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**Agriculture & Natural Resources  
Committee**

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**HB 2337**

**Brief Description:** Concerning civil enforcement of construction projects in state waters.

**Sponsors:** Representatives Fitzgibbon, Tarleton, Santos and McBride.

**Brief Summary of Bill**

- Authorizes, under certain circumstances, the Washington Department of Fish and Wildlife (WDFW) to issue stop work orders and notices to comply, and to obtain administrative inspection warrants.
- Changes, from a maximum of \$100 per day to a maximum of \$10,000 per violation, the authority of the WDFW to assess civil penalties for a violation of the hydraulic code or its implementing rules that occurs at or below the ordinary high water line.
- Retains the authority of the WDFW to assess a civil penalty of up to \$100 per day for a violation of the hydraulic code or its implementing rules that occurs above the ordinary high water line.

**Hearing Date:** 1/11/18

**Staff:** Robert Hatfield (786-7117).

**Background:**

Hydraulic Project Approvals.

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.

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*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.*

### 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 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:**

#### Violations of the Hydraulic Code.

When the WDFW determines that a violation has occurred or is about to occur, it must first attempt to achieve voluntary compliance by providing 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.

#### Stop Work Orders.

The WDFW is authorized to issue a stop work order if there is a violation of the hydraulic code or of 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 Pollution Control Hearings Board (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 informal 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.

#### Notices 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 informal 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 - At or Below the Ordinary High Water Line.

The WDFW may assess civil penalties of up to \$10,000 for every violation of either the hydraulic code or the rules adopted to implement the hydraulic code that occurs at or below the ordinary high water line. 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. Any person incurring a penalty may also formally appeal the issuance of a penalty to the Pollution Control Hearings Board.

A penalty becomes due and payable 30 days after receipt of the notice of penalty unless an appeal is filed. If a 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, upon the request of the director of the WDFW, must 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, 2019. 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.

#### Civil Penalties - Above the Ordinary High Water Line.

The WDFW may assess civil penalties of up to \$100 per day for every violation of either the hydraulic code or the rules adopted to implement the hydraulic code that occurs above the ordinary high water line.

The terms and requirements of civil penalties for violations that occur above the ordinary high water line are similar to those for violations that occur at or below the ordinary high water line, except that the maximum penalty amount is \$100 rather than \$10,000, and the penalty is assessed on a per-day basis rather than on a per-occurrence basis.

#### Administrative Inspection Warrants.

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 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 WDFW 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.

**Appropriation:** None.

**Fiscal Note:** Not requested.

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