



Washington's Hydraulic Project Approval Program Hydraulic Code Implementation Citizen Advisory Group Agenda

Thursday, May 31, 2018

10:00 am - 3:00 pm

Directors Conference Room 537
WDFW Headquarters, Natural Resources Building
1111 Washington St.
Olympia, WA 98501

Protection Division Manager: Randi Thurston
Staff: Teresa Scott

1.	10:00 am	Welcome and Introductions Old Business	Randi
		<ul style="list-style-type: none">• Approve meeting notes from March 2018 meetings.• Review agenda, Lunch Orders	Teresa
2.	10:10 am	WDFW and Habitat Program Updates and Discussion Jeff Davis, Assistant Director, Habitat Program	Jeff Davis
		<ul style="list-style-type: none">• Agency and Program Budget Update• Overview of potential WDFW Request Legislation for 2109 Legislative Session• Questions and answers	
3.	12:00 pm	Working Lunch (Lunch Provided)	
4.	12:30 am	HPA Rulemaking Update	Randi Thurston
		<ul style="list-style-type: none">• Randi will provide an update on the recently completed HPA rulemaking and rules that become effective on June 1, 2018.• New Rulemaking. Update on the process and timeline for rulemaking to remove suction dredging from the Gold and Fish Pamphlet.	
5.	1:00 pm	Steve Whitehouse request Steve has requested time to discuss potential legislation allowing after-the-fact HPAs.	Steve Whitehouse
6.	2:00 pm	HCICAG Business	Teresa and Randi
		<ul style="list-style-type: none">• Update and discussion on HCICAG work planning to address Habitat Program priorities and next steps.• HCICAG Charter - Quick update, recommendation.• Future meeting schedule, topics, and locations• Next steps	
	3:00 pm	Adjourn	

Notes: Meeting materials will be posted on WDFW's Hydraulic Code Implementation Citizen Advisory Group website: <http://wdfw.wa.gov/about/advisory/hcicag/>

Driving and Parking Directions

Washington Department of Fish & Wildlife

Main Office

Natural Resources Building
1111 Washington St. SE
Olympia, WA 98501
360-902-2200

[Get Directions](#)

Directions and Access to the Natural Resources Building (NRB): From I-5, take State Capitol exit (105). The exit puts you on 14th Avenue. Go through the tunnel and turn right onto Capitol Way. Turn right onto 11th Avenue. Turn right onto Washington and left into the NRB visitor parking lot.

NRB Visitor Parking: Parking costs \$1.50 per hour, payable at the meters. Parking meters accept credit/debit card, \$1 bills or coins.

NRB Visitor Sign-in: **You will need to sign in and pick up a visitor badge at the first floor information kiosk, then head up to the 5th floor, Room 556.**

Hydraulic Code Implementation Citizen Advisory Group (HCICAG) Charter

Final - July 7, 2015

Commented [t1s1]: Track changes from HCICAG members after 3/22/2018 meeting.

Introduction

In 2015, with rule changes adopted for the Hydraulic Project Approval program, the Washington Department of Fish and Wildlife (WDFW) Commission recommended the formation of two committees to advise agency staff on hydraulic code issues and implementation: one committee of stakeholders representing industry and regulated entities, identified as the Hydraulic Code Implementation Citizen Advisory Group, and one committee of agency and other quasi-government entities.

This charter establishes the roles and responsibilities for the Hydraulic Code Implementation the Citizen Advisory Group (HCICAG).

Mission of HCICAG

The Hydraulic Code Implementation Citizen Advisory Group provides recommendations to the Washington Department of Fish and Wildlife on the administration of the Hydraulic Code Rules (Chapter 220-660 WAC).

HCICAG Membership

HCICAG members represent a range of stakeholders who are impacted by or have an interest in issues related to the hydraulic code and HPA Program. Members were selected through an open process requiring letters of interest and review and selection by Department staff, with the following considerations:

- Members represent a group or organization affected or impacted, by, and/or interested in, hydraulic code implementation issues;
- Are committed to sharing information and bringing to the group feedback from their respective organizations/constituents; and
- Are interested and committed to working collaboratively; and
- Understand and are comfortable in the role of serving in an advisory capacity.

Commented [t1s2]: Member comment: "Define - advising on material"

HCICAG Role & Responsibilities

In addition, the advisory group is expected to:

- Provide recommendations to the Department on the Hydraulic Code regulations, rules and the policies and procedures related to implementation of the hydraulic code.
- Communicate stakeholder opinions, attitudes, and needs to the agency as it relates to the hydraulic code rules.
- Identify areas of concern and recommend change to how the hydraulic code is interpreted and implemented.
- Understand their group's roles and responsibilities.

Commented [t1s3]: Member comment: "2 meetings ago, we were told we weren't to be involved in legislation (i.e. changes to WAC) through this group. So, what can we recommend within our realm of influence? Interpretation? Enforcement? Policy/procedure? Application of best available science? A more accurate wording of our role may be to "Provide recommendations to Department staff on implementation of the Hydraulic Code, including internal department policies and procedures, and application of best available science."

Commented [t1s4]: Member comment: "I think sometimes we get off topic at times because the subject matter of some of the stakeholder suggestions is not related to HPAs."

- Consider adding “Meet periodically jointly with the committee of agency and other quasi-government entities to more fully understand issues of interagency concern relating to the CAG’s advisory topics.”

- Keep up-to-date on issues and regulations affecting their focus areas.
- Attend public workshops or forums established by the Department.
- Keep the Department advised of current trends and developments.
- Provide advice regarding enforcement and regulatory compliance issues.
- Assist the Department in developing communication strategies and communicating with members of the public regarding the issues that come before the advisory group.
- Be respectful and carefully consider the views of others.
- Attend advisory group meetings or advise the Department of absences. Requests to have an alternate attend should be coordinated with the Department in advance, and may not always be accommodated.

Commented [t1s5]: Member comment: “Would like to see a joint meeting with the interagency advisory group with a view to better understanding issues of an interagency nature that might impact advice HCICAG is considering for the Department.”

Commented [t1s6]: Member comment: “WDFW should keep us up-to-date on issues.”

Commented [t1s7]: Member comment: “WDFW should also keep us up-to-date on current issues and developments.”

Department Roles & Responsibilities

The role of WDFW staff relative to the HCICAG is to facilitate effective input in hydraulic code implementation issues. The HCICAG is supported by staff from the WDFW HPA program.

Responsibilities include:

- Clearly define the advisory group’s role.
- Provide the Department’s mission and goals statement.
- Provide timely opportunities for advisors to counsel the agency on policy and provide timely communication on emerging issues.
- Schedule meetings in consultation with advisors and provide meeting places.
- Provide background materials, presentations, decision “maps” and other briefing materials on science, programs, administration and related issues.
- Facilitate meetings and conference calls as needed.
- Develop productive agendas that clearly outline the desired outcomes of each meeting.
- Develop agendas, materials and work products for advisory group review.
- Distribute materials in advance of advisory group meetings.
- Develop and distribute advisory group meeting notes that summarize the key discussion items and recommendations.
- Be respectful of the views of others, including Department staff and advisory group members.
- Communicate the advisory group recommendations, comments, views and perspectives to agency leadership prior to decision making.
- Provide feedback regarding how the Department uses advisory group’s input.
- Capture recommendations, viewpoints and opinions by advisory group members including divergent or dissenting views. Abstention is okay.
- Solicit case studies, examples, lessons learned and other information from the group, relevant to agenda topics or other work of the group.

- Identify agency programs, initiatives and processes in progress that are relevant to the group’s area of interest and scope.
- Respond to advisors’ requests for information including presentations about specific topics.

Operating Guidelines

The following guidelines are recommended for productive discussion and forward progress.

- Advisory group members are expected to attend all advisory group meetings if possible. Illness, family emergencies or deaths and other valid issues will provide acceptable reasons for missing a meeting. At their discretion, members may identify and brief an alternate to participate and/or take notes at the meeting. Members will notify the meeting coordinator Randi Thurston if unable to attend and indicate whether someone will come in their place.
- Advisory group members will review information prior to meetings and come prepared to discuss materials that have been distributed.
- The advisory group shall not communicate its positions and opinions about the advisory group to entities outside the Department without notifying Department staff.
- The advisory group should not meet as a formal group with outside entities unless it has prior approval from Department staff. Nothing prevents an individual advisor from expressing their views as a private citizen.
- Members absent for more than two meetings in a 12-month period may be asked to end their terms and identify a permanent alternate member. See suggestion above for reasonable reasons for missing a meeting.
- Advisory group members are responsible for their own travel and meal expenses unless otherwise previously provided.
- Members are expected to serve for no more than three years, but may be reappointed at the Department’s discretion.

Commented [t1s8]: Member comment: “I’m not sure what this is intending- meaning no advisory member should talk to the press about their opinion of the group?”

Commented [t1s9]: Member comment: “At times, agenda items, rules, and decision making have to be discussed outside this advisory group to get consensus with [user group] - is that now going to be a problem? With entities that decision/discussion may affect? Clearer position as advisor outside Olympia - what about single rep?”

Commented [t1s10]: Member comment: “Some of these meetings might be best attended by phone conference or such. ...disliking this drive to Olympia. ... might not be able to find an alternate.”

Meeting Discussion Guidelines

Advisory group members are expected to conduct themselves in a professional manner and be respectful of others. The following discussion guidelines are recommended to facilitate productive meetings and advisory group interactions:

- All members are expected and encouraged to participate
- All members have the chance to be heard; no member should dominate
- Raise your hand to indicate desire to speak
- Share all pertinent information
- Keep an open mind
- Actively listen
- Treat others with respect
- Stay focused on the meeting objectives
- Refrain from side discussions when others are talking
- Ask for clarification when needed
- Recognize the role of the facilitator

- Use the marina/[parking lot](#) to document topics for further discussion at a later date.

Meeting Frequency and Location

The advisory committee will meet ~~bimonthly-to~~ quarterly, as agreed to by the CAG and the agency, generally from 10 a.m. to 3 p.m. on weekdays. Meeting locations will alternate, as much as possible, between Olympia, near-eastern Washington (e.g. Wenatchee, Yakima, Cle Elum, Ellensburg), and North Sound, including locations in Tacoma, Seattle and/or Mill Creek. In-person participation is preferred; however, a conference line will be provided for inclement weather, illness and other unpredictable events.

Public Comment

The purpose of advisory group meetings is primarily for group discussion of participants. This may be supplemented and enhanced with input from members of the public and other interested parties. Advisory group meetings are open to the public and an opportunity for public input will be provided at each meeting. Members of the public will be recognized at the beginning of each HCICAG meeting, and time will be provided at the end of each discussion item for public comment, as time allows. If necessary, time limits may be imposed to allow members enough time for advisory group discussion.

Decision-Making

The HCICAG is not a decision-making body or voting group. Members are expected to “advise” staff about their views on hydraulic code implementation. Consensus of the group is not required, nor will it be specifically sought; however, staff will seek to understand common as well as divergent views, and consider all advisory group input before making and implementing decisions about the hydraulic code.

Commented [t1s11]: Member comment: “I do not entirely agree with the wording of this section. The group can and often does make decisions about advice to the Department. While this is not the same as making policy decisions reserved to the Department by statute or rule, consensus decisions or those by most of the CAG should generally carry significant weight.”

Advisory Group Roster, Agendas and Meeting Notices

An advisory group roster, identifying members’ names and organizations, in addition to WDFW staff contacts, will be posted on the agency website, along with agendas and meeting notes at <http://wdfw.wa.gov/about/advisory/hcicag/>

Commented [t1s12]: •Member comment: “Advisory recommendations are reviewed by Dept. They then move forward or not. The issue of “cemented spawning gravels” comes to mind - the remedy was rejected. I would have liked the Dept. to have given the Advisory Group a better reason or more discussion. Different treatment for different streams. Some of the cemented gravels are sins of very poor erosion control practices many years in the past, i.e. building industry, road building, etc. ‘... case by case basis’ would have been a better management decision.”

Department Staff Contact Information

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May 10, 2018

TO: Hydraulic Code Citizen Advising Committee

FROM: Steve Whitehouse

At the last two meetings there was significant discussion regarding the lack of substantive requests from the department for our advice. We identified a number of topic areas for potential discussion. However, I have not seen anything, as yet, to indicate that at the next meeting any of these topics will be discussed. I am also mindful that we bear some responsibility for not bringing issues forward.

So I wanted to initiate a proposed action by the committee to, at least, get something rolling. It is not my intent to co-op anything but just we get us started somewhere. I encourage similar efforts by others.

I would propose that the department seek amendment to RCW 77.55.021 to authorize after the fact permits under the following conditions:

1. That the project, as existing, or with modification, have the potential for approval.
2. That such a permit only be authorized for non-intentional violations.
3. That the fee for such a permit be double the normal permit fee.

In the past, from my limited experience, the department has had somewhat inconsistent approaches to unpermitted projects with inconsistent discretion being exercised.

Prior to 2014, the department had in affect a policy, POL-M5002, copy attached. This provided some authorization for what the policy terms "violation settlements". In 2014, this policy was rescinded and Policy 5121 (enclosed) implemented. The basic impact of this policy is that any violations are to be reported to a fisheries enforcement officer who is then directed to seek criminal charges in the local jurisdiction. I have some information that may not be fully occurring.

The problems with this current process is several:

1. It permits inconsistent enforcement.

2. It allows the department to force removal of a project that might otherwise be fully in compliance other than there being no permit.
3. It still has the project remaining in an unpermitted status of allowed to remain.

I am also enclosing copies of various other statutes and HB 2337 from the last session that gave some hint regarding the need for department cooperation, with unpermitted projects.

I would also propose that the committee recommend that Policy 5212 be rescinded and something similar to POL-M5002 be reimplemented.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Whitehouse', with a long horizontal flourish extending to the right.

STEPHEN WHITEHOUSE
WHITEHOUSE & NICHOLS, LLP.
Attorney at Law

Department of Fish and Wildlife

POL-M5002

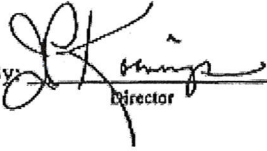
POLICY TITLE: Requiring or Recommending Mitigation

Replaces: WDW POL 3000, 3001 and 3002,
all dated 10/1/92; WDW POL 3003,
dated 9/16/92; WDF Policy 410,
dated 9/10/90; and WDF Policy 404,
dated 5/1/87

Effective Date:

Jan. 18, 1999

Approved By:


Director

See Also: Commission Policies

POL-M5002 REQUIRING OR RECOMMENDING MITIGATION

This policy applies to all habitat protection assignments where the Washington Department of Fish and Wildlife (WDFW) is issuing or commenting on environmental protection permits, documents, or **violation settlements**; or when seeking commensurate compensation for impacts to fish and wildlife resources resulting from oil or other toxic spills.

1. Goal is to achieve no loss of habitat functions and values.

The goal of WDFW is to maintain the functions and values of fish and wildlife habitat in the state. We strive to protect the productive capacity and opportunities reasonably expected of a site in the future. In the long-term, WDFW shall seek a net gain in productive capacity of habitat through restoration, creation, and enhancement.

Mitigation credits and debits shall be based on a scientifically valid measure of habitat function, value, and area. Ratios shall be greater than 1:1 to compensate for temporal losses, uncertainty of performance, and differences in functions and values.

2. WDFW uses the following definition of mitigation; avoiding impacts is the highest mitigation priority.

"Mitigation" means actions that shall be required or recommended to avoid or compensate for impacts to fish, wildlife, or habitat from the proposed project activity. The type(s) of mitigation required shall be considered and implemented, where feasible, in the following sequential order of preference:

- A. Avoiding the impact altogether by not taking a certain action or parts of an action.
 - B. Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
 - C. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
 - D. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
 - E. Compensating for the impact by replacing or providing substitute resources or environments.
 - F. Monitoring the impact and taking appropriate corrective measures to achieve the identified goal.
3. WDFW requires mitigation when issuing environmental permits or documents.
4. WDFW recommends mitigation on permits or documents issued by other agencies.

5. Complete mitigation ensures no loss of habitat functions or values, or populations.

Complete mitigation is achieved when mitigation elements in number 2 (A-F) ensures no loss of habitat functions or values, or fish and wildlife populations. Habitat loss and mitigation success shall be measured with the Habitat Evaluation Procedure (HEP) or other method acceptable to WDFW.

6. On-site in-kind mitigation is the highest priority.

WDFW priorities for mitigation location and type, in the following sequential order of preference, are:

- A. On-site, in-kind.
- B. Off-site, in-kind.
- C. On-site, out-of-kind.
- D. Off-site, out-of-kind.

For off-site mitigation to be accepted, the project proponent must demonstrate to WDFW's satisfaction that greater habitat function and value can be achieved off-site than on-site.

Combination of the four types may be accepted. "On-site" means on or adjacent to the project impact site. "In-kind" means the same species or habitat that was impacted.

Out-of-kind mitigation is not acceptable for impacts to priority habitats and species, with two exceptions: (1) priority habitats and species that are at greater risk can be substituted for impacted priority habitats and species; and (2) for hydraulic projects, WDFW shall consider off-site and/or out-of-kind mitigation where equal or better biological functions and values are provided (see number 8 below). Priority habitats, and habitats of priority species, may be replaced at a level greater than the impacts of the project on those habitats and species.

7. For off-site fish mitigation, mitigation must occur in the same Water Resource Inventory Area (WRIA) as the impacts.

Exceptions to the above must be approved by the director.

For federal endangered or threatened species, mitigation must occur within the habitat supporting the same Evolutionary Significant Unit (ESU).

8. WDFW may not limit mitigation to on-site, in-kind mitigation when making decisions on hydraulic project approvals for infrastructure development projects.

The State Legislature has declared that it is the policy of the state to authorize innovative mitigation measures by requiring state regulatory agencies to consider mitigation proposals for infrastructure projects that are timed, designed, and located in a manner to provide equal or better biological functions and values compared to traditional on-site, in-kind mitigation proposals. For these types of projects, WDFW may not limit the scope of options in a mitigation plan to areas on or near the project site, or to habitat types of the same type as contained on a project site. When making a permit decision, WDFW shall consider whether the mitigation plan provides equal or better biological functions and values, compared to the existing conditions, for the target resources or species identified in the mitigation plan. The factors WDFW must consider in making this decision are identified in RCW 90.74.020 (3). Also see RCW 75.20.098 and Chapter 90.74 RCW.

9. When WDFW is issuing a Hydraulic Project Approval in relation to state or federal cleanup sites, and WDFW is the sole decision-maker, WDFW can only require mitigation if the

sediment dredging or capping actions do not result in a cleaner aquatic environment and equal or better habitat functions and values.

When other agencies are decision-makers, recommendations for mitigation may be made under other state or federal authority to protect habitat functions and values.

10. When WDFW is issuing a Hydraulic Project Approval and is the sole decision-maker, WDFW can request, but cannot require "habitat mitigation" for maintenance dredging of existing navigable channels and berthing areas.

The phrase, "habitat mitigation" is analogous to compensatory mitigation. See RCW 75.20.325. When other agencies are decision-makers, recommendations for mitigation may be made under other state or federal authority to protect habitat functions and values.

11. Preserving at-risk, high quality priority habitat may be considered as part of an acceptable mitigation plan.

When high quality areas of priority habitats or habitats of priority species are at risk, preservation of those habitats may be accepted as part of a mitigation plan, as long as there is no loss of habitat function.

12. Habitat replacement is preferred to hatcheries for fish mitigation.

Commission policy directs WDFW to give priority to natural production rather than hatchery production, within habitat capabilities.

13. Mitigation game fish may be purchased from aquatic farmers.

If WDFW requires, as part of a mitigation agreement, that resident hatchery game fish be stocked, RCW 77.18.020 requires that WDFW notify the project proponent that the fish may be purchased from a private aquatic farmer. WDFW shall specify fish health requirements, pounds or numbers, species, stock, and/or race of the fish to be provided.

14. Where authority exists, strive to maintain recreational and harvest opportunities.
15. Approved habitat mitigation measures shall be based on best available science.
16. Mitigation plans shall be required for a project with significant impacts.

Mitigation plans shall include the following:

- Baseline data
 - Estimate of impacts
 - Mitigation measures
 - Goals and objectives
 - Detailed implementation plan
 - Adequate replacement ratio
 - Performance standards to measure whether goals are being reached
 - Maps and drawings of proposal
 - As-built drawings
 - Operation and maintenance plans (including who will perform)
 - Monitoring and evaluation plans (including schedules)
 - Contingency plans, including corrective actions that will be taken if mitigation developments do not meet goals and objectives
 - Any agreements on performance bonds or other guarantees that the proponent will fulfill mitigation, operation and maintenance, monitoring, and contingency plan.
17. Proven mitigation techniques must be used.

Experimental mitigation techniques are allowable only if advance mitigation is being performed and will be fully functional prior to the project impacts.

18. Mitigation shall proceed along with project construction.

Mitigation measures are an integral part of a construction project and shall be completed before or during project construction, except projects with impacts that have no proven mitigation techniques. Those projects require advance mitigation.

19. Delayed mitigation shall include replacement that is greater than losses.

Mitigation that is implemented after project construction, or that requires a long time to reach replacement value, shall include additional habitat value (over and above replacement value) equal to the loss through time.

20. WDFW shall determine impacts and mitigation.

WDFW shall determine the project impact, significance of impact, amount of mitigation required, and amount of mitigation achieved, based on the best available information, including the applicant's plans and specifications.

For large projects with potentially significant impacts, this will be based on review of studies approved by WDFW.

21. Cumulative impacts of projects shall be considered.

Cumulative impacts of projects shall be considered and appropriate measures taken to avoid or minimize those impacts.

22. Project proponent pays mitigation costs.

Mitigation costs may include but are not limited to:

- A. Studies to determine impacts and mitigation needs.
- B. Alteration of project design.
- C. Planning, design, and construction of mitigation features.
- D. Operation and maintenance of mitigation measures for duration of project (including personnel).
- E. Monitoring of mitigation measures and fish and wildlife response.
- F. All WDFW costs including engineering analysis and input.

23. Performance bond or other monetary assurance may be accepted.

A performance bond, letter of credit, escrow account, or other written financial guarantee may be accepted to ensure that the project proponent will fulfill mitigation requirements, operation and maintenance, monitoring, and contingency plans. The amount of the bond should cover the costs plus 10 percent.

24. Mitigation site shall be protected for the life of the project.

The mitigation site shall be protected permanently, or at a minimum, for the life of the project. This protection shall be through conservation easement, deed restriction, donation to WDFW, or other legally binding method.

25. WDFW shall seek mitigation for unmitigated projects.

WDFW shall seek mitigation for unmitigated or undermitigated existing projects. Criteria for prioritizing unmitigated projects are:

- A. Fish and wildlife losses from the project.
- B. Potential gains of fish and wildlife.
- C. Likelihood of achieving mitigation.
- D. Time required to achieve mitigation.
- E. Support from other agencies and tribes.
- F. Presence of priority habitats and species.
- G. Cost to WDFW.

26. Compliance monitoring shall be performed as funding allows.

27. Mitigation banking may be an acceptable form of mitigation.

The term "mitigation bank" as used here refers to a habitat creation, restoration, or enhancement project undertaken by a project proponent to act as a bank of credits to compensate for habitat impacts from future development projects. Credits and debits shall be based on area or a scientifically valid measure of habitat function and value acceptable to WDFW, such as the Habitat Evaluation Procedure (HEP). The use of credits from a mitigation bank as a form of compensation shall occur only after the standard sequencing of mitigation negotiations (avoid, minimize, rectify, reduce, and then compensate). Habitat units may be traded or sold.

28. Terms of mitigation must be documented.

A mitigation contract is necessary to document the terms of the mitigation. Mitigation contracts may take several forms:

- A. Mitigation agreement (must be approved by Office of Attorney General).
- B. Federal Energy Regulatory Commission (FERC) order.
- C. Conditions on an environmental permit.
- D. Statements in a final environmental impact statement.
- E. Conservation easement.
- F. Energy Facility Site Evaluation Council (EFSEC) site certification.
- G. Landowner Landscape Plan.

29. Habitat and Lands Services Program coordinates all mitigation projects except Columbia and Snake River mainstem fish mitigation projects that are coordinated by the Intergovernmental Fisheries Program.

The program that coordinates the mitigation projects is responsible for coordinating with all other programs and regions that have interest or involvement in the project.

30. Facilities shall be transferred to the appropriate program for management.

When mitigation planning is completed, responsibility for any facilities (land, fish cultural facility, etc.) shall be transferred to the appropriate program and region. During the latter stages of planning, the managing program shall be phased into the process.

31. Managing programs shall follow the mitigation contract.

The program and region managing a mitigation facility or project shall follow the terms of the mitigation contract at all times. No deviations shall be made from the mitigation contract unless approved by the program that negotiated the contract.

Effective Date: 4/25/14

POLICY 5212

Cancels:

See Also: PRO - 5212

POL - M5002

POL - 1004

RCW 77.55

WAC 220-110-340

WAC 220-110-350

Approved By: /s/ Phil Anderson

POL-5212 MONITORING COMPLIANCE WITH THE STATE HYDRAULIC CODE (CHAPTER 77.55RCW)

This policy applies to employees who enforce and monitor compliance with the State Hydraulic Code (Chapter 77.55 RCW) or encounter potential Hydraulic Code violations in the course of their duties.

Intent:

This policy applies to WDFW employees who monitor hydraulic projects, investigate potential hydraulic code violations, or witness a Hydraulic Code violation. Whenever there is doubt as to the proper course of action, employees should consult PRO-5212.

Definitions:

Habitat Biologist (HB): Any WDFW employee who is authorized by the Director through Policy1004 to sign Hydraulic Project Approvals (HPAs).

Compliance Check: An examination or review to ensure that hydraulic work meets conditions of an HPA.

Fish and Wildlife Officer (FWO): A commissioned Fish and Wildlife Officer 1, 2 or 3, detective or commissioned supervisory personnel.

Hydraulic Code: Chapter 77.55 RCW

1. Program Actions to Support and Implement this Policy

Habitat and Enforcement Program Personnel will develop and implement training of staff in both programs on:

Application of the Hydraulic Code through review of projects for Hydraulic Project Approval (HPA), and HPA Enforcement Assistance Procedures including, but not

limited to; requirements of PRO-5212, report writing, investigation techniques, and how to provide testimony as an expert witness.

To the extent practicable, the Enforcement Program and Habitat Program databases will be integrated and designed to allow information to be added to the system, accurately and quickly.

This policy will be implemented as per WDFW Procedure 5212.

2. Landowner notification by WDFW staff

a. Permitted hydraulic projects

An HPA Applicant consents to the permitting agencies entering their property when they sign their Joint Aquatic Resources Permit Application or online application form. In addition to this consent, the Habitat Biologist will attempt to notify the landowner in person, by telephone, mail, or e-mail to secure permission prior to conducting a compliance check of the job site identified in a signed HPA application. This notification must include the name of the person conducting the compliance check, their contact information, the reason for needing access to the property, and the date and time of the planned compliance check. The Habitat Biologist will document the notification method, date(s) notified, and landowner response in APPS.

If the attempt to notify the landowner is not successful, staff may conduct the compliance inspection based on applicant consent provided through the signed application. In this circumstance, the HB must notify the landowner by telephone, mail, or email of the date and time they conducted the compliance check (see Procedure 5212).

If the landowner, contractor, project supervisor, or applicant/permittee is present and denies access, or if the HB is threatened in any way, the HB will exit the property immediately and notify the FWO of this situation.

b. Unpermitted hydraulic project activity

FWOs will have primary responsibility for conducting investigations of all projects without valid Hydraulic Project Approvals. The FWO shall coordinate with the HB to identify and assess fish and habitat impacts and to integrate mitigation alternatives into the case report.

If HBs observe unpermitted hydraulic activity, the biologist will document the physical location of the unpermitted hydraulic activity and report the violation to the Enforcement communications center (WILDCOMM).

3. WDFW staff will conduct compliance checks on permitted projects according to the procedures described in Procedure 5212.

HBs have the primary responsibility for conducting compliance inspections for all projects with valid HPAs. FWOs have the primary responsibility of locating and investigating unpermitted hydraulic projects. FWOs may also conduct compliance inspections of permitted projects.

If the HB observes a violation of a HPA permit during a compliance check, the HB will inform the landowner, contractor, project supervisor, or applicant/permittee in writing of any violations of law or agency rules. The HB will provide a written statement to the landowner, contractor, project supervisor, or applicant/permittee that includes corrective actions to achieve compliance, the date by which compliance is to be achieved, and opportunity to request an extension. The HB will also provide the FWO with all written information provided to the landowner, contractor, project supervisor or applicant/permittee.

If landowner, contractor, project supervisor, or applicant/permittee is unwilling to comply with HB corrective actions, HB will refer violations to FWO.

- a) FWO and HB will discuss the referral. The FWO will decide the appropriate enforcement track to follow.
- b) FWO will consult with the HB if they discover a violation of a HPA provision.
- c) If landowner is present and denies access, or if threatened in any way, the HB will exit the property immediately and notify the FWO of this situation.

4. HB will refer Hydraulic Projects that do not have valid HPA to Enforcement for investigation.

5. Regional Habitat Program Managers and Enforcement Captains Will Coordinate to Ensure Efficient and Effective Enforcement of Hydraulic Code Compliance.

- a. Habitat Program Managers and Captains will jointly monitor ongoing HPA violation cases. These Managers and Captains will discuss the implementation of POL 5212 and PRO 5212 during their weekly regional meetings and will develop plans and schedules for unpermitted hydraulic project emphasis patrols that will be conducted in each region annually.

6. Compliance monitoring information and the final disposition of a violation will be entered into the Aquatic Protection Permitting System (APPS).

- a. FWO will track hydraulic code violation cases in the Enforcement Program database system. The FWO will provide the HB with the case tracking number, case updates, and the final disposition.**
- b. HB will enter compliance monitoring information, case tracking number, and the final disposition of all violations, into APPS.**

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 may do business))~~
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.

--- END ---

RCW 77.55.021**Permit.**

(1) 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.

(2) A complete written application for a permit may be submitted in person or by registered mail 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;
- (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**.

(3) 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**.

(4) 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) With the exception of emergency permits as provided in subsection (12) 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) 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) Except as provided for emergency permits in subsection (12) 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**.

(7)(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) through (14) and (16) 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 stormwater 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) 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)(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) 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. The modification is appealable as provided in subsection (8) 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) 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. A decision by the department is appealable as provided in subsection (8) 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)(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 until after the emergency permit is issued and reduced to writing.

(13) 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) 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) 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)(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) and (7) 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) 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) 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.

[2012 1st sp.s. c 1 § 102; 2010 c 210 § 27; 2008 c 272 § 1; 2005 c 146 § 201.]

NOTES:

***Reviser's note:** RCW 77.55.321 expired June 30, 2017.

Finding—Intent—Limitation—Jurisdiction/authority of Indian tribe under act—2012 1st sp.s. c 1: See notes following RCW 77.55.011.

Authority of department of fish and wildlife under act—2012 1st sp.s. c 1: See note following RCW 76.09.040.

Intent—Effective dates—Application—Pending cases and rules—2010 c 210: See notes following RCW 43.21B.001.

Part headings not law—2005 c 146: See note following RCW 77.55.011.

RCW 77.55.291**Civil penalty.**

(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. The penalty provided shall be imposed by notice in writing, either by certified mail or personal service to the person incurring the penalty, from the director or the director's designee describing the violation.

(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 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.

(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 county in which such violator may do business, 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.

[2010 c 210 § 31; 2005 c 146 § 701; 2000 c 107 § 19; 1993 sp.s. c 2 § 35; 1988 c 36 § 35; 1986 c 173 § 6. Formerly RCW 77.55.140, 75.20.106.]

NOTES:

Intent—Effective dates—Application—Pending cases and rules—2010 c 210: See notes following RCW 43.21B.001.

Part headings not law—2005 c 146: See note following RCW 77.55.011.

Effective date—1993 sp.s. c 2 §§ 1-6, 8-59, and 61-79: See RCW 43.300.900.

Washington Administrative Code
Title 220. Fish and Wildlife, Department of (Fisheries)
Environmental Standards and Conservation
Chapter 220-660. Hydraulic Code Rules

WAC 220-660-480

220-660-480. Compliance with HPA provisions.

Currentness

(1) **Technical assistance program:** Pursuant to chapter 43.05 RCW, the department will develop programs to encourage voluntary compliance with HPA provisions by providing technical assistance consistent with chapter 43.05 RCW. The programs include technical assistance visits, printed information, information and assistance by telephone, training meetings, and other appropriate methods for the delivery of technical assistance. In addition, provisions of chapter 43.05 RCW require the department to provide, upon request, a list of organizations, including private companies, that provide technical assistance. This list must be compiled by the department from information submitted by the organizations and does not constitute an endorsement by the department of any organization.

(a) Technical assistance is defined in chapter 43.05 RCW as including:

- (i) Information on the laws, rules, and compliance methods and technologies applicable to the department's programs;
- (ii) Information on methods to avoid compliance problems;
- (iii) Assistance in applying for permits; and
- (iv) Information on the mission, goals, and objectives of the program.

(b) "Technical assistance documents" means documents prepared to provide information specified in (a) of this subsection that is labeled a technical assistance document by the department. Technical assistance documents do not include notices of correction, violation, or enforcement action. Technical assistance documents do not impose mandatory obligations or serve as the basis for a citation.

(2) **Technical assistance visit:**

(a) Pursuant to RCW 43.05.030, a technical assistance visit is defined as a visit by the department to a project site or other location that:

- (i) Has been requested or is voluntarily accepted; and

(ii) The department declares to be a technical assistance visit at the start of the visit.

(b) Notice of violation. During a technical assistance visit, or within a reasonable time thereafter, the department must prepare a notice of violation to inform the person of any violations of law or department rules identified by the department as follows:

(i) A description of what is not in compliance and the text of the specific section or subsection of the applicable state law or rule;

(ii) A statement of what is required to achieve compliance;

(iii) The date by which the project must achieve compliance;

(iv) Notice of the means to obtain any technical assistance services provided by the department or others; and

(v) Notice of when, where, and to whom a request to extend the time to achieve compliance for good cause may be filed with the department.

(c) A notice of violation is not a formal enforcement action and is not subject to appeal.

(3) Notice of correction:

(a) Procedures for correction of violations. If during any inspection or visit that is not a technical assistance visit, the department becomes aware of conditions that do not comply with applicable laws and rules enforced by the department and are not subject to penalties as provided for in subsection (4) of this section, the department may issue a notice of correction to the responsible party that must include:

(i) A description of what is not in compliance and the text of the specific section or subsection of the applicable state law or rule;

(ii) A statement of what is required to achieve compliance;

(iii) The date by which the department requires compliance to be achieved;

(iv) Notice of the means to contact any technical assistance services provided by the department or others; and

(v) Notice of when, where, and to who in the department a person may file a request to extend the time to achieve compliance for good cause.

(b) A notice of correction is not a formal enforcement action, is not subject to appeal, and is a public record.

(c) If the department issues a notice of correction, it must not issue a civil penalty for the violations identified in the notice of correction unless the responsible party fails to comply with the notice.

(4) Civil penalties:

(a) The department may impose a civil penalty of up to one hundred dollars per day for a violation of any provisions of chapter 77.55 RCW or this chapter. The department must impose the civil penalty with an order in writing delivered by certified mail or personal service to the person who is penalized. The notice must describe the violation, identify the amount of the penalty, identify how to pay the penalty, and identify the process for informal and formal appeals of the penalty. If the violation is an ongoing violation, the penalty may accrue for each additional day of violation.

(b) The department may issue a civil penalty without first issuing a notice of correction, as provided in RCW 43.05.110 if:

(i) The person has previously been subject to an enforcement action for the same or similar type of HPA violation, or has been given previous notice of the same or similar type of HPA violation;

(ii) Compliance is not achieved by the date set by the department in a previously issued notice of correction, if the department has responded to any request for review of such date by reaffirming the original date or establishing a new date;

(iii) The violation has a probability of placing a person in danger of death or bodily harm, has a probability of causing more than minor environmental harm, or has a probability of causing physical damage to the property of another in an amount exceeding one thousand dollars; or

(iv) The violation was committed by a business that employed fifty or more employees on at least one day in each of the preceding twelve months.

(c) Appeal of a civil penalty. If a civil penalty order is not appealed in a timely manner under WAC 220-660-460 or 220-660-470, the civil penalty order is final and nonappealable. If appealed, the civil penalty becomes final upon issuance of a final order not subject to any further administrative appeal. When a civil penalty order becomes final, it is due and payable.

(d) Payment of a civil penalty. The penalty imposed is 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 is 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. If the civil penalty is not paid within thirty days after it becomes due and payable, the department may seek enforcement of the order under RCW 77.55.291 and 34.05.578.

(e) Unpaid civil penalty. If the amount of any penalty is not paid within thirty days after it is due and payable, the attorney general, upon the request of the director, must bring an action in the name of the state of Washington in the superior court of Thurston County or of any county in which such violator may do business, to recover such penalty. In all such actions, the procedure and rules of evidence must be the same as an ordinary civil action. All penalties recovered under this section must be paid into the state's general fund.

(f) The department must comply with the requirements of RCW 34.05.110 before issuing a civil penalty to a small business as defined in that statute.

(5) **Time for compliance:** The department must provide for a reasonable time to achieve compliance. Any person receiving a notice of correction under subsection (3) or (4) of this section may request an extension of time for good cause to achieve compliance. The person must request an extension from the department in writing and follow the procedures specified by the department in the notice. The department must respond in writing within ten calendar days.

(6) **Criminal penalty:** Under RCW 77.15.300, it is a gross misdemeanor to construct any form of hydraulic project or perform other work on a hydraulic project without having first obtained an HPA from the department, or to violate any requirements or conditions of the HPA for such construction or work.

Credits

Statutory Authority: RCW 77.04.012, 77.04.020, and 77.12.047. WSR 15-02-029 (Order 14-353), S 220-660-480, filed 12/30/14, effective 7/1/15.

Current with amendments adopted through the 18-06 Washington State Register dated, March 21, 2018.

WAC 220-660-480, WA ADC 220-660-480

RCW 77.15.020**Authority to define violation of rule as infraction—Agreement to enforce certain civil infractions.**

(1) If the commission or director has authority to adopt a rule that is punishable as a crime under this chapter, then the commission or director may provide that violation of the rule shall be punished with notice of infraction under RCW 7.84.030. Neither the commission nor the director have the authority to adopt a rule providing that a violation punishable as an infraction shall be a crime.

(2) The director may, under the provisions of RCW 7.84.140, enter into an agreement allowing employees of the state parks and recreation commission and the department of natural resources to enforce certain civil infractions created under this title.

[2011 c 320 § 17; 2005 c 321 § 2; 1998 c 190 § 3.]

NOTES:

Effective date—2011 c 320: See note following RCW 79A.80.005.

Findings—Intent—2011 c 320: See RCW 79A.80.005.

RCW 77.15.300**Unlawful hydraulic project activities—Penalty.**

(1) A person is guilty of unlawfully undertaking hydraulic project activities if the person constructs any form of hydraulic project or performs other work on a hydraulic project and:

(a) Fails to have a hydraulic project approval required under chapter **77.55** RCW for such construction or work; or

(b) Violates any requirements or conditions of the hydraulic project approval for such construction or work.

(2) Unlawfully undertaking hydraulic project activities is a gross misdemeanor.

[2000 c 107 § 239; 1998 c 190 § 52.]

SENATE BILL 5466

State of Washington

65th Legislature

2017 Regular Session

By Senators McCoy, Chase, and Fortunato; by request of Department of Fish and Wildlife

Read first time 01/25/17. Referred to Committee on Natural Resources & Parks.

1 AN ACT Relating to construction projects in state waters;
2 amending RCW 77.55.141, 77.55.181, 77.55.231, and 77.55.291; adding
3 new sections to chapter 77.55 RCW; repealing RCW 77.55.321; and
4 prescribing penalties.

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

6 **Sec. 1.** RCW 77.55.141 and 2010 c 210 s 28 are each amended to
7 read as follows:

8 (1) In order to protect the property of marine waterfront
9 shoreline owners it is necessary to facilitate issuance of permits
10 for bulkheads or rockwalls under certain conditions.

11 (2) The department (~~shall~~) may issue a permit with (~~or~~
12 ~~without~~) conditions within forty-five days of receipt of a complete
13 and accurate application which authorizes commencement of
14 construction, replacement, or repair of a marine beach front
15 protective bulkhead or rockwall for single-family type residences
16 (~~or property~~) under the following conditions:

17 (a) The applicant provides a geotechnical analysis that
18 demonstrates that erosion from waves or currents is imminently
19 threatening or that, unless the new bulkhead or rockwall is
20 constructed, damage is expected to occur within three years;

21 (b) The erosion is not caused by upland conditions;

1 (c) The proposed bulkhead or rockwall will provide greater
2 protection than feasible, nonstructural alternatives such as slope
3 drainage systems, vegetative growth stabilization, gravel berms, and
4 beach nourishment;

5 (d) The proposal is the minimum necessary to protect existing
6 legally established single-family type residences;

7 (e) Adequate mitigation measures will be provided to maintain
8 existing shoreline processes and critical food fish or shellfish
9 habitats;

10 (f) The waterward face of a new bulkhead or rockwall shall be
11 located only as far waterward as is necessary to excavate for
12 footings or place base rock for the structure and under no conditions
13 shall be located more than six feet waterward of the ordinary high
14 water line;

15 ~~((b))~~ (g) Any bulkhead or rockwall to replace or repair an
16 existing bulkhead or rockwall shall be placed along the same
17 alignment as the bulkhead or rockwall it is replacing. However, the
18 replaced or repaired bulkhead or rockwall may be placed waterward of
19 and directly abutting the existing structure only in cases where
20 removal of the existing bulkhead or rockwall would result in
21 environmental degradation or removal problems related to geological,
22 engineering, or safety considerations; ~~(and~~

23 ~~(e))~~ (h) Construction of a new bulkhead or rockwall, or
24 replacement or repair of an existing bulkhead or rockwall waterward
25 of the existing structure shall not result in the ~~(permanent))~~ net
26 loss of critical food fish or shellfish habitats; and

27 ~~((d))~~ (i) Timing constraints shall be applied on a case-by-case
28 basis for the protection of critical habitats, including but not
29 limited to migration corridors, rearing and feeding areas, and
30 spawning habitats, for the proper protection of fish life.

31 (3) Any bulkhead or rockwall construction, replacement, or repair
32 not meeting the conditions in this section shall be processed under
33 this chapter in the same manner as any other application.

34 (4) Any person aggrieved by the approval, denial, conditioning,
35 or modification of a permit under this section may appeal the
36 decision as provided in RCW 77.55.021~~((4))~~ (8).

37 **Sec. 2.** RCW 77.55.181 and 2014 c 120 s 1 are each amended to
38 read as follows:

1 (1) (a) In order to receive the permit review and approval process
2 created in this section, a fish habitat enhancement project must meet
3 the criteria under this section and must be a project to accomplish
4 one or more of the following tasks:

5 (i) Elimination of human-made or caused fish passage barriers,
6 including culvert repair and replacement;

7 (ii) Restoration of an eroded or unstable stream bank employing
8 the principle of bioengineering, including limited use of rock as a
9 stabilization only at the toe of the bank, and with primary emphasis
10 on using native vegetation to control the erosive forces of flowing
11 water; ~~((or))~~

12 (iii) Placement of woody debris, spawning material, or other
13 ~~((instream))~~ habitat structures that benefit naturally reproducing
14 fish stocks;

15 (iv) Restoration of marine and lake shorelines by removing
16 armoring and other hard shoreline stabilization structures, or
17 replacing hard shoreline structures with natural or soft techniques,
18 with primary emphasis on using native vegetation, root wads, large
19 woody material, and beach nourishment to mimic natural shoreline
20 processes; or

21 (v) Restoration of lake and marine nearshore by removing docks
22 and other human-made structures.

23 (b) ~~((The department shall develop size or scale threshold tests
24 to determine if projects accomplishing any of these tasks should be
25 evaluated under the process created in this section or under other
26 project review and approval processes.))~~ A project proposal shall not
27 be reviewed under the process created in this section if the
28 department or the local government determines that the scale of the
29 project raises environmental and public health and safety concerns
30 ~~((regarding public health and safety))~~ or if the department
31 determines that fish or fish habitat would be adversely impacted by
32 the project.

33 (c) A fish habitat enhancement project must be approved in one of
34 the following ways in order to receive the permit review and approval
35 process created in this section:

36 (i) By the department pursuant to chapter 77.95 or 77.100 RCW;

37 (ii) By the sponsor of a watershed restoration plan as provided
38 in chapter 89.08 RCW;

39 (iii) By the department as a department-sponsored fish habitat
40 enhancement or restoration project;

1 (iv) (~~Through the review and approval process for the jobs for~~
2 ~~the environment program;~~) By a tribe as a tribal sponsored fish
3 habitat enhancement or restoration project;

4 (v) Through the review and approval process for conservation
5 district-sponsored projects, where the project complies with design
6 standards established by the conservation commission through
7 interagency agreement with the (~~United States fish and wildlife~~
8 ~~service and the natural resource conservation service~~) department;

9 (vi) Through a formal grant program established by the
10 legislature or the department for fish habitat enhancement or
11 restoration;

12 (vii) Through the department of transportation's environmental
13 retrofit program as a stand-alone fish passage barrier correction
14 project;

15 (viii) Through a local, state, or federally approved fish barrier
16 removal grant program designed to assist local governments in
17 implementing stand-alone fish passage barrier corrections;

18 (ix) By a city or county for a stand-alone fish passage barrier
19 correction project funded by the city or county; and

20 (x) Through other formal review and approval processes
21 established by the legislature.

22 (2) Fish habitat enhancement projects meeting the criteria of
23 subsection (1) of this section are expected to result in beneficial
24 impacts to the environment. Decisions pertaining to fish habitat
25 enhancement projects meeting the criteria of subsection (1) of this
26 section and being reviewed and approved according to the provisions
27 of this section are not subject to the requirements of RCW
28 43.21C.030(2)(c).

29 (3)(a) A permit is required for projects that meet the criteria
30 of subsection (1) of this section and are being reviewed and approved
31 under this section. An applicant shall use the department's online
32 permit application system or a joint aquatic resource permit
33 application form developed by the office of regulatory assistance to
34 apply for approval under this chapter. (~~On the same day, the~~
35 ~~applicant shall provide copies of~~) Upon receipt of a complete
36 application, the department shall notify the local government that
37 the completed application form (~~to the department and to each~~
38 ~~appropriate local government~~) is available for review in the online
39 permit system.

1 (b) Notification by the department to the local governments shall
2 ~~((accept the application))~~ serve as notice of the proposed project.
3 The department shall provide a ~~((fifteen-day))~~ thirty-day comment
4 period during which it will receive comments regarding potential
5 environmental and public health and safety impacts.

6 (c) Within forty-five days, the department shall either issue a
7 permit, with or without conditions, deny approval, or make a
8 determination that the review and approval process created by this
9 section is not appropriate for the proposed project. The department
10 shall base this determination on identification during the comment
11 period of adverse impacts that cannot be mitigated by the
12 conditioning of a permit.

13 (d) If the department determines that the review and approval
14 process created by this section is not appropriate for the proposed
15 project, the department shall notify the applicant and the
16 appropriate local governments of its determination. The applicant may
17 reapply for approval of the project under other review and approval
18 processes.

19 (e) Any person aggrieved by the approval, denial, conditioning,
20 or modification of a permit under this section may appeal the
21 decision as provided in RCW 77.55.021(8).

22 (4) No local government may require permits or charge fees for
23 fish habitat enhancement projects that meet the criteria of
24 subsection (1) of this section and that are reviewed and approved
25 according to the provisions of this section.

26 (5) No civil liability may be imposed by any court on the state
27 or its officers and employees for any adverse impacts resulting from
28 a fish enhancement project permitted by the department under the
29 criteria of this section except upon proof of gross negligence or
30 willful or wanton misconduct.

31 **Sec. 3.** RCW 77.55.231 and 2012 1st sp.s. c 1 s 106 are each
32 amended to read as follows:

33 (1) Conditions imposed upon a permit must be reasonably related
34 to the project. The permit conditions must ensure that the project
35 provides proper protection for fish life, but the department may not
36 impose conditions that attempt to optimize conditions for fish life
37 that are out of proportion to the impact of the proposed project.

1 (2) The permit must contain provisions ~~((allowing for minor))~~
2 exempting the following modifications from all fees listed under this
3 section:

4 (a) Minor modifications to the plans and specifications ~~((without~~
5 ~~requiring reissuance of the permit.~~

6 ~~(3) The permit must contain provisions that allow for))~~;

7 (b) Minor modifications to the required work timing ~~((without~~
8 ~~requiring the reissuance of the permit))~~. "Minor modifications to the
9 required work timing" means a minor deviation from the timing window
10 set forth in the permit when there are no spawning or incubating fish
11 present within the vicinity of the project; and

12 (c) Transfer of a permit to a new permittee or authorized agent.

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

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

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

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

31 (4) If a person violates this chapter, or any of the rules
32 adopted by the department that implement this chapter, the department
33 may issue a notice to comply, stop work order, or civil penalty.

34 NEW SECTION. Sec. 5. A new section is added to chapter 77.55
35 RCW to read as follows:

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

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

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

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

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

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

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

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

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

14 (3) The department shall mail a copy of such an order to the
15 applicant and landowner at the address shown on the hydraulic project
16 application within five business days.

17 (4) Issuance of a stop work order may be informally appealed by
18 the applicant or landowner to the department within thirty days from
19 the date of receipt of the penalty. Requests for informal appeal must
20 be filed in the form and manner prescribed by the department by rule.
21 A stop work order that has been informally appealed to the department
22 is appealable to the appeals board within thirty days from the date
23 of receipt of the department's decision on the informal appeal.

24 (5) The applicant or landowner may commence an appeal to the
25 board within thirty days from the date of receipt of the stop work
26 order. If such an appeal is commenced, the proceeding is an
27 adjudicative proceeding under chapter 34.05 RCW, the administrative
28 procedure act. The recipient must comply with the order of the
29 department immediately upon being served, but the board may
30 discontinue the order, upon motion, under such conditions as the
31 board may impose.

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

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

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

- 1 (ii) Any necessary corrective action; and
2 (iii) The right of the person to an appeal.

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

6 (2) The department shall mail a copy of such a notice to the
7 applicant and landowner at the address shown on the hydraulic project
8 application within five business days.

9 (3) Issuance of such a notice may be informally appealed by the
10 applicant or landowner to the department within thirty days from the
11 date of receipt of the penalty. Requests for informal appeal must be
12 filed in the form and manner prescribed by the department by rule. A
13 notice to comply that has been informally appealed to the department
14 is appealable to the appeals board within thirty days from the date
15 of receipt of the department's decision on the informal appeal.

16 (4) The applicant or landowner may commence an appeal to the
17 board within thirty days from the date of receipt of the notice. If
18 such an appeal is commenced, the proceeding is an adjudicative
19 proceeding under chapter 34.05 RCW, the administrative procedure act.
20 The recipient must comply with the notice to comply immediately upon
21 being served, but the board may discontinue the notice to comply,
22 upon motion, under such conditions as the board may impose.

23 **Sec. 7.** RCW 77.55.291 and 2010 c 210 s 31 are each amended to
24 read as follows:

25 (1) The department may levy civil penalties of up to (~~one~~
26 ~~hundred dollars per day for violation of any provisions of RCW~~
27 ~~77.55.021. The penalty provided shall be imposed by notice in~~
28 ~~writing, either by certified mail or personal service to the person~~
29 ~~incurring the penalty, from the director or the director's designee~~
30 ~~describing the violation~~) ten thousand dollars for every violation
31 of this chapter or the rules adopted to implement this chapter. Each
32 and every violation is a separate and distinct civil offense. The
33 penalty provided must be imposed by notice in writing by the
34 department, either by certified mail or personal service to the
35 person incurring the penalty, describing the violation. The civil
36 penalty notice must specify the:

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

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

1 (2) (a) Except as provided in (b) of this subsection, any person
2 incurring any penalty under this chapter may appeal the same under
3 chapter 34.05 RCW to the board. Appeals shall be filed within thirty
4 days from the date of receipt of the penalty in accordance with RCW
5 43.21B.230.

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

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

21 (4) If the amount of any penalty is not paid within thirty days
22 after it becomes due and payable, the attorney general, upon the
23 request of the director, shall bring an action in the name of the
24 state of Washington in the superior court of Thurston county or of
25 ~~((any))~~ the county in which such ~~((violation may be done))~~
26 violation occurred, to recover such penalty. In all such actions the
27 procedure and rules of evidence shall be the same as an ordinary
28 civil action. All penalties ~~((recovered under this section shall be~~
29 ~~paid into the state's general fund))~~ received or recovered by state
30 agency action for violations as prescribed in subsection (1) of this
31 section must be deposited into the state's general fund. The
32 department is also entitled to recover reasonable attorneys' fees and
33 costs incurred in connection with the penalty recovered under this
34 section.

35 (5) The department shall adopt by rule a penalty schedule to be
36 effective by January 1, 2018. The schedule must be developed in
37 consideration of the following:

38 (a) Previous violation history;

39 (b) Severity of the impact on fish and fish habitat;

1 (c) Whether the violation of this chapter or its rules was
2 intentional;

3 (d) Cooperation with the department;

4 (e) Reparability of the adverse effect from the violation; and

5 (f) The extent to which a penalty to be imposed on a person for a
6 violation committed by another should be reduced if the person was
7 unaware of the violation and has not received a substantial economic
8 benefit from the violation.

9 NEW SECTION. Sec. 8. A new section is added to chapter 77.55
10 RCW to read as follows:

11 The department may apply for an administrative inspection warrant
12 in either Thurston county superior court or the superior court in the
13 county where the project is located. The court may issue an
14 administrative inspection warrant where:

15 (1) Department personnel need to inspect the project site to
16 ensure compliance with this chapter and rules adopted to implement
17 this chapter; or

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

21 NEW SECTION. Sec. 9. A new section is added to chapter 77.55
22 RCW to read as follows:

23 (1) The department shall charge fees for hydraulic project
24 approvals issued under RCW 77.55.021 to recover a portion of the
25 costs for processing and issuing decisions on permit applications,
26 administering fee collections, and compliance and effectiveness
27 monitoring and enforcement of projects requiring a permit. The fees
28 are based on the scale and complexity of the project and the relative
29 effort required for department staff to review the application,
30 conduct site visits, consult with applicants as necessary, and issue
31 or deny the permit.

32 (2) For the purposes of assessing fees for permits under
33 subsection (1) of this section, the department must categorize the
34 following repair or maintenance hydraulic projects as low complexity:

35 (a) Emergencies;

36 (b) Freshwater beach habitat creation;

37 (c) Beaver dams;

38 (d) Breeding substrate;

- 1 (e) Large woody material work;
2 (f) Riparian habitat work;
3 (g) Wetlands or estuarine habitat work;
4 (h) Conduit or cable work using boring;
5 (i) Dredging less than fifty cubic yards of bed material;
6 (j) Water crossings, including a bridge, culvert, or ford, in
7 nonfish-bearing waters;
8 (k) Bridge work exclusively above the ordinary high water line;
9 (l) Shoreline modification or bank protection of less than one
10 hundred feet, not associated with jetties, dikes, or levees;
11 (m) Booms;
12 (n) Anchoring or mooring buoys and navigation aids;
13 (o) Piling work;
14 (p) Overwater structures, not including marinas or marine
15 terminals;
16 (q) Boat lifts or railway launches;
17 (r) Boat ramps or launches;
18 (s) Timber felling and yarding activities;
19 (t) Temporary or permanent stream gauges or other scientific
20 instruments;
21 (u) Outfalls;
22 (v) Tidegates;
23 (w) Mechanical aquatic plant control not addressed by the aquatic
24 plants and fish pamphlet;
25 (x) Pump water diversions and fish screens; and
26 (y) Gravity water diversions and fish screens.
27 (3) When assessing fees for permits under subsection (1) of this
28 section, the department must categorize the following new,
29 replacement, or removal hydraulic projects as low complexity:
30 (a) Beaver dams;
31 (b) Conduit or cable work using boring;
32 (c) Bridge work exclusively above the ordinary high water line;
33 (d) Booms;
34 (e) Anchoring or mooring buoys and navigation aids;
35 (f) Overwater structures in the current footprint, not including
36 marinas or marine terminals;
37 (g) Boat ramps or launches within the existing footprint of an
38 existing structure;
39 (h) Timber felling and yarding activities; and

1 (i) Temporary or permanent stream gauges or other scientific
2 instruments.

3 (4) When assessing fees for permits under subsection (1) of this
4 section, the department must categorize the following repair or
5 maintenance hydraulic projects as medium complexity:

6 (a) Aquaculture;

7 (b) Off channel, side channel, or in-channel enhancement or
8 restoration work, not including projects that are exclusively large
9 woody material work;

10 (c) Channel realignment work;

11 (d) Bed modification, not including habitat enhancement or
12 restoration and dredging;

13 (e) Conduit or cable work using trenching;

14 (f) Dredging greater than fifty cubic yards of bed material;

15 (g) Water crossings, including a bridge, culvert, or ford, in
16 fish-bearing waters, not including fish passage retrofits;

17 (h) Fish passage barrier removal with replacement or retrofit
18 using such methods as baffles or log controls for passage through or
19 over a structure;

20 (i) Fish passage not associated with a water crossing structure,
21 such as a bypass of a natural barrier or a fishway to bypass a dam;

22 (j) Shoreline modification or bank protection greater than one
23 hundred feet that is not associated with jetties, dikes, or levees;

24 (k) Jetties, dikes, or levees;

25 (l) Overwater structures outside of the footprint of an existing
26 structure, not including marinas or marine terminals;

27 (m) Marinas and marine terminals; and

28 (n) Dams not under jurisdiction of the federal energy regulatory
29 commission.

30 (5) When assessing fees for permits under subsection (1) of this
31 section, the department must categorize the following new,
32 replacement, or removal hydraulic projects as medium complexity:

33 (a) Emergencies;

34 (b) Aquaculture;

35 (c) Freshwater beach habitat creation;

36 (d) Breeding substrate;

37 (e) Large woody material work;

38 (f) Riparian habitat work;

39 (g) Conduit or cable work using trenching;

40 (h) Dredging less than fifty cubic yards of bed material;

1 (i) Water crossings, including a bridge, culvert, or ford, in
2 nonfish-bearing waters;

3 (j) Shoreline modification or bank protection less than one
4 hundred feet, not associated with jetties, dikes, or levees;

5 (k) Piling work;

6 (l) Overwater structures outside of the footprint of an existing
7 structure, not including marinas or marine terminals;

8 (m) Boat lifts or railway launches;

9 (n) Boat ramps or launches outside of the footprint of an
10 existing structure;

11 (o) Outfalls;

12 (p) Tidegates;

13 (q) Mechanical aquatic plant control not addressed by the aquatic
14 plants and fish pamphlet;

15 (r) Mineral prospecting not addressed by the gold and fish
16 pamphlet;

17 (s) Pump water diversions and fish screens; and

18 (t) Gravity water diversions and fish screens.

19 (6) When assessing fees for permits under subsection (1) of this
20 section, the department must categorize the following new,
21 replacement, or removal hydraulic projects as high complexity:

22 (a) Off channel, side channel, or in-channel enhancement or
23 restoration work, not including projects that are exclusively large
24 woody material work;

25 (b) Wetland or estuarine habitat work;

26 (c) Channel realignment work;

27 (d) Bed modification, not including habitat enhancement or
28 restoration and dredging;

29 (e) Dredging greater than fifty cubic yards of bed material;

30 (f) Water crossings, including a bridge, culvert, or ford, in
31 fish-bearing waters, not including fish passage retrofits;

32 (g) Fish passage barrier removal with replacement or retrofit
33 using such methods as baffles or log controls for passage through or
34 over a structure;

35 (h) Fish passage not associated with a water crossing structure,
36 such as a bypass of a natural barrier or a fishway to bypass a dam;

37 (i) Shoreline modification or bank protection greater than one
38 hundred feet, not associated with jetties, dikes, or levees;

39 (j) Jetties, dikes, or levees;

40 (k) Marinas and marine terminals; and

1 (1) Dams not under jurisdiction of the federal energy regulatory
2 commission.

3 (7) If the department receives an application for a project type
4 not identified in subsections (2) through (6) of this section, it
5 shall categorize them as low, medium, or high risk and charge fees
6 based on those categories consistent with the most similar project
7 types identified in subsections (2) through (6) of this section.

8 (8) The department must charge the following fees. Until January
9 1, 2018, the fee is one hundred fifty dollars. Beginning January 1,
10 2018, the following applies:

11 (a) A notification/application submittal fee of one hundred fifty
12 dollars for a low complexity hydraulic project;

13 (b) An application submittal fee of two hundred fifty dollars for
14 a medium complexity hydraulic project;

15 (c) An application submittal fee of five hundred dollars for a
16 high complexity hydraulic project; and

17 (d) An application submittal fee of one thousand dollars for a
18 general hydraulic project approval.

19 (9) In cases where hydraulic projects include work that falls
20 into more than one of the permit categories outlined in subsection
21 (8) of this section, the fee charged must be based on the most
22 complex component of the project.

23 (10) In addition to the base fee defined in subsection (8) of
24 this section, the department must charge the following additional
25 fees except where exempted in RCW 77.55.231:

26 (a) A one hundred dollar fee for modifications to low complexity
27 hydraulic projects;

28 (b) A one hundred twenty-five dollar fee for modifications to
29 medium complexity hydraulic projects;

30 (c) A two hundred fifty dollar fee for modifications to high
31 complexity hydraulic projects;

32 (d) A five hundred dollar fee for modifications to general
33 hydraulic project approvals;

34 (e) A one hundred fifty dollar fee for extensions to the end date
35 of a project approval; and

36 (f) A thirty dollar fee for applications submitted without using
37 the online system.

38 (11) The following hydraulic projects are exempt from all fees
39 listed under this section:

1 (a) Hydraulic projects approved under applicant-funded contracts
2 with the department that pay for the costs of processing those
3 projects;

4 (b) Pamphlet hydraulic projects;

5 (c) Mineral prospecting and mining activities;

6 (d) Hydraulic projects occurring on farm and agricultural land,
7 as that term is defined in RCW 84.34.020; and

8 (e) Fish habitat enhancement projects as provided for in RCW
9 77.55.181.

10 (12) The department shall refund fifty percent of the permit
11 processing fee to any person that properly applies for any permit or
12 permit modification under RCW 77.55.021 if the department fails to
13 process the application or request within the timelines required by
14 RCW 77.55.021.

15 (13) The department shall refund one hundred percent of all fees
16 if:

17 (a) No permit is required for the proposed work; or

18 (b) The hydraulic project is exempt from substantial development
19 permit requirements under RCW 90.58.147 and the project proponent
20 provides the department a copy of the letter documenting exemption
21 approval by the local government.

22 (14) Prior to submitting its biennial operating budget every two
23 years to the office of financial management, the department shall
24 send a report to the appropriate committees of the legislature on the
25 progress of the hydraulic project approval program.

26 NEW SECTION. **Sec. 10.** RCW 77.55.321 (Application fee for a
27 hydraulic project permit or permit modification—Projects exempt from
28 fees—Disposition of fees) and 2012 1st sp.s. c 1 s 103 are each
29 repealed.

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Washington Department of Fish and Wildlife
Habitat Program
15 May 2018

To: Hydraulic Code Implementation Citizen Advisory Group
From: Randi Thurston, Protection Division Manager and HCICAG Chair
Subject: Background on After-the-Fact HPA Permits

I want to thank Stephen for bringing this request to the group. I wanted to provide some additional background for your consideration. I know that the ability to issue after-the-fact permits is a tool that counties and cities have. I think it is important to estimate the biological, ecological, socio-political, legal, and economic consequences of proposed changes based on as much information as you can gather before making a decision. Here is some additional information for your consideration.

Current Requirement

An HPA allows a person to do something that would otherwise be illegal. This is true for all permits. If the a person fails to obtain an HPA prior to doing work or an HPA holder fails to follow the terms of the permit, they've committed an HPA violation and are subject to the penalties associated with an HPA violation.

Currently, state law ([RCW 77.55.021\(1\)](#)) states " 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."

Because the law requires a person to obtain the HPA before commencing work we currently cannot issue an after-the-fact HPA for work completed without an HPA. It is important to note that while we do not issue HPAs for work done without or in violation of the terms of the HPA, we do issue HPAs for work needed to correct or mitigate for a violation.

Others Laws and Policies

Violation of the Hydraulic Code is a gross misdemeanor [RCW 77.15.300](#). Our Fish and Wildlife Officers are responsible for enforcing this RCW. The statute also allows for a civil (administrative) enforcement option. Our habitat biologists (HBs) work with our Fish and Wildlife Officers (FWOs) when technical assistance and voluntary compliance is an option.

There are three statutes that govern our civil options. The first on is [RCW 77.55.291 Civil Penalty](#). It allows the department to levy a civil penalty of up to \$100 a day for a violation. [RCW 34.05.110](#) provides for additional considerations for small businesses. [Chapter 43.05](#) provides that agencies describe how agencies including Fish and Wildlife will implement their civil authority. Currently, WDFW does not issue civil penalties because \$100 a day is not a deterrent. We also lack some of the other civil compliance tools available to the other Natural Resource agencies, stop-work authority being one example.

The legislature has given agencies the authority to adopt rules. These rules describe how the agencies will implement the statutes. The rule for HPA compliance is [WAC 220-660-480 Compliance with HPA Provisions](#). It covers technical assistance, notices of corrections, time for compliance, and civil and criminal penalties.

Contrary to Stephen's statement, both Policy 5002, Mitigation, and Policy 5212 are still in effect. Policy 5002 applies to all habitat protection assignments where the Washington Department of Fish and Wildlife (WDFW) is issuing or commenting on environmental protection permits, documents, or violation settlements; or when seeking commensurate compensation for impacts to fish and wildlife resources resulting from oil or other toxic spills. Policy 5212 applies to employees who enforce and monitor compliance with the State Hydraulic Code (Chapter 77.55 RCW), or who believe they have encountered potential Hydraulic Code violations in the course of their duties. The main purpose is to specify which staff (FWOs or HBs) have the responsibility for ensuring compliance. Most HPA violations investigated by FWOs are not referred to county prosecutors because they are resolved through technical assistance and voluntary compliance.

Some other considerations

Amending the statute to allow for after-the-fact HPAs has come up in the past. The Northwest Indian Fisheries Commission member Tribes voiced strong opposition to this proposed change. They were worried that allowing for after-the fact HPAs would result in an increase in unpermitted work.

How would the department determine whether a violation is unintentional?

There is currently no HPA fee so doubling it to provide a disincentive is not an option. I am assuming that Stephan is proposing this as a disincentive since processing an HPA for a violation does not take staff longer than it would take for a normal application. Are there other disincentives for constructing a project without an HPA that might be appropriate?

I think it is worthwhile to talk about the specific projects where WDFW required the removal of a project constructed without an HPA that otherwise complied with the hydraulic code and the benefits of an after-the-fact HPA in these situations. I am not aware of these instances.

Conclusion

I want to thank Stephen for bringing this topic forward for discussion by the group. Whether solved through statute change or internal implementation mechanism, it's a topic relevant to HPA implementation and appropriate for discussion by this group. I join Stephen in encouraging other members to bring forward similar implementation issues for discussion.

Statutory/Legislation issues

- Aquaculture
- Emphasis on some species (ESA) over other fish species
- Additional restrictions for ESA-listed species from new development
- Avoidance – don't accept
- Cumulative impacts need to be considered
- After the fact permits need to be considered
- Saltwater freshwater rivers lakes differentiate standards
- Definition of Habitat
- Optimizing habitat for fish life
- Fish prey included

Agency field staff input

- Feedback from field biologists on what issues they are having with permitting
- Regional differences in implementation
 - How does staff deal with this
 - Avoid one size fits all

Interagency Coordination

- Water Quality permitting
- Interactions / contributions between state / federal agencies
- Fish passage
 - Industry has meet requirements, what about downstream blockages (double standard, totality)
- Eelgrass survey protocols
- How does WDFW work with comanagers
- MAP team, TFW, Evaluate local, state, federal
- Work window coordination

Rule changes

- 320 – saltwater habitats of special concern
- Improve protection for ESA species
- Invasive species – BMPs, etc.
- Is Zoster japonica an AIS?
- Saltwater and lakes very different
- Differentiate eelgrass from macroalgae protections

Definitions

- Define WDFW role in recovery
- “Habitat” – strong emphasis on fish versus habitat; little guidance on optimizing habitat for fish protection
- Define prey as habitat
- Clearly define jurisdiction boundary
- “Natural flow”
- Defining habitats & mapping data layer
- How we define fish habitat

Improving fish life protection

- Emphasizing ESA species
- Invasive species regulation (what are we doing)
- Better mapping of fish habitat

Improving consistency

- Availability of science tools
- Better internal guidance
- Better technical assistance delivery
- How does WDFW ensure consistency? What does WDFW do?
- FPA/HPA consistency still not smooth – water typing
- Consistency on parameters
- But understand how staff applies provision differently in different regions
- Training biologists (field trips, SOPs)
- Overreach re: jurisdiction
- Interpretation of guidance
- Staff topic specialists
- Correct implementation of survey protocols
- Updating survey protocols

Improving compliance

- What violations are seen?
- What does WDFW do about it?
- Is there adaptive management to reduce violations or improve response?
- How does WDFW view contract requirements (Kim’s permit requirements are contract requirements – what do we do to enforce or monitor compliance?)
- What are invasive species requirements
- Compliance re: fish passage structures in forest environments
- Package of documents related to compliance (enforcement/compliance; policy 5212)

- Alternatives to criminal prosecution
- After-the-fact permits
- More flexible enforcement mechanisms

Improving outreach

- Training for contractors
- ESA species (how our regs protect ESA species)
- What are permittee responsibilities (vis-à-vis requirements in a permit)
- Landowner “rights” (what to expect/demand from contractors)
- Outreach to local government
- Outreach on the importance of habitat to fish
- Prey as habitat
- In-water work windows
- PHS and other mapping – what’s available?

Customer Service

- Improve information for applicant
- Map data delivery
- Define habitat for the lay person

Improving transparency

- Understanding how WDFW implements the code
- Structure
- Policy? Guidance? Tools? [note: when Steve is talking about policy he’s mainly talking about internal guidance documents, but is sometimes talking about agency policy like 5212]
- In water work windows

HPA implementation mechanisms

- Concurrence under FPA/HPA
- Mechanism for getting CAG advice to decisionmakers (SMT?)
- What are the expectations of permittees’ responsibilities
- Regional flexibility – want to hear more about what this is like
- Dual/trio responsibilities of protection, restoration, information provider/advisor – diversification (was this a good step for fish protection?)
- Documentation of HB decisions – “basis”
- Forage fish work windows/protection tools

Other

- Want to know what is the implementation environment

-
- CAG wants field trips, see site-specific stuff, have same resources as a habitat bio before go out in the field
 - WAC review (most members appear not to even know what's in WAC)
 - For CAG meetings, limit the education of cag members
 - Focus more on feedback/issues from CAG
 - HCICAG more in control of the agenda
 - Rotating chair to set agenda and lead meeting
 - Any information to share with CAG re: aquaculture permitting?
 - Updating protocols
 - Science
 - Internal communications and coordination (HBs not consulting with science staff)
 - Tools – one stop shop for info
 - Timely updates to (....?)