
**Agriculture & Natural Resources
Committee**

HB 1428

Brief Description: Concerning construction projects in state waters.

Sponsors: Representatives Blake, Fitzgibbon, Lytton, Morris and Tharinger; by request of Department of Fish and Wildlife.

Brief Summary of Bill

- Provides additional criteria that must be met before the Washington Department of Fish and Wildlife (WDFW) may issue a Hydraulic Project Approval (HPA) for the construction, repair, or replacement of a single-family marine bulkhead or rockwall.
- Expands the scope of projects that qualify for expedited HPA review and approval as fish habitat enhancement projects.
- Authorizes, under certain circumstances, the WDFW to issue stop work orders and notices to comply, and to obtain administrative inspection warrants.
- Changes, from \$100 per day to \$10,000 per violation, the authority of the WDFW to assess civil penalties for violations of the hydraulic code or its implementing rules.
- Changes the fee structure for HPAs, from a flat fee for projects of all sizes, to a variable fee based on, among other things, the complexity of the project.
- Requires the WDFW to refund all or part of the permit processing fee under certain conditions.

Hearing Date: 2/2/17

Staff: Robert Hatfield (786-7117).

Background:

Hydraulic Project Approvals.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

A person must obtain a Hydraulic Project Approval (HPA) prior to commencing any construction project that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state. Hydraulic Project Approvals are issued by the Washington Department of Fish and Wildlife (WDFW) to ensure the proper protection of fish life. To receive an HPA, the applicant must provide certain information to the WDFW. This information includes general plans for the overall project and complete plans for the proper protection of fish life.

HPA Fees.

Most applicants for an HPA are required to pay a \$150 application fee. The application fee is currently due to expire June 30, 2017.

Certain activities are exempt from the application fee requirement. These include, for example, projects located above the ordinary high water line, certain noxious weed control projects, mineral prospecting and mining projects, HPAs related to forest practices hydraulic projects, and HPAs occurring on farm or agricultural land.

The Joint Aquatic Resource Permit Application.

The Joint Aquatic Resource Permit Application (JARPA) process was developed by the Office for Regulatory Innovation and Assistance to assist in obtaining various local, state, and federal permits for activities associated with aquatic resources in Washington. The JARPA includes a standardized form application, but also requires submittal of additional documentation as necessary to meet the permitting requirements of each agency that uses the JARPA.

HPAs for Marine Bulkheads.

The WDFW must issue a permit, with or without conditions, for the construction, replacement, or repair of a marine bulkhead if certain conditions are met, including:

- the waterward edge of the bulkhead must extend toward the water only so far as necessary to construct the bulkhead, and may not be located more than six feet waterward of the ordinary high water line;
- a bulkhead to replace or repair an existing bulkhead must be placed along the same alignment as the original bulkhead;
- construction of a new bulkhead shall not result in the permanent loss of critical food fish or shellfish habitat; and
- timing constraints shall be applied on a case-by-case basis for the protection of critical habitats.

Hydraulic Project Approvals for Fish Habitat Enhancement.

Certain fish habitat enhancement projects may qualify for a streamlined administrative review and approval process by the WDFW. These projects are expected to result in beneficial impacts to the environment and, if they qualify for streamlined review, receive a decision regarding the associated HPA in 45 days. This streamlined review is available for projects of an adequate size or scale that either eliminate human-made or caused fish passage barriers, restore eroded or unstable stream banks, or involve the placement of woody debris into the water.

Not all fish habitat enhancement projects are eligible for a streamlined review. To be eligible, the projects must also be approved for specific and limited purposes by the WDFW, a conservation district, the Washington State Department of Transportation, a city or county, or other formal review and approval processes.

In addition to a streamlined HPA process, projects that meet the criteria for fish habitat enhancement projects are eligible for exemption from the State Environmental Policy Act and exemption from local government permits and fees.

Applicants for fish habitat enhancement projects must submit a JARPA form. Applicants must also provide completed copies of the application to each appropriate local government.

Civil Penalties.

The WDFW may levy a civil penalty of up to \$100 per day for violations of a permit.

Issuance of a civil penalty may be informally appealed to the WDFW by the person incurring the penalty. A civil penalty that has been informally appealed to the WDFW may be formally appealed to the Pollution Control Hearings Board (Board) within 30 days of receipt of the WDFW's decision on the informal appeal. If no appeal is filed, the civil penalty is due and payable 30 days after receipt of the penalty. If an appeal is filed, the penalty is due upon the issuance of a final order that confirms the penalty in whole or in part.

If the civil penalty is not paid within 30 days after it becomes due and payable, the attorney general, at the request of the Director of the WDFW, shall bring an action to recover the penalty in the superior court of either Thurston County or of the county where the violator does business. All penalties received by the state must be deposited into the state's general fund.

Summary of Bill:

HPAs for Marine Bulkheads.

The WDFW may, rather than shall, issue an HPA for the construction, replacement, or repair of a single-family marine beachfront bulkhead or rockwall, provided certain conditions are met. In order to be eligible for an HPA, the marine bulkhead project must meet the following conditions, in addition to the current conditions:

- the applicant must provide a geotechnical analysis indicating that unless the new bulkhead is built, damage from erosion is expected to occur within three years;
- the erosion must not be caused by upland conditions;
- the proposed bulkhead will provide greater protection than feasible, nonstructural alternatives;
- the proposal is the minimum necessary to protect existing legally established single-family residences; and
- adequate mitigation measures will be provided to maintain existing shoreline processes and habitats.

In addition, the construction, repair, or replacement of a bulkhead may not result in a net loss of critical food fish or shellfish habitats.

Fish Habitat Enhancement Projects.

The scope of projects that qualify for expedited HPA review and approval as fish habitat enhancement projects is expanded to include:

- the placement of spawning material or other habitat structures;

- restoration of marine and lake shorelines by removing armoring and other hard shoreline stabilization structures; and
- restoration of marine and lake shorelines by removing docks and other human-made structures.

A fish habitat enhancement project does not qualify for expedited HPA review and approval if the WDFW or the local government determines it raises environmental and public health and safety concerns, or if the WDFW determines that fish or fish habitat would be adversely impacted by the project.

In order to obtain the expedited HPA review and approval process for fish habitat enhancement projects, a project must be approved one of a number of different entities, including a tribe as a tribal sponsored fish habitat enhancement or restoration project.

A project applicant must use either the WDFW's online permit application system or the JARPA form. Upon receipt of a complete application, the WDFW shall notify the local government that the application is available for review. The WDFW shall provide a 30-day comment period to receive comments regarding environmental and public health and safety impacts.

Fee-exempt Modifications.

Certain modifications to an HPA permit are exempt from all HPA fees, including minor modifications to the plans and specifications, minor modifications to the required work timing, and transfer of a permit.

Violations.

When the WDFW determines that a violation has occurred or is about to occur, it must first attempt to achieve voluntary compliance through information, technical assistance, and a reasonable timeline for the project to be brought into compliance.

If the WDFW determines that a violation is causing harm to fish life or fish habitat, the WDFW must take immediate action to correct the violation.

If a person violates the hydraulic code, or any of the rules adopted by the WDFW that implement the hydraulic code, the WDFW may issue a notice to comply, a stop work order, or a civil penalty.

WDFW Authority to Issue Stop Work Order.

The WDFW is authorized to issue a stop work order if there is a violation of the hydraulic code or the WDFW's rules, if there is a deviation from the HPA, or if immediate action is necessary to stop or avoid material damage to fish life. The stop work order may require that the person stop all work connected with the violation until corrective action is taken.

A person receiving a stop work order has the option of submitting an informal appeal to the WDFW, or submitting a formal appeal to the Board. A person who submits an informal appeal to the WDFW remains eligible to submit a formal appeal to the Board after receiving the WDFW's decision on the formal appeal.

A person receiving a stop work order must comply with the stop work order immediately upon being served, but the Board may discontinue the order, if requested, under such conditions as the Board may impose.

WDFW Authority to Issue Notice to Comply.

If a violation or damage to fish life has occurred but the WDFW determines that a stop work order is not necessary, the WDFW must issue a notice to comply. The notice must set forth certain information, including any necessary corrective action and the right of the person to appeal the notice.

A person receiving a notice to comply has the option of submitting an informal appeal to the WDFW, or submitting a formal appeal to the Board. A person who submits an informal appeal to the WDFW remains eligible to submit a formal appeal to the Board after receiving the WDFW's decision on the formal appeal.

A person receiving a notice to comply must comply with the notice to comply immediately upon being served, but the Board may discontinue the notice, if requested, under such conditions as the Board may impose.

Civil Penalties.

The WDFW may assess civil penalties of up to \$10,000 for every violation of the hydraulic code or the rules adopted to implement the hydraulic code. Each penalty must be imposed in writing and must be served on the person incurring the penalty by either certified mail or personal service. The penalty must set forth the basis and amount of the penalty, as well as the right of the person to appeal the penalty.

Issuance of a civil penalty may be informally appealed to the WDFW by either the landowner or by the applicant.

When the penalty becomes past due, it is subject to interest at the rate allowed by law for debts to the state, currently 12 percent per year.

If the civil penalty is not paid within 30 days after it becomes due and payable, the attorney general, at the request of the Director of the WDFW, shall bring an action to recover the penalty in the superior court of either Thurston County or of the county where the violation occurred. The WDFW is entitled to recover its reasonable attorney fees and costs in connection with the recovery of a penalty.

The WDFW must adopt a penalty schedule to be effective by January 1, 2018. The penalty schedule must take into consideration, among other things, a person's previous violation history, the severity of the impact on fish and fish habitat, whether the violation was intentional, and whether the person received a substantial economic benefit from the violation.

WDFW Authority to Obtain Warrant.

The WDFW is authorized to apply for an administrative inspection warrant in the superior court for either Thurston County or the county where the project is located. The court may issue a warrant where the WDFW personnel need to inspect the project site in order to ensure compliance with the hydraulic code or the rules adopted to implement the hydraulic code, or

where DFW personnel have probable cause to believe that there has been a violation of the hydraulic code or the rules adopted to implement the hydraulic code.

HPA fees.

The DFW must charge fees for HPAs in order to recover a portion of the cost for processing permit applications, including issuing decisions, administering fee collections, and compliance monitoring. The fees must be based on the scale and complexity of the project and the effort required by the DFW staff to process the application. The fees vary based on the complexity of the project, and whether the fee is for an initial application fee or for a modification to a project.

Beginning January 1, 2018, the WDFW is directed to charge a base application submittal fee, which ranges from \$150 for a low complexity project, to \$250 for a medium complexity project, to \$500 for a high complexity project, to \$1,000 for a general HPA.

In addition to the base fees described above, the WDFW is directed to charge an additional modification fee, which ranges from \$100 for modifications to low complexity projects, to \$125 for modifications to medium complexity projects, to \$250 for high complexity projects, to \$500 for modifications to general hydraulic project approvals.

Certain hydraulic projects are exempt from all HPA fees, including fish habitat enhancement projects. The current exemption from HPA fees for projects above the ordinary high water line is removed.

The WDFW must refund 50 percent of the permit processing fee to any person that properly applies for a permit if the DFW fails to process the application within the timelines required by the hydraulic code.

The WDFW must refund 100 percent of the permit processing fee under certain conditions, including where no permit is required for the proposed work.

The WDFW must report to the Legislature on the progress of the HPA program every two years before submitting its biennial operating budget to the Office of Financial Management.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.