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**SUBSTITUTE HOUSE BILL 1428**

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

**By** House Agriculture & Natural Resources (originally sponsored by Representatives Blake, Fitzgibbon, Lytton, Morris, and Tharinger; by request of Department of Fish and Wildlife)

AN ACT Relating to construction projects in state waters; amending RCW 77.55.181, 77.55.231, and 77.55.021; adding a new section to chapter 77.55 RCW; and repealing RCW 77.55.321.

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

**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)~~)) (9).

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

(t) Outfalls;

(u) Tidegates;

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

(w) Pump water diversions and fish screens; and

(x) 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; and

(h) 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.

**Sec.**  RCW 77.55.021 and 2012 1st sp.s. c 1 s 102 are each amended to read as follows:

(1)(a) Except as provided in RCW 77.55.031, 77.55.051, 77.55.041, and 77.55.361, in the event that any person ((~~or government agency~~)) desires to undertake a hydraulic project, the person ((~~or government agency~~)) shall((~~, before commencing work thereon,~~)) secure the approval of the department ((~~in the form of a permit as to the adequacy of the means proposed for the protection of fish life~~)) before conducting work on that project.

(b) When issuing approval for hydraulic projects, the department shall provide for the protection of fish life.

(2) A person must secure the approval of the department for the following hydraulic projects:

(a) Any hydraulic project conducted at or below the ordinary high water mark and associated upland components;

(b) Any shoreline or stream bank protection; bank reshaping or regrading; dike or levee; avulsion prevention techniques; floodplain or tidal channel fill; channel creation, relocation, or realignment; floodplain mining; or mineral prospecting; and

(c) New and replacement bridge construction; replacement, repair, and maintenance of substructure and superstructure, abutments, wing walls, and piers; and scour protection. A permit is also required for bridge painting and other maintenance where there is the potential for paint, sandblasting material, sediments, deck overlay material, or bridge parts to fall into the water unless the work is conducted in compliance with a valid national pollutant discharge elimination system and state waste discharge permit for discharges issued by the Washington state department of ecology.

(3) A complete written application for a permit ((~~may~~)) must be submitted ((~~in person or by registered mail~~)) to the department and must contain the following:

(a) General plans for the overall project;

(b) Complete plans and specifications of the proposed construction or work ((~~within the mean higher high water line in saltwater or within the ordinary high water line in freshwater~~)) listed in subsection (2) of this section;

(c) Complete plans and specifications for the proper protection of fish life;

(d) Notice of compliance with any applicable requirements of the state environmental policy act, unless otherwise provided for in this chapter; and

(e) Payment of all applicable application fees charged by the department under ((~~RCW 77.55.321~~)) section 3 of this act.

((~~(3)~~)) (4) The department may establish direct billing accounts or other funds transfer methods with permit applicants to satisfy the fee payment requirements of ((~~RCW 77.55.321~~)) section 3 of this act.

((~~(4)~~)) (5) The department may accept complete, written applications as provided in this section for multiple site permits and may issue these permits. For multiple site permits, each specific location must be identified.

((~~(5)~~)) (6) With the exception of emergency permits as provided in subsection ((~~(12)~~)) (13) of this section, applications for permits must be submitted to the department's headquarters office in Olympia. Requests for emergency permits as provided in subsection ((~~(12)~~)) (13) of this section may be made to the permitting biologist assigned to the location in which the emergency occurs, to the department's regional office in which the emergency occurs, or to the department's headquarters office.

((~~(6)~~)) (7) Except as provided for emergency permits in subsection ((~~(12)~~)) (13) of this section, the department may not proceed with permit review until all fees are paid in full as required in ((~~RCW 77.55.321~~)) section 3 of this act.

((~~(7)~~)) (8)(a) Protection of fish life is the only ground upon which approval of a permit may be denied or conditioned. Approval of a permit may not be unreasonably withheld or unreasonably conditioned.

(b) Except as provided in this subsection and subsections ((~~(12)~~)) (13) through ((~~(14)~~)) (15) and ((~~(16)~~)) (17) of this section, the department has forty-five calendar days upon receipt of a complete application to grant or deny approval of a permit. The forty-five day requirement is suspended if:

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

(ii) The site is physically inaccessible for inspection;

(iii) The applicant requests a delay; or

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

(c) Immediately upon determination that the forty-five day period is suspended under (b) of this subsection, the department shall notify the applicant in writing of the reasons for the delay.

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

((~~(8)~~)) (9) If the department denies approval of a permit, the department shall provide the applicant a written statement of the specific reasons why and how the proposed project would adversely affect fish life.

(a) Except as provided in (b) of this subsection, issuance, denial, conditioning, or modification of a permit shall be appealable to the board within thirty days from the date of receipt of the decision as provided in RCW 43.21B.230.

(b) Issuance, denial, conditioning, or modification of a permit may be informally appealed to the department within thirty days from the date of receipt of the decision. Requests for informal appeals must be filed in the form and manner prescribed by the department by rule. A permit decision 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.

((~~(9)~~)) (10)(a) The permittee must demonstrate substantial progress on construction of that portion of the project relating to the permit within two years of the date of issuance.

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

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

((~~(10)~~)) (11) The department may, after consultation with the permittee, modify a permit due to changed conditions. A modification under this subsection is not subject to the fees provided under ((~~RCW 77.55.321~~)) section 3 of this act. The modification is appealable as provided in subsection ((~~(8)~~)) (9) of this section. For a hydraulic project that diverts water for agricultural irrigation or stock watering purposes, when the hydraulic project or other work is associated with stream bank stabilization to protect farm and agricultural land as defined in RCW 84.34.020, the burden is on the department to show that changed conditions warrant the modification in order to protect fish life.

((~~(11)~~)) (12) A permittee may request modification of a permit due to changed conditions. The request must be processed within forty-five calendar days of receipt of the written request and payment of applicable fees under ((~~RCW 77.55.321~~)) section 3 of this act. A decision by the department is appealable as provided in subsection ((~~(8)~~)) (9) of this section. For a hydraulic project that diverts water for agricultural irrigation or stock watering purposes, when the hydraulic project or other work is associated with stream bank stabilization to protect farm and agricultural land as defined in RCW 84.34.020, the burden is on the permittee to show that changed conditions warrant the requested modification and that such a modification will not impair fish life.

((~~(12)~~)) (13)(a) The department, the county legislative authority, or the governor may declare and continue an emergency. If the county legislative authority declares an emergency under this subsection, it shall immediately notify the department. A declared state of emergency by the governor under RCW 43.06.010 shall constitute a declaration under this subsection.

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

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

(d) The department may not charge a person requesting an emergency permit any of the fees authorized by ((~~RCW 77.55.321~~)) section 3 of this act until after the emergency permit is issued and reduced to writing.

((~~(13)~~)) (14) All state and local agencies with authority under this chapter to issue permits or other authorizations in connection with emergency water withdrawals and facilities authorized under RCW 43.83B.410 shall expedite the processing of such permits or authorizations in keeping with the emergency nature of such requests and shall provide a decision to the applicant within fifteen calendar days of the date of application.

((~~(14)~~)) (15) The department or the county legislative authority may determine an imminent danger exists. The county legislative authority shall notify the department, in writing, if it determines that an imminent danger exists. In cases of imminent danger, the department shall issue an expedited written permit, upon request, for work to remove any obstructions, repair existing structures, restore banks, protect fish resources, or protect property. Expedited permit requests require a complete written application as provided in subsection ((~~(2)~~)) (3) of this section and must be issued within fifteen calendar days of the receipt of a complete written application. Approval of an expedited permit is valid for up to sixty days from the date of issuance. The department may not require the provisions of the state environmental policy act, chapter 43.21C RCW, to be met as a condition of issuing a permit under this subsection.

((~~(15)~~)) (16)(a) For any property, except for property located on a marine shoreline, that has experienced at least two consecutive years of flooding or erosion that has damaged or has threatened to damage a major structure, water supply system, septic system, or access to any road or highway, the county legislative authority may determine that a chronic danger exists. The county legislative authority shall notify the department, in writing, when it determines that a chronic danger exists. In cases of chronic danger, the department shall issue a permit, upon request, for work necessary to abate the chronic danger by removing any obstructions, repairing existing structures, restoring banks, restoring road or highway access, protecting fish resources, or protecting property. Permit requests must be made and processed in accordance with subsections ((~~(2)~~)) (3) and ((~~(7)~~)) (8) of this section.

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

((~~(16)~~)) (17) The department may issue an expedited written permit in those instances where normal permit processing would result in significant hardship for the applicant or unacceptable damage to the environment. Expedited permit requests require a complete written application as provided in subsection ((~~(2)~~)) (3) of this section and must be issued within fifteen calendar days of the receipt of a complete written application. Approval of an expedited permit is valid for up to sixty days from the date of issuance. The department may not require the provisions of the state environmental policy act, chapter 43.21C RCW, to be met as a condition of issuing a permit under this subsection.

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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