H-3412.1

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**HOUSE BILL 2337**

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**State of Washington 65th Legislature 2018 Regular Session**

**By** Representatives Fitzgibbon, Tarleton, Santos, and McBride

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

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

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, at or below the ordinary high water line, the department may issue a notice to comply, stop work order, or a civil penalty as provided in section 4 of this act.

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

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's, landowner's, and contractor's last known address, and to the local jurisdiction in which the project is located, 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's, landowner's, and contractor's last known address, and to the local jurisdiction in which the project is located, 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.

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

(1) The department may levy civil penalties of up to ten thousand dollars for every violation of this chapter or the rules adopted to implement this chapter that occurs at or below the ordinary high water line. 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 and to the local jurisdiction in which the project is located, 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 penalty under chapter 34.05 RCW to the board. Appeals must 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 becomes 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 becomes 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 the county in which such a violation occurred, to recover the penalty. In all such actions, the procedures and rules of evidence are the same as an ordinary civil action. All penalties 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, 2019. 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.

**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 that occurs above the ordinary high water line. Each and every violation is a separate and distinct civil offense. The penalty provided shall be imposed by notice in writing, either by certified mail or personal service to the person incurring the penalty, and a copy sent to the local jurisdiction in which the project is located, from the director or the director's designee 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.

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

(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.

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