government to carry out the intent and purposes of
38 this chapter.

1 (20) "Year" means the twelve-month period commencing January 1st
2 and ending December 31st.

3 **Sec. 5.** RCW 77.57.010 and 2005 c 146 s 901 are each amended to
4 read as follows:

5 (1)(a) A diversion device used for conducting water from a lake,
6 river, or stream for any purpose shall be equipped with a fish guard
7 approved by the director to prevent the passage of fish into the
8 diversion device. The fish guard shall be maintained at all times when
9 water is taken into the diversion device. The fish guards shall be
10 installed at places and times prescribed by the director upon thirty
11 days' notice to the owner of the diversion device.

12 (b) A diversion device equipped with a fully constructed fish
13 passage improvement project certified by the department under section
14 1 of this act is deemed in compliance with this section. However,
15 department certification of the fish passage improvement project
16 accompanying the diversion device is not a necessary element of
17 compliance with this section and does not represent the minimum
18 standard for compliance with this section.

19 (2) Each day the diversion device is not equipped with an approved
20 fish guard is a separate offense. If within thirty days after notice
21 to equip a diversion device the owner fails to do so, the director may
22 take possession of the diversion device and close the device until it
23 is properly equipped. Expenses incurred by the department constitute
24 the value of a lien upon the diversion device and upon the real and
25 personal property of the owner. Notice of the lien shall be filed and
26 recorded in the office of the county auditor of the county in which the
27 action is taken.

28 **Sec. 6.** RCW 77.57.030 and 2005 c 146 s 903 are each amended to
29 read as follows:

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

1 (b) A diversion device equipped with a fully constructed fish
2 passage improvement project certified by the department under section
3 1 of this act is deemed in compliance with this section. However,
4 department certification of the fish passage improvement project
5 accompanying the diversion device is not a necessary element of
6 compliance with this section and does not represent the minimum
7 standard for compliance with this section.

8 (2)(a) If a person fails to construct and maintain a fishway or to
9 remove the dam or obstruction in a manner satisfactory to the director,
10 then within thirty days after written notice to comply has been served
11 upon the owner, his or her agent, or the person in charge, the director
12 may construct a fishway or remove the dam or obstruction. Expenses
13 incurred by the department constitute the value of a lien upon the dam
14 and upon the personal property of the person owning the dam. Notice of
15 the lien shall be filed and recorded in the office of the county
16 auditor of the county in which the dam or obstruction is situated. The
17 lien may be foreclosed in an action brought in the name of the state.

18 (b) If, within thirty days after notice to construct a fishway or
19 remove a dam or obstruction, the owner, his or her agent, or the person
20 in charge fails to do so, the dam or obstruction is a public nuisance
21 and the director may take possession of the dam or obstruction and
22 destroy it. No liability shall attach for the destruction.

23 (3) For the purposes of this section, "other obstruction" does not
24 include tide gates, flood gates, and associated (~~man-made~~) human-made
25 agricultural drainage facilities that were originally installed as part
26 of an agricultural drainage system on or before May 20, 2003, or the
27 repair, replacement, or improvement of such tide gates or flood gates.

28 **Sec. 7.** RCW 77.55.021 and 2008 c 272 s 1 are each amended to read
29 as follows:

30 (1) Except as provided in RCW 77.55.031, 77.55.051, (~~and~~)
31 77.55.041, and section 3 of this act, in the event that any person or
32 government agency desires to undertake a hydraulic project, the person
33 or government agency shall, before commencing work thereon, secure the
34 approval of the department in the form of a permit as to the adequacy
35 of the means proposed for the protection of fish life.

36 (2) A complete written application for a permit may be submitted in
37 person or by registered mail and must contain the following:

- 1 (a) General plans for the overall project;
- 2 (b) Complete plans and specifications of the proposed construction
3 or work within the mean higher high water line in saltwater or within
4 the ordinary high water line in freshwater;
- 5 (c) Complete plans and specifications for the proper protection of
6 fish life; and
- 7 (d) Notice of compliance with any applicable requirements of the
8 state environmental policy act, unless otherwise provided for in this
9 chapter.

10 (3)(a) Protection of fish life is the only ground upon which
11 approval of a permit may be denied or conditioned. Approval of a
12 permit may not be unreasonably withheld or unreasonably conditioned.
13 Except as provided in this subsection and subsections (8), (10), and
14 (12) of this section, the department has forty-five calendar days upon
15 receipt of a complete application to grant or deny approval of a
16 permit. The forty-five day requirement is suspended if:

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

20 (ii) The site is physically inaccessible for inspection;

21 (iii) The applicant requests a delay; or

22 (iv) The department is issuing a permit for a storm water discharge
23 and is complying with the requirements of RCW 77.55.161(3)(b).

24 (b) Immediately upon determination that the forty-five day period
25 is suspended, the department shall notify the applicant in writing of
26 the reasons for the delay.

27 (c) The period of forty-five calendar days may be extended if the
28 permit is part of a multiagency permit streamlining effort and all
29 participating permitting agencies and the permit applicant agree to an
30 extended timeline longer than forty-five calendar days.

31 (4) If the department denies approval of a permit, the department
32 shall provide the applicant a written statement of the specific reasons
33 why and how the proposed project would adversely affect fish life.
34 Issuance, denial, conditioning, or modification of a permit shall be
35 appealable to the department or the board as specified in RCW 77.55.301
36 within thirty days of the notice of decision.

37 (5)(a) The permittee must demonstrate substantial progress on

1 construction of that portion of the project relating to the permit
2 within two years of the date of issuance.

3 (b) Approval of a permit is valid for a period of up to five years
4 from the date of issuance, except as provided in (c) of this subsection
5 and in RCW 77.55.151.

6 (c) A permit remains in effect without need for periodic renewal
7 for hydraulic projects that divert water for agricultural irrigation or
8 stock watering purposes and that involve seasonal construction or other
9 work. A permit for streambank stabilization projects to protect farm
10 and agricultural land as defined in RCW 84.34.020 remains in effect
11 without need for periodic renewal if the problem causing the need for
12 the streambank stabilization occurs on an annual or more frequent
13 basis. The permittee must notify the appropriate agency before
14 commencing the construction or other work within the area covered by
15 the permit.

16 (6) The department may, after consultation with the permittee,
17 modify a permit due to changed conditions. The modification becomes
18 effective unless appealed to the department or the board as specified
19 in RCW 77.55.301 within thirty days from the notice of the proposed
20 modification. For hydraulic projects that divert water for
21 agricultural irrigation or stock watering purposes, or when the
22 hydraulic project or other work is associated with streambank
23 stabilization to protect farm and agricultural land as defined in RCW
24 84.34.020, the burden is on the department to show that changed
25 conditions warrant the modification in order to protect fish life.

26 (7) A permittee may request modification of a permit due to changed
27 conditions. The request must be processed within forty-five calendar
28 days of receipt of the written request. A decision by the department
29 may be appealed to the board within thirty days of the notice of the
30 decision. For hydraulic projects that divert water for agricultural
31 irrigation or stock watering purposes, or when the hydraulic project or
32 other work is associated with streambank stabilization to protect farm
33 and agricultural land as defined in RCW 84.34.020, the burden is on the
34 permittee to show that changed conditions warrant the requested
35 modification and that such a modification will not impair fish life.

36 (8)(a) The department, the county legislative authority, or the
37 governor may declare and continue an emergency. If the county
38 legislative authority declares an emergency under this subsection, it

1 shall immediately notify the department. A declared state of emergency
2 by the governor under RCW 43.06.010 shall constitute a declaration
3 under this subsection.

4 (b) The department, through its authorized representatives, shall
5 issue immediately, upon request, oral approval for a stream crossing,
6 or work to remove any obstructions, repair existing structures, restore
7 streambanks, protect fish life, or protect property threatened by the
8 stream or a change in the stream flow without the necessity of
9 obtaining a written permit prior to commencing work. Conditions of the
10 emergency oral permit must be established by the department and reduced
11 to writing within thirty days and complied with as provided for in this
12 chapter.

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

16 (9) All state and local agencies with authority under this chapter
17 to issue permits or other authorizations in connection with emergency
18 water withdrawals and facilities authorized under RCW 43.83B.410 shall
19 expedite the processing of such permits or authorizations in keeping
20 with the emergency nature of such requests and shall provide a decision
21 to the applicant within fifteen calendar days of the date of
22 application.

23 (10) The department or the county legislative authority may
24 determine an imminent danger exists. The county legislative authority
25 shall notify the department, in writing, if it determines that an
26 imminent danger exists. In cases of imminent danger, the department
27 shall issue an expedited written permit, upon request, for work to
28 remove any obstructions, repair existing structures, restore banks,
29 protect fish resources, or protect property. Expedited permit requests
30 require a complete written application as provided in subsection (2) of
31 this section and must be issued within fifteen calendar days of the
32 receipt of a complete written application. Approval of an expedited
33 permit is valid for up to sixty days from the date of issuance. The
34 department may not require the provisions of the state environmental
35 policy act, chapter 43.21C RCW, to be met as a condition of issuing a
36 permit under this subsection.

37 (11)(a) For any property, except for property located on a marine
38 shoreline, that has experienced at least two consecutive years of

1 flooding or erosion that has damaged or has threatened to damage a
2 major structure, water supply system, septic system, or access to any
3 road or highway, the county legislative authority may determine that a
4 chronic danger exists. The county legislative authority shall notify
5 the department, in writing, when it determines that a chronic danger
6 exists. In cases of chronic danger, the department shall issue a
7 permit, upon request, for work necessary to abate the chronic danger by
8 removing any obstructions, repairing existing structures, restoring
9 banks, restoring road or highway access, protecting fish resources, or
10 protecting property. Permit requests must be made and processed in
11 accordance with subsections (2) and (3) of this section.

12 (b) Any projects proposed to address a chronic danger identified
13 under (a) of this subsection that satisfies the project description
14 identified in RCW 77.55.181(1)(a)(ii) are not subject to the provisions
15 of the state environmental policy act, chapter 43.21C RCW. However,
16 the project is subject to the review process established in RCW
17 77.55.181(3) as if it were a fish habitat improvement project.

18 (12) The department may issue an expedited written permit in those
19 instances where normal permit processing would result in significant
20 hardship for the applicant or unacceptable damage to the environment.
21 Expedited permit requests require a complete written application as
22 provided in subsection (2) of this section and must be issued within
23 fifteen calendar days of the receipt of a complete written application.
24 Approval of an expedited permit is valid for up to sixty days from the
25 date of issuance. The department may not require the provisions of the
26 state environmental policy act, chapter 43.21C RCW, to be met as a
27 condition of issuing a permit under this subsection.

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