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**SENATE BILL 5466**

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**State of Washington 65th Legislature 2017 Regular Session**

**By** Senators McCoy, Chase, and Fortunato; by request of Department of Fish and Wildlife

AN ACT Relating to construction projects in state waters; amending RCW 77.55.141, 77.55.181, 77.55.231, and 77.55.291; adding new sections to chapter 77.55 RCW; repealing RCW 77.55.321; and prescribing penalties.

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

**Sec.**  RCW 77.55.141 and 2010 c 210 s 28 are each amended to read as follows:

(1) In order to protect the property of marine waterfront shoreline owners it is necessary to facilitate issuance of permits for bulkheads or rockwalls under certain conditions.

(2) The department ((~~shall~~)) may issue a permit with ((~~or without~~)) conditions within forty-five days of receipt of a complete and accurate application which authorizes commencement of construction, replacement, or repair of a marine beach front protective bulkhead or rockwall for single-family type residences ((~~or property~~)) under the following conditions:

(a) The applicant provides a geotechnical analysis that demonstrates that erosion from waves or currents is imminently threatening or that, unless the new bulkhead or rockwall is constructed, damage is expected to occur within three years;

(b) The erosion is not caused by upland conditions;

(c) The proposed bulkhead or rockwall will provide greater protection than feasible, nonstructural alternatives such as slope drainage systems, vegetative growth stabilization, gravel berms, and beach nourishment;

(d) The proposal is the minimum necessary to protect existing legally established single-family type residences;

(e) Adequate mitigation measures will be provided to maintain existing shoreline processes and critical food fish or shellfish habitats;

(f) The waterward face of a new bulkhead or rockwall shall be located only as far waterward as is necessary to excavate for footings or place base rock for the structure and under no conditions shall be located more than six feet waterward of the ordinary high water line;

((~~(b)~~)) (g) Any bulkhead or rockwall to replace or repair an existing bulkhead or rockwall shall be placed along the same alignment as the bulkhead or rockwall it is replacing. However, the replaced or repaired bulkhead or rockwall may be placed waterward of and directly abutting the existing structure only in cases where removal of the existing bulkhead or rockwall would result in environmental degradation or removal problems related to geological, engineering, or safety considerations; ((~~and~~

~~(c)~~)) (h) Construction of a new bulkhead or rockwall, or replacement or repair of an existing bulkhead or rockwall waterward of the existing structure shall not result in the ((~~permanent~~)) net loss of critical food fish or shellfish habitats; and

((~~(d)~~)) (i) Timing constraints shall be applied on a case-by-case basis for the protection of critical habitats, including but not limited to migration corridors, rearing and feeding areas, and spawning habitats, for the proper protection of fish life.

(3) Any bulkhead or rockwall construction, replacement, or repair not meeting the conditions in this section shall be processed under this chapter in the same manner as any other application.

(4) Any person aggrieved by the approval, denial, conditioning, or modification of a permit under this section may appeal the decision as provided in RCW 77.55.021((~~(4)~~)) (8).

**Sec.**  RCW 77.55.181 and 2014 c 120 s 1 are each amended to read as follows:

(1)(a) In order to receive the permit review and approval process created in this section, a fish habitat enhancement project must meet the criteria under this section and must be a project to accomplish one or more of the following tasks:

(i) Elimination of human-made or caused fish passage barriers, including culvert repair and replacement;

(ii) Restoration of an eroded or unstable stream bank employing the principle of bioengineering, including limited use of rock as a stabilization only at the toe of the bank, and with primary emphasis on using native vegetation to control the erosive forces of flowing water; ((~~or~~))

(iii) Placement of woody debris, spawning material, or other ((~~instream~~)) habitat structures that benefit naturally reproducing fish stocks;

(iv) Restoration of marine and lake shorelines by removing armoring and other hard shoreline stabilization structures, or replacing hard shoreline structures with natural or soft techniques, with primary emphasis on using native vegetation, root wads, large woody material, and beach nourishment to mimic natural shoreline processes; or

(v) Restoration of lake and marine nearshore by removing docks and other human-made structures.

(b) ((~~The department shall develop size or scale threshold tests to determine if projects accomplishing any of these tasks should be evaluated under the process created in this section or under other project review and approval processes.~~)) A project proposal shall not be reviewed under the process created in this section if the department or the local government determines that the scale of the project raises environmental and public health and safety concerns ((~~regarding public health and safety~~)) or if the department determines that fish or fish habitat would be adversely impacted by the project.

(c) A fish habitat enhancement project must be approved in one of the following ways in order to receive the permit review and approval process created in this section:

(i) By the department pursuant to chapter 77.95 or 77.100 RCW;

(ii) By the sponsor of a watershed restoration plan as provided in chapter 89.08 RCW;

(iii) By the department as a department-sponsored fish habitat enhancement or restoration project;

(iv) ((~~Through the review and approval process for the jobs for the environment program;~~)) By a tribe as a tribal sponsored fish habitat enhancement or restoration project;

(v) Through the review and approval process for conservation district-sponsored projects, where the project complies with design standards established by the conservation commission through interagency agreement with the ((~~United States fish and wildlife service and the natural resource conservation service~~)) department;

(vi) Through a formal grant program established by the legislature or the department for fish habitat enhancement or restoration;

(vii) Through the department of transportation's environmental retrofit program as a stand-alone fish passage barrier correction project;

(viii) Through a local, state, or federally approved fish barrier removal grant program designed to assist local governments in implementing stand-alone fish passage barrier corrections;

(ix) By a city or county for a stand-alone fish passage barrier correction project funded by the city or county; and

(x) Through other formal review and approval processes established by the legislature.

(2) Fish habitat enhancement projects meeting the criteria of subsection (1) of this section are expected to result in beneficial impacts to the environment. Decisions pertaining to fish habitat enhancement projects meeting the criteria of subsection (1) of this section and being reviewed and approved according to the provisions of this section are not subject to the requirements of RCW 43.21C.030(2)(c).

(3)(a) A permit is required for projects that meet the criteria of subsection (1) of this section and are being reviewed and approved under this section. An applicant shall use the department's online permit application system or a joint aquatic resource permit application form developed by the office of regulatory assistance to apply for approval under this chapter. ((~~On the same day, the applicant shall provide copies of~~)) Upon receipt of a complete application, the department shall notify the local government that the completed application form ((~~to the department and to each appropriate local government~~)) is available for review in the online permit system.

(b) Notification by the department to the local governments shall ((~~accept the application~~)) serve as notice of the proposed project. The department shall provide a ((~~fifteen-day~~)) thirty-day comment period during which it will receive comments regarding potential environmental and public health and safety impacts.

(c) Within forty-five days, the department shall either issue a permit, with or without conditions, deny approval, or make a determination that the review and approval process created by this section is not appropriate for the proposed project. The department shall base this determination on identification during the comment period of adverse impacts that cannot be mitigated by the conditioning of a permit.

(d) If the department determines that the review and approval process created by this section is not appropriate for the proposed project, the department shall notify the applicant and the appropriate local governments of its determination. The applicant may reapply for approval of the project under other review and approval processes.

(e) Any person aggrieved by the approval, denial, conditioning, or modification of a permit under this section may appeal the decision as provided in RCW 77.55.021(8).

(4) No local government may require permits or charge fees for fish habitat enhancement projects that meet the criteria of subsection (1) of this section and that are reviewed and approved according to the provisions of this section.

(5) No civil liability may be imposed by any court on the state or its officers and employees for any adverse impacts resulting from a fish enhancement project permitted by the department under the criteria of this section except upon proof of gross negligence or willful or wanton misconduct.

**Sec.**  RCW 77.55.231 and 2012 1st sp.s. c 1 s 106 are each amended to read as follows:

(1) Conditions imposed upon a permit must be reasonably related to the project. The permit conditions must ensure that the project provides proper protection for fish life, but the department may not impose conditions that attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project.

(2) The permit must contain provisions ((~~allowing for minor~~)) exempting the following modifications from all fees listed under this section:

(a) Minor modifications to the plans and specifications ((~~without requiring reissuance of the permit.~~

~~(3) The permit must contain provisions that allow for~~));

(b) Minor modifications to the required work timing ((~~without requiring the reissuance of the permit~~)). "Minor modifications to the required work timing" means a minor deviation from the timing window set forth in the permit when there are no spawning or incubating fish present within the vicinity of the project; and

(c) Transfer of a permit to a new permittee or authorized agent.

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

(1) When the department determines that a violation has or is about to occur, it shall first attempt to achieve voluntary compliance, provided the violation is not causing harm to fish life or fish habitat.

(2) As part of this first response, the department must offer information and technical assistance to the person, identifying one or more means to accomplish the person's purposes within the framework of the law. The department must provide a reasonable timeline for voluntary compliance to be achieved that takes into consideration factors specific to the violation, such as the complexity of the hydraulic project, the actual or potential risk to fish life or fish habitat, and the environmental conditions at the time of the first response.

(3) If the department determines that a violation is causing harm to fish life or fish habitat, the department shall take immediate action to end the violation.

(4) If a person violates this chapter, or any of the rules adopted by the department that implement this chapter, the department may issue a notice to comply, stop work order, or civil penalty.

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

(1) The department has the authority to serve a person a stop work order, which is a final order of the department, if:

(a) There is any violation of the provisions of this chapter or the department's rules;

(b) There is a deviation from the hydraulic project approval; or

(c) Immediate action is necessary to prevent continuation of or to avoid material damage to fish life.

(2)(a) A stop work order must set forth:

(i) The specific nature, extent, and time of the violation, deviation, damage, or potential damage;

(ii) The specific course of action needed to correct or prevent a continuing violation, deviation, damage, or potential damage; and

(iii) The right of the person to a hearing before the board.

(b) A stop work order may require that the person stop all work connected with the violation until corrective action is taken.

(3) The department shall mail a copy of such an order to the applicant and landowner at the address shown on the hydraulic project application within five business days.

(4) Issuance of a stop work order may be informally appealed by the applicant or landowner to the department within thirty days from the date of receipt of the penalty. Requests for informal appeal must be filed in the form and manner prescribed by the department by rule. A stop work order that has been informally appealed to the department is appealable to the appeals board within thirty days from the date of receipt of the department's decision on the informal appeal.

(5) The applicant or landowner may commence an appeal to the board within thirty days from the date of receipt of the stop work order. If such an appeal is commenced, the proceeding is an adjudicative proceeding under chapter 34.05 RCW, the administrative procedure act. The recipient must comply with the order of the department immediately upon being served, but the board may discontinue the order, upon motion, under such conditions as the board may impose.

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

(1)(a) If a violation, deviation, damage, or potential damage to fish life has occurred and the department determines that a stop work order is unnecessary, then the department shall issue and serve upon the applicant and landowner a notice to comply, which must clearly set forth:

(i) The nature, extent, date, and time of the violation;

(ii) Any necessary corrective action; and

(iii) The right of the person to an appeal.

(b) The notice to comply may require that the person take corrective action to prevent, correct, or compensate for adverse impacts to fish life.

(2) The department shall mail a copy of such a notice to the applicant and landowner at the address shown on the hydraulic project application within five business days.

(3) Issuance of such a notice may be informally appealed by the applicant or landowner to the department within thirty days from the date of receipt of the penalty. Requests for informal appeal must be filed in the form and manner prescribed by the department by rule. A notice to comply that has been informally appealed to the department is appealable to the appeals board within thirty days from the date of receipt of the department's decision on the informal appeal.

(4) The applicant or landowner may commence an appeal to the board within thirty days from the date of receipt of the notice. If such an appeal is commenced, the proceeding is an adjudicative proceeding under chapter 34.05 RCW, the administrative procedure act. The recipient must comply with the notice to comply immediately upon being served, but the board may discontinue the notice to comply, upon motion, under such conditions as the board may impose.

**Sec.**  RCW 77.55.291 and 2010 c 210 s 31 are each amended to read as follows:

(1) The department may levy civil penalties of up to ((~~one hundred dollars per day for violation of any provisions of RCW 77.55.021. The penalty provided shall be imposed by notice in writing, either by certified mail or personal service to the person incurring the penalty, from the director or the director's designee describing the violation~~)) ten thousand dollars for every violation of this chapter or the rules adopted to implement this chapter. Each and every violation is a separate and distinct civil offense. The penalty provided must be imposed by notice in writing by the department, either by certified mail or personal service to the person incurring the penalty, describing the violation. The civil penalty notice must specify the:

(a) Basis for the penalty and the amount levied; and

(b) Right of the person to an appeal.

(2)(a) Except as provided in (b) of this subsection, any person incurring any penalty under this chapter may appeal the same under chapter 34.05 RCW to the board. Appeals shall be filed within thirty days from the date of receipt of the penalty in accordance with RCW 43.21B.230.

(b) Issuance of a civil penalty may be informally appealed by the applicant or landowner to the department within thirty days from the date of receipt of the penalty. Requests for informal appeal must be filed in the form and manner prescribed by the department by rule. A civil penalty that has been informally appealed to the department is appealable to the board within thirty days from the date of receipt of the department's decision on the informal appeal.

(3) The penalty imposed shall become due and payable thirty days after receipt of a notice imposing the penalty unless an appeal is filed. Whenever an appeal of any penalty incurred under this chapter is filed, the penalty shall become due and payable only upon completion of all review proceedings and the issuance of a final order confirming the penalty in whole or in part. When the penalty becomes past due, it is also subject to interest at the rate allowed by RCW 43.17.240 for debts owed to the state.

(4) If the amount of any penalty is not paid within thirty days after it becomes due and payable, the attorney general, upon the request of the director, shall bring an action in the name of the state of Washington in the superior court of Thurston county or of ((~~any~~)) the county in which such ((~~violator may do business~~)) violation occurred, to recover such penalty. In all such actions the procedure and rules of evidence shall be the same as an ordinary civil action. All penalties ((~~recovered under this section shall be paid into the state's general fund~~)) received or recovered by state agency action for violations as prescribed in subsection (1) of this section must be deposited into the state's general fund. The department is also entitled to recover reasonable attorneys' fees and costs incurred in connection with the penalty recovered under this section.

(5) The department shall adopt by rule a penalty schedule to be effective by January 1, 2018. The schedule must be developed in consideration of the following:

(a) Previous violation history;

(b) Severity of the impact on fish and fish habitat;

(c) Whether the violation of this chapter or its rules was intentional;

(d) Cooperation with the department;

(e) Reparability of the adverse effect from the violation; and

(f) The extent to which a penalty to be imposed on a person for a violation committed by another should be reduced if the person was unaware of the violation and has not received a substantial economic benefit from the violation.

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

The department may apply for an administrative inspection warrant in either Thurston county superior court or the superior court in the county where the project is located. The court may issue an administrative inspection warrant where:

(1) Department personnel need to inspect the project site to ensure compliance with this chapter and rules adopted to implement this chapter; or

(2) Department personnel have probable cause to believe that a violation of this chapter or of the rules adopted to implement this chapter is occurring or has occurred.

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

(1) The department shall charge fees for hydraulic project approvals issued under RCW 77.55.021 to recover a portion of the costs for processing and issuing decisions on permit applications, administering fee collections, and compliance and effectiveness monitoring and enforcement of projects requiring a permit. The fees are based on the scale and complexity of the project and the relative effort required for department staff to review the application, conduct site visits, consult with applicants as necessary, and issue or deny the permit.

(2) For the purposes of assessing fees for permits under subsection (1) of this section, the department must categorize the following repair or maintenance hydraulic projects as low complexity:

(a) Emergencies;

(b) Freshwater beach habitat creation;

(c) Beaver dams;

(d) Breeding substrate;

(e) Large woody material work;

(f) Riparian habitat work;

(g) Wetlands or estuarine habitat work;

(h) Conduit or cable work using boring;

(i) Dredging less than fifty cubic yards of bed material;

(j) Water crossings, including a bridge, culvert, or ford, in nonfish-bearing waters;

(k) Bridge work exclusively above the ordinary high water line;

(l) Shoreline modification or bank protection of less than one hundred feet, not associated with jetties, dikes, or levees;

(m) Booms;

(n) Anchoring or mooring buoys and navigation aids;

(o) Piling work;

(p) Overwater structures, not including marinas or marine terminals;

(q) Boat lifts or railway launches;

(r) Boat ramps or launches;

(s) Timber felling and yarding activities;

(t) Temporary or permanent stream gauges or other scientific instruments;

(u) Outfalls;

(v) Tidegates;

(w) Mechanical aquatic plant control not addressed by the aquatic plants and fish pamphlet;

(x) Pump water diversions and fish screens; and

(y) Gravity water diversions and fish screens.

(3) When assessing fees for permits under subsection (1) of this section, the department must categorize the following new, replacement, or removal hydraulic projects as low complexity:

(a) Beaver dams;

(b) Conduit or cable work using boring;

(c) Bridge work exclusively above the ordinary high water line;

(d) Booms;

(e) Anchoring or mooring buoys and navigation aids;

(f) Overwater structures in the current footprint, not including marinas or marine terminals;

(g) Boat ramps or launches within the existing footprint of an existing structure;

(h) Timber felling and yarding activities; and

(i) Temporary or permanent stream gauges or other scientific instruments.

(4) When assessing fees for permits under subsection (1) of this section, the department must categorize the following repair or maintenance hydraulic projects as medium complexity:

(a) Aquaculture;

(b) Off channel, side channel, or in-channel enhancement or restoration work, not including projects that are exclusively large woody material work;

(c) Channel realignment work;

(d) Bed modification, not including habitat enhancement or restoration and dredging;

(e) Conduit or cable work using trenching;

(f) Dredging greater than fifty cubic yards of bed material;

(g) Water crossings, including a bridge, culvert, or ford, in fish-bearing waters, not including fish passage retrofits;

(h) Fish passage barrier removal with replacement or retrofit using such methods as baffles or log controls for passage through or over a structure;

(i) Fish passage not associated with a water crossing structure, such as a bypass of a natural barrier or a fishway to bypass a dam;

(j) Shoreline modification or bank protection greater than one hundred feet that is not associated with jetties, dikes, or levees;

(k) Jetties, dikes, or levees;

(l) Overwater structures outside of the footprint of an existing structure, not including marinas or marine terminals;

(m) Marinas and marine terminals; and

(n) Dams not under jurisdiction of the federal energy regulatory commission.

(5) When assessing fees for permits under subsection (1) of this section, the department must categorize the following new, replacement, or removal hydraulic projects as medium complexity:

(a) Emergencies;

(b) Aquaculture;

(c) Freshwater beach habitat creation;

(d) Breeding substrate;

(e) Large woody material work;

(f) Riparian habitat work;

(g) Conduit or cable work using trenching;

(h) Dredging less than fifty cubic yards of bed material;

(i) Water crossings, including a bridge, culvert, or ford, in nonfish-bearing waters;

(j) Shoreline modification or bank protection less than one hundred feet, not associated with jetties, dikes, or levees;

(k) Piling work;

(l) Overwater structures outside of the footprint of an existing structure, not including marinas or marine terminals;

(m) Boat lifts or railway launches;

(n) Boat ramps or launches outside of the footprint of an existing structure;

(o) Outfalls;

(p) Tidegates;

(q) Mechanical aquatic plant control not addressed by the aquatic plants and fish pamphlet;

(r) Mineral prospecting not addressed by the gold and fish pamphlet;

(s) Pump water diversions and fish screens; and

(t) Gravity water diversions and fish screens.

(6) When assessing fees for permits under subsection (1) of this section, the department must categorize the following new, replacement, or removal hydraulic projects as high complexity:

(a) Off channel, side channel, or in-channel enhancement or restoration work, not including projects that are exclusively large woody material work;

(b) Wetland or estuarine habitat work;

(c) Channel realignment work;

(d) Bed modification, not including habitat enhancement or restoration and dredging;

(e) Dredging greater than fifty cubic yards of bed material;

(f) Water crossings, including a bridge, culvert, or ford, in fish-bearing waters, not including fish passage retrofits;

(g) Fish passage barrier removal with replacement or retrofit using such methods as baffles or log controls for passage through or over a structure;

(h) Fish passage not associated with a water crossing structure, such as a bypass of a natural barrier or a fishway to bypass a dam;

(i) Shoreline modification or bank protection greater than one hundred feet, not associated with jetties, dikes, or levees;

(j) Jetties, dikes, or levees;

(k) Marinas and marine terminals; and

(l) Dams not under jurisdiction of the federal energy regulatory commission.

(7) If the department receives an application for a project type not identified in subsections (2) through (6) of this section, it shall categorize them as low, medium, or high risk and charge fees based on those categories consistent with the most similar project types identified in subsections (2) through (6) of this section.

(8) The department must charge the following fees. Until January 1, 2018, the fee is one hundred fifty dollars. Beginning January 1, 2018, the following applies:

(a) A notification/application submittal fee of one hundred fifty dollars for a low complexity hydraulic project;

(b) An application submittal fee of two hundred fifty dollars for a medium complexity hydraulic project;

(c) An application submittal fee of five hundred dollars for a high complexity hydraulic project; and

(d) An application submittal fee of one thousand dollars for a general hydraulic project approval.

(9) In cases where hydraulic projects include work that falls into more than one of the permit categories outlined in subsection (8) of this section, the fee charged must be based on the most complex component of the project.

(10) In addition to the base fee defined in subsection (8) of this section, the department must charge the following additional fees except where exempted in RCW 77.55.231:

(a) A one hundred dollar fee for modifications to low complexity hydraulic projects;

(b) A one hundred twenty-five dollar fee for modifications to medium complexity hydraulic projects;

(c) A two hundred fifty dollar fee for modifications to high complexity hydraulic projects;

(d) A five hundred dollar fee for modifications to general hydraulic project approvals;

(e) A one hundred fifty dollar fee for extensions to the end date of a project approval; and

(f) A thirty dollar fee for applications submitted without using the online system.

(11) The following hydraulic projects are exempt from all fees listed under this section:

(a) Hydraulic projects approved under applicant-funded contracts with the department that pay for the costs of processing those projects;

(b) Pamphlet hydraulic projects;

(c) Mineral prospecting and mining activities;

(d) Hydraulic projects occurring on farm and agricultural land, as that term is defined in RCW 84.34.020; and

(e) Fish habitat enhancement projects as provided for in RCW 77.55.181.

(12) The department shall refund fifty percent of the permit processing fee to any person that properly applies for any permit or permit modification under RCW 77.55.021 if the department fails to process the application or request within the timelines required by RCW 77.55.021.

(13) The department shall refund one hundred percent of all fees if:

(a) No permit is required for the proposed work; or

(b) The hydraulic project is exempt from substantial development permit requirements under RCW 90.58.147 and the project proponent provides the department a copy of the letter documenting exemption approval by the local government.

(14) Prior to submitting its biennial operating budget every two years to the office of financial management, the department shall send a report to the appropriate committees of the legislature on the progress of the hydraulic project approval program.

NEW SECTION. **Sec.**  RCW 77.55.321 (Application fee for a hydraulic project permit or permit modification—Projects exempt from fees—Disposition of fees) and 2012 1st sp.s. c 1 s 103 are each repealed.

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