
HOUSE BILL 2337

State of Washington

65th Legislature

2018 Regular Session

By Representatives Fitzgibbon, Tarleton, Santos, and McBride

Prefiled 12/28/17. Read first time 01/08/18. Referred to Committee on Agriculture & Natural Resources.

1 AN ACT Relating to civil enforcement of construction projects in
2 state waters; amending RCW 77.55.291; adding new sections to chapter
3 77.55 RCW; and prescribing penalties.

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

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 77.55
6 RCW to read as follows:

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

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

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

4 (4) If a person violates this chapter, or any of the rules
5 adopted by the department that implement this chapter, at or below
6 the ordinary high water line, the department may issue a notice to
7 comply, stop work order, or a civil penalty as provided in section 4
8 of this act.

9 (5) If a person violates this chapter, or any of the rules
10 adopted by the department that implement this chapter, above the
11 ordinary high water line, the department may issue a notice to
12 comply, stop work order, or civil penalty as provided in RCW
13 77.55.291.

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

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

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

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

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

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

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

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

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

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

31 (3) The department shall mail a copy of such an order to the
32 applicant's, landowner's, and contractor's last known address, and to
33 the local jurisdiction in which the project is located, within five
34 business days.

35 (4) Issuance of a stop work order may be informally appealed by
36 the applicant or landowner to the department within thirty days from
37 the date of receipt of the penalty. Requests for informal appeal must
38 be filed in the form and manner prescribed by the department by rule.
39 A stop work order that has been informally appealed to the department

1 is appealable to the appeals board within thirty days from the date
2 of receipt of the department's decision on the informal appeal.

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

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

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

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

19 (ii) Any necessary corrective action; and

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

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

24 (2) The department shall mail a copy of such a notice to the
25 applicant's, landowner's, and contractor's last known address, and to
26 the local jurisdiction in which the project is located, within five
27 business days.

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

35 (4) The applicant or landowner may commence an appeal to the
36 board within thirty days from the date of receipt of the notice. If
37 such an appeal is commenced, the proceeding is an adjudicative
38 proceeding under chapter 34.05 RCW, the administrative procedure act.
39 The recipient must comply with the notice to comply immediately upon

1 being served, but the board may discontinue the notice to comply,
2 upon motion, under such conditions as the board may impose.

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

5 (1) The department may levy civil penalties of up to ten thousand
6 dollars for every violation of this chapter or the rules adopted to
7 implement this chapter that occurs at or below the ordinary high
8 water line. Each and every violation is a separate and distinct civil
9 offense. The penalty provided must be imposed by notice in writing by
10 the department, either by certified mail or personal service to the
11 person incurring the penalty and to the local jurisdiction in which
12 the project is located, describing the violation. The civil penalty
13 notice must specify the:

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

15 (b) Right of the person to an appeal.

16 (2)(a) Except as provided in (b) of this subsection, any person
17 incurring any penalty under this chapter may appeal the penalty under
18 chapter 34.05 RCW to the board. Appeals must be filed within thirty
19 days from the date of receipt of the penalty in accordance with RCW
20 43.21B.230.

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

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

36 (4) If the amount of any penalty is not paid within thirty days
37 after it becomes due and payable, the attorney general, upon the
38 request of the director, shall bring an action in the name of the
39 state of Washington in the superior court of Thurston county or of

1 the county in which such a violation occurred, to recover the
2 penalty. In all such actions, the procedures and rules of evidence
3 are the same as an ordinary civil action. All penalties received or
4 recovered by state agency action for violations as prescribed in
5 subsection (1) of this section must be deposited into the state's
6 general fund. The department is also entitled to recover reasonable
7 attorneys' fees and costs incurred in connection with the penalty
8 recovered under this section.

9 (5) The department shall adopt by rule a penalty schedule to be
10 effective by January 1, 2019. The schedule must be developed in
11 consideration of the following:

- 12 (a) Previous violation history;
- 13 (b) Severity of the impact on fish and fish habitat;
- 14 (c) Whether the violation of this chapter or its rules was
15 intentional;
- 16 (d) Cooperation with the department;
- 17 (e) Reparability of the adverse effect from the violation; and
- 18 (f) The extent to which a penalty to be imposed on a person for a
19 violation committed by another should be reduced if the person was
20 unaware of the violation and has not received a substantial economic
21 benefit from the violation.

22 **Sec. 5.** RCW 77.55.291 and 2010 c 210 s 31 are each amended to
23 read as follows:

24 (1) The department may levy civil penalties of up to one hundred
25 dollars per day for violation of any provisions of RCW 77.55.021 that
26 occurs above the ordinary high water line. Each and every violation
27 is a separate and distinct civil offense. The penalty provided shall
28 be imposed by notice in writing, either by certified mail or personal
29 service to the person incurring the penalty, and a copy sent to the
30 local jurisdiction in which the project is located, from the director
31 or the director's designee describing the violation. The civil
32 penalty notice must specify the:

- 33 (a) Basis for the penalty and the amount levied; and
- 34 (b) Right of the person to an appeal.

35 (2)(a) Except as provided in (b) of this subsection, any person
36 incurring any penalty under this chapter may appeal the same under
37 chapter 34.05 RCW to the board. Appeals shall be filed within thirty
38 days from the date of receipt of the penalty in accordance with RCW
39 43.21B.230.

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

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

16 (4) If the amount of any penalty is not paid within thirty days
17 after it becomes due and payable, the attorney general, upon the
18 request of the director, shall bring an action in the name of the
19 state of Washington in the superior court of Thurston county or of
20 ~~((any))~~ the county in which such ~~((violation occurred))~~
21 violation occurred, to recover such penalty. In all such actions the
22 procedure and rules of evidence shall be the same as an ordinary
23 civil action. All penalties ~~((recovered under this section shall be~~
24 ~~paid into the state's general fund))~~ received or recovered by state
25 agency action for violations as prescribed in subsection (1) of this
26 section must be deposited into the state's general fund.

27 (5) The department shall consider the following when determining
28 a penalty:

- 29 (a) Previous violation history;
30 (b) Severity of the impact on fish and fish habitat;
31 (c) Whether the violation of this chapter or its rules was
32 intentional;
33 (d) Cooperation with the department;
34 (e) Reparability of the adverse effect from the violation; and
35 (f) The extent to which a penalty to be imposed on a person for a
36 violation committed by another should be reduced if the person was
37 unaware of the violation and has not received a substantial economic
38 benefit from the violation.

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

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

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

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

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