



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

**Thursday, November 29, 2018**  
**10:00 am - 2:30 pm**

Washington PUD Association Conference Room  
212 Union St. Suite 201  
Olympia, WA 98501

Protection Division Manager: Randi Thurston

Facilitator: Neil Aaland

Staff: Dan Doty, Teresa  
Scott, and Pat  
Chapman

1.	10:00 am	<b>Welcome and Introductions</b> <b>Old Business</b> <ul style="list-style-type: none"><li>Review agenda</li></ul>	Neil
2.	10:15 am	<b>HCICAG Roles, responsibilities and moving forward.</b> <ul style="list-style-type: none"><li>Committee role with WDFW</li><li>Charter</li><li>Workplan/future topics</li><li>Members/terms</li></ul>	Randi, All
3.	11:00 am	<b>Compliance (first of multiple meeting discussions)</b> <ul style="list-style-type: none"><li>Orca Task Force recommendations regarding compliance</li><li>Background information on WDFW Compliance authority</li><li>Potential recommendations from advisory group: civil citations, enforcement</li></ul>	Randi
4.	12:00 noon	<b>Lunch (Lunch will be provided)</b>	
5.	12:30 pm	<b>Discussion: What steps should WDFW make to increase compliance?</b>	All
6.	1:00 pm	<b>Compliance and enforcement by local officials</b>	Scott Bird, WDFW
7.	2:00 on	<b>Discussion: What steps should WDFW take to improve prosecution?</b>	All
8.	2:30pm	<b>Review/Discuss Stephen Whitehouse Proposal regarding Issuance of After the Fact HPAs</b>	Stephen Whitehouse
9.	3:00 pm	<b>Adjourn</b>	

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

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## **Driving and Parking Directions**

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### **Washington Department of Fish & Wildlife**

#### **Main Office**

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

#### **[Get Directions](#)**

**Directions to meeting location:** 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. From there, walk two blocks north to Union Street.

**NRB Visitor Parking:** Parking costs \$1.50 cents per hour, payable at the meters. Parking meters accept credit/debit card, \$1 bills or coins. 9-hour street parking is also available near the PUD Association building.

# Civil and criminal enforcement of the HPA - materials for HCICAG 29 November 2018

## Introduction

An HPA allows a person to do something that would otherwise be illegal. 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.” The Hydraulic Code laws and regulations are intended to be self-implementing. This means knowledge of and voluntary compliance with the laws and regulations by the regulated community is required and expected. Where instances of noncompliance with the Hydraulic Code are found, WDFW is authorized by the state Legislature to take both administrative (civil) and criminal enforcement actions.

## Criminal Enforcement

A criminal enforcement action begins with a criminal citation issued to a violator. Unlike a civil compliance process, investigating and prosecuting environmental crimes must establish a violation of law and a state of mind. Usually, the required mental state, under state law, is that the person committed the violation knowingly, or intentionally, and/or willfully. Criminal prosecution also has a higher burden of proof to establish the violator committed a crime.

Violation of the Hydraulic Code is a gross misdemeanor RCW 77.15.300, with up to 364 days imprisonment and/or a \$5,000 fine. Our Fish and Wildlife Officers (FWOs) are responsible for enforcing this RCW. Many HPA violations investigated by FWOs are not referred to county prosecutors because they are resolved through technical assistance and voluntary compliance. Our habitat biologists (HBs) work with our FWOs when technical assistance and voluntary compliance are options to achieve the best outcomes for fish and people.

## Civil compliance

Civil compliance process may be pursued through the courts (judicially) or directly through action by the Habitat Program (administratively). If evidence of egregious or repeated violations is noted, it may be appropriate to refer the action to the WDFW Enforcement Program for criminal investigation. This may be done concurrent with ongoing inspections or taking other civil enforcement actions. Civil and criminal actions may happen simultaneously if carefully coordinated.

Civil compliance tools consist of letters of non-compliance, notices, and civil penalties. Administrative enforcement uses state civil authority to direct a permittee to comply with state law. An administrative enforcement action is based on 1) a violation of, or a potential to

violate, state law or regulation; and 2) authority to enforce that law or regulation. All direction and actions/notices must be issued in writing.

Following is a comparison between criminal and civil compliance pathways:

ITEM	CIVIL	CRIMINAL
Intent	Deterrent	Punishment
Mode	Non-judicial	Judicial
Tools	Noncompliance letter, notice of correction, civil penalties	Gross misdemeanor
Penalty	Up to \$100 per day	Up to \$5,000 fine and/or up to 1 year in jail
Process	Letters, notices, and civil penalties issued by WDFW	FWO investigates and refers suitable cases to the local prosecutor. Prosecutor determines whether a case will or will not be prosecuted.
Appeals	Penalties appealed to PCHB	Per judicial process

### **Compliance Sequence**

Since Hydraulic Code laws and regulations are complicated, WDFW has a responsibility to help the regulated community understand how to comply. We use a range of tools as our roles move from educator to enforcer. We achieve voluntary compliance through education and technical assistance when we advise and consult on permits, conduct compliance checks, perform on-site technical visits, or provide guidance materials written in easily understood language.

When we cannot get voluntary compliance, WDFW may use a range of increasingly strict enforcement tools. This ranges from issuing letters of non-compliance to penalties and, when appropriate, criminal prosecution. Effective and equitable enforcement requires using the appropriate tool for the violation.

WDFW encourages informal, practical, result-oriented resolution of alleged non-compliance. Education, technical assistance, and administrative enforcement actions are all used to gain compliance with the Hydraulic Code. However, intentional and serious violations may also be referred to the Enforcement Program for criminal prosecution. WDFW has developed methods to ensure fair and effective use of WDFW's civil and criminal enforcement authority to obtain compliance.

## **Compliance/Enforcement Statutes, Rules, and Policies**

RCW 77.15.300 establishes the penalty for violation of HPA provisions or conducting HPA work without a permit.

There are three statutes that govern our civil options: The first one is RCW 77.55.291 Civil Penalty, which 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. 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 and local governments, such as stop-work authority.

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. This rule would be updated if any new compliance/enforcement bills become law.

WDFW 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 of this policy is to specify which staff (FWOs or HBs) have the responsibility for conducting which compliance actions.

Following are the key statutes and rules involved in violations, penalties, and compliance actions.

### **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](#).]

### **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](#).]

### **WAC 220-660-480 Compliance with HPA provisions.**

(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.

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

## Chapter [43.05](#) RCW Technical Assistance Programs

### **RCW [43.05.005](#) Technical Assistance Programs - Findings.**

The legislature finds that, due to the volume and complexity of laws and rules it is appropriate for regulatory agencies to adopt programs and policies that encourage voluntary compliance by those affected by specific rules. The legislature recognizes that a cooperative partnership between agencies and regulated parties that emphasizes education and assistance before the imposition of penalties will achieve greater compliance with laws and rules and that most individuals and businesses who are subject to regulation will attempt to comply with the law, particularly if they are given sufficient information. In this context, enforcement should assure that the majority of a regulated community that complies with the law are not placed at a competitive disadvantage and that a continuing failure to comply that is within the control of a party who has received technical assistance is considered by an agency when it determines the amount of any civil penalty that is issued.

[ [1995 c 403 § 601](#).]

### **RCW [43.05.010](#) Technical Assistance Programs - Definitions.**

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Civil penalty" means a monetary penalty administratively issued by a regulatory agency for noncompliance with state or federal law or rules. The term does not include any criminal

penalty, damage assessments, wages, premiums, or taxes owed, or interest or late fees on any existing obligation.

(2) "Regulatory agency" means an agency as defined in RCW [34.05.010](#) that has the authority to issue civil penalties. The term does not include the state patrol or any institution of higher education as defined in RCW [28B.10.016](#).

(3) "Technical assistance" includes:

(a) Information on the laws, rules, and compliance methods and technologies applicable to the regulatory agency's programs;

(b) Information on methods to avoid compliance problems;

(c) Assistance in applying for permits; and

(d) Information on the mission, goals, and objectives of the program.

(4) "Technical assistance documents" means documents prepared to provide information specified in subsection (3) of this section entitled a technical assistance document by the agency head or its designee. 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.

[ [1999 c 236 § 1](#); [1995 c 403 § 602](#).]

**RCW [43.05.030](#) *Technical assistance visit—Notice of violation.***

(1) For the purposes of this chapter, a technical assistance visit is a visit by a regulatory agency to a facility, business, or other location that:

(a) Has been requested or is voluntarily accepted; and

(b) Is declared by the regulatory agency at the beginning of the visit to be a technical assistance visit.

(2) A technical assistance visit also includes a consultative visit pursuant to RCW [49.17.250](#).

(3) During a technical assistance visit, or within a reasonable time thereafter, a regulatory agency shall inform the owner or operator of the facility of any violations of law or agency rules identified by the agency as follows:

(a) A description of the condition that is not in compliance and the text of the specific section or subsection of the applicable state or federal law or rule;

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

(c) The date by which the agency requires compliance to be achieved;

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

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

[ [1996 c 206 § 2](#); [1995 c 403 § 604](#).]

**RCW 43.05.040 Time to correct violations—Revisit—Issuance of penalties.**

(1) The owner and operator shall be given a reasonable period of time to correct violations identified during a technical assistance visit before any civil penalty provided for by law is imposed for those violations. A regulatory agency may revisit a facility, business, or other location after a technical assistance visit and a reasonable period of time has passed to correct violations identified by the agency in writing and issue civil penalties as provided for by law for any uncorrected violations.

(2) During a visit under subsection (1) of this section, the regulatory agency may not issue civil penalties for violations not previously identified in a technical assistance visit, unless the violations are of the type for which the agency may issue a citation: (a) During a technical assistance visit under RCW [43.05.050](#); or (b) under RCW [43.05.090](#).

[ [2001 c 190 § 1](#); [1995 c 403 § 605](#).]

**RCW [43.05.050](#) Issuance of penalty during technical assistance visit.**

A regulatory agency that observes a violation during a technical assistance visit may issue a civil penalty as provided for by law if: (1) The individual or business has previously been subject to an enforcement action for the same or similar type of violation of the same statute or rule or has been given previous notice of the same or similar type of violation of the same statute or rule; or (2) the issue involves sales taxes due to the state and the individual or business is not remitting previously collected sales taxes to the state; or (3) 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.

[ [1995 c 403 § 606](#).]

**RCW [43.05.100](#) Departments of agriculture, fish and wildlife, health, licensing, natural resources—Notice of correction.**

(1) If in the course of any inspection or visit that is not a technical assistance visit, the department of agriculture, fish and wildlife, health, licensing, or natural resources becomes aware of conditions that are not in compliance with applicable laws and rules enforced by the department and are not subject to civil penalties as provided for in RCW [43.05.110](#), the department may issue a notice of correction to the responsible party that shall include:

- (a) A description of the condition that is not in compliance and the text of the specific section or subsection of the applicable state or federal law or rule;
- (b) A statement of what is required to achieve compliance;
- (c) The date by which the department requires compliance to be achieved;

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

(e) 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.

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

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

[ [1996 c 206 § 5](#); [1995 c 403 § 611](#).]

***RCW [43.05.110](#) Departments of agriculture, fish and wildlife, health, licensing, natural resources—Penalty.***

The department of agriculture, fish and wildlife, health, licensing, or natural resources may issue a civil penalty provided for by law without first issuing a notice of correction if: (1) The person has previously been subject to an enforcement action for the same or similar type of violation of the same statute or rule or has been given previous notice of the same or similar type of violation of the same statute or rule; or (2) compliance is not achieved by the date established 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; [or] (3) 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 (4) 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. In addition, the department of fish and wildlife may issue a civil penalty provided for by law without first issuing a notice of correction for a violation of any rule dealing with seasons, catch or bag limits, gear types, or geographical areas for fish or wildlife removal, reporting, or disposal.

This section does not apply to the civil penalties imposed under \*RCW [82.38.170](#)(13).

[ [1998 c 176 § 84](#); [1995 c 403 § 612](#).]

***RCW [43.05.120](#) Time for compliance—Extension.***

The date for compliance established by the department of ecology, labor and industries, agriculture, fish and wildlife, health, licensing, or natural resources pursuant to RCW [43.05.060](#), [43.05.090](#), or [43.05.100](#) respectively shall provide for a reasonable time to achieve compliance. Any person receiving a notice of correction pursuant to RCW [43.05.060](#) or [43.05.100](#) or a report or citation pursuant to RCW [43.05.090](#) may request an extension of time to achieve compliance for good cause from the issuing department. Requests shall be submitted to the issuing

department and responded to by the issuing department in writing in accordance with procedures specified by the issuing department in the notice, report, or citation.

[ [1995 c 403 § 613.](#)]

**RCW [43.05.150](#) Agency immunity—Enforcement authority.**

Nothing in this chapter obligates a regulatory agency to conduct a technical assistance visit. The state and officers or employees of the state shall not be liable for damages to a person to the extent that liability is asserted to arise from providing technical assistance, or if liability is asserted to arise from the failure of the state or officers or employees of the state to provide technical assistance. This chapter does not limit the authority of any regulatory agency to take any enforcement action, other than a civil penalty, authorized by law. This chapter shall not limit a regulatory agency's authority to issue a civil penalty as authorized by law based upon a person's failure to comply with specific terms and conditions of any permit or license issued by the agency to that person.

[ [1995 c 403 § 617.](#)]

**RCW [34.05.010](#) - Administrative Procedure Act -Definitions.**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adjudicative proceeding" means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied except as limited by RCW [66.08.150](#), or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

(2) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter [42.41](#) RCW.

(3) "Agency action" means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.

Agency action does not include an agency decision regarding (a) contracting or procurement of goods, services, public works, and the purchase, lease, or acquisition by any other means, including eminent domain, of real estate, as well as all activities necessarily related to those functions, or (b) determinations as to the sufficiency of a showing of interest filed in support of a representation petition, or mediation or conciliation of labor disputes or arbitration of labor disputes under a collective bargaining law or similar statute, or (c) any sale, lease, contract, or

other proprietary decision in the management of public lands or real property interests, or (d) the granting of a license, franchise, or permission for the use of trademarks, symbols, and similar property owned or controlled by the agency.

(4) "Agency head" means the individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law. If the agency head is a body of individuals, a majority of those individuals constitutes the agency head.

(5) "Entry" of an order means the signing of the order by all persons who are to sign the order, as an official act indicating that the order is to be effective.

(6) "Filing" of a document that is required to be filed with an agency means delivery of the document to a place designated by the agency by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.

(7) "Institutions of higher education" are the University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, The Evergreen State College, the various community colleges, and the governing boards of each of the above, and the various colleges, divisions, departments, or offices authorized by the governing board of the institution involved to act for the institution, all of which are sometimes referred to in this chapter as "institutions."

(8) "Interpretive statement" means a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order.

(9)(a) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law, but does not include (i) a license required solely for revenue purposes, or (ii) a certification of an exclusive bargaining representative, or similar status, under a collective bargaining law or similar statute, or (iii) a license, franchise, or permission for use of trademarks, symbols, and similar property owned or controlled by the agency.

(b) "Licensing" includes the agency process respecting the issuance, denial, revocation, suspension, or modification of a license.

(10) "Mail" or "send," for purposes of any notice relating to rule making or policy or interpretive statements, means regular mail or electronic distribution, as provided in RCW [34.05.260](#). "Electronic distribution" or "electronically" means distribution by electronic mail or facsimile mail.

(11)(a) "Order," without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.

(b) "Order of adoption" means the official written statement by which an agency adopts, amends, or repeals a rule.

(12) "Party to agency proceedings," or "party" in a context so indicating, means:

(a) A person to whom the agency action is specifically directed; or

(b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.

(13) "Party to judicial review or civil enforcement proceedings," or "party" in a context so indicating, means:

(a) A person who files a petition for a judicial review or civil enforcement proceeding; or

(b) A person named as a party in a judicial review or civil enforcement proceeding, or allowed to participate as a party in a judicial review or civil enforcement proceeding.

(14) "Person" means any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.

(15) "Policy statement" means a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.

(16) "Rule" means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale. The term includes the amendment or repeal of a prior rule, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, (ii) declaratory rulings issued pursuant to RCW [34.05.240](#), (iii) traffic restrictions for motor vehicles, bicyclists, and pedestrians established by the secretary of transportation or his or her designee where notice of such restrictions is given by official traffic control devices, (iv) rules of institutions of higher education involving standards of admission, academic advancement, academic credit, graduation and the granting of degrees, employment relationships, or fiscal processes, or (v) the determination and publication of updated nexus thresholds by the department of revenue in accordance with RCW [82.04.067](#).

(17) "Rules review committee" or "committee" means the joint administrative rules review committee created pursuant to RCW [34.05.610](#) for the purpose of selectively reviewing existing and proposed rules of state agencies.

(18) "Rule making" means the process for formulation and adoption of a rule.

(19) "Service," except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal or electronic service. Service by mail is

complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic transmission, or by commercial parcel delivery company.

[ [2014 c 97 § 101](#); [2013 c 110 § 3](#); [2011 c 336 § 762](#); [1997 c 126 § 2](#); [1992 c 44 § 10](#); [1989 c 175 § 1](#); [1988 c 288 § 101](#); [1982 c 10 § 5](#). Prior: [1981 c 324 § 2](#); [1981 c 183 § 1](#); [1967 c 237 § 1](#); [1959 c 234 § 1](#). Formerly RCW [34.04.010](#).]

**RCW [34.05.110](#) - APA - Violations of state law or agency rule by small businesses—Notice requirements—Waiver of penalty for first-time paperwork violations.**

(1) Agencies must provide to a small business a copy of the state law or agency rule that a small business is violating and a period of at least seven calendar days to correct the violation before the agency may impose any fines, civil penalties, or administrative sanctions for a violation of a state law or agency rule by a small business. If no correction is possible or if an agency is acting in response to a complaint made by a third party and the third party would be disadvantaged by the application of this subsection, the requirements in this subsection do not apply.

(2) Except as provided in subsection (4) of this section, agencies shall waive any fines, civil penalties, or administrative sanctions for first-time paperwork violations by a small business.

(3) When an agency waives a fine, penalty, or sanction under this section, when possible it shall require the small business to correct the violation within a reasonable period of time, in a manner specified by the agency. If correction is impossible, no correction may be required and failure to correct is not grounds for reinstatement of fines, penalties, or sanctions under subsection (5)(b) of this section.

(4) Exceptions to requirements of subsection (1) of this section and the waiver requirement in subsection (2) of this section may be made for any of the following reasons:

(a) The agency head determines that the effect of the violation or waiver presents a direct danger to the public health, results in a loss of income or benefits to an employee, poses a potentially significant threat to human health or the environment, or causes serious harm to the public interest;

(b) The violation involves a knowing or willful violation;

(c) The violation is of a requirement concerning the assessment, collection, or administration of any tax, tax program, debt, revenue, receipt, a regulated entity's financial filings, or insurance rate or form filing;

(d) The requirements of this section are in conflict with federal law or program requirements, federal requirements that are a prescribed condition to the allocation of federal funds to the state, or the requirements for eligibility of employers in this state for federal unemployment tax credits, as determined by the agency head;

(e) The small business committing the violation previously violated a substantially similar requirement; or



(f) The owner or operator of the small business committing the violation owns or operates, or owned or operated a different small business which previously violated a substantially similar requirement.

(5)(a) Nothing in this section prohibits an agency from waiving fines, civil penalties, or administrative sanctions incurred by a small business for a paperwork violation that is not a first-time offense.

(b) Any fine, civil penalty, or administrative sanction that is waived under this section may be reinstated and imposed in addition to any additional fines, penalties, or administrative sanctions associated with a subsequent violation for noncompliance with a substantially similar paperwork requirement, or failure to correct the previous violation as required by the agency under subsection (3) of this section.

(6) Nothing in this section may be construed to diminish the responsibility for any citizen or business to apply for and obtain a permit, license, or authorizing document that is required to engage in a regulated activity, or otherwise comply with state or federal law.

(7) Nothing in this section shall be construed to apply to small businesses required to provide accurate and complete information and documentation in relation to any claim for payment of state or federal funds or who are licensed or certified to provide care and services to vulnerable adults or children.

(8) Nothing in this section affects the attorney general's authority to impose fines, civil penalties, or administrative sanctions as otherwise authorized by law; nor shall this section affect the attorney general's authority to enforce the consumer protection act, chapter [19.86](#) RCW.

(9) As used in this section:

(a) "Small business" means a business with two hundred fifty or fewer employees or a gross revenue of less than seven million dollars annually as reported on its most recent federal income tax return or its most recent return filed with the department of revenue.

(b) "Paperwork violation" means the violation of any statutory or regulatory requirement that mandates the collection of information by an agency, or the collection, posting, or retention of information by a small business. This includes but is not limited to requirements in the Revised Code of Washington, the Washington Administrative Code, the Washington State Register, or any other agency directive.

(c) "First-time paperwork violation" means the first instance of a particular or substantially similar paperwork violation.

[ [2011 c 18 § 1](#); [2010 c 194 § 1](#); [2009 c 358 § 1](#).]

Department of Fish and Wildlife

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.



## Hydraulic Code Implementation Citizen Advisory Group (HCICAG) Charter

### Background

The WDFW Habitat Program Protection Division is charged with guiding implementation of the state's hydraulic code, Chapter 77.55 RCW - Construction Projects in State Waters. The hydraulic code authorizes WDFW to issue a permit - the Hydraulic Project Approval (HPA) - to ensure that actions affecting the bed or flow of state waters provide adequate means for the protection of fish life. Hydraulic code rules have been adopted to guide implementation of the HPA program and inform citizens about the measures typically required to provide protection of fish life.

Day-to-day implementation of the HPA program is a team effort involving Protection Division staff (located at WDFW headquarters in Olympia), which are involved in statewide and cross-regional topics, and regional staff, which review permit applications and issue HPA permits.

Objectives of the Protection Division include to maintain and improve consistency and effectiveness of the HPA Program; improve the soundness of permits and rules; and improve outcomes for fish and people. To do this, Protection Division develops rule language, conducts the rule making process, engages in legislative issues including bill analysis and response to legislative inquiries, and develops and maintains statewide guidance, training, and tools to support staff implementing the HPA Program. Protection Division also manages informal appeals of HPA decisions.

### HCICAG Purpose

The purpose of the HCICAG is to provide input to Washington Department of Fish and Wildlife (WDFW) HPA Program staff on implementation of the HPA Program in order to 1) maintain and improve consistency and effectiveness of the HPA Program; 2) improve the soundness of permits; and 3) improve outcomes for fish and people.

### HCICAG Objectives

Within the context of resource and people priorities set by WDFW, the HCICAG provides input on the effectiveness of the HPA program in such areas as procedures, transparency, consistency, outcomes, compliance, and communications. Fish protections that can be improved through implementation measures without changes to rule or statute will also be posed for input from HCICAG.

Input from HCICAG on formal policies or rule changes could be solicited after fully briefing the group on the context for the policy or rule change.

### HPA Program Implementation Constraints

Members of HCICAG must acknowledge certain constraints of the HPA Program. First, changes to foundational authorities cannot be made at the implementation level - authority issues are addressed at the legislative level. HCICAG members understand that WDFW must focus limited

staff and funding resources at the highest risk project types. Advice should be directed at helping WDFW use the resources available to maximize the effectiveness of the program as a whole rather than optimizing one particular topic or project area. Recommendations that require legislative action or cross-agency coordination are not appropriate for HCICAG.

### **Role of WDFW Staff**

- Chair the HCICAG
- Clearly communicate the HCICAG's scope and role as outlined in this document.
- Provide background on Habitat Program initiatives and activities, agency programs, and the WDFW's mission and goals that are relevant to HPA implementation.
- Respond to advisors' requests for information relating to HPA implementation, including scheduling presentations about specific topics.
- Provide timely opportunities for advisors to provide input to the agency on emerging HPA implementation issues.
- Communicate the HCICAG recommendations, comments, views and perspectives to Habitat Program Senior Management Team for incorporation into decision making and implementation procedures.
- Provide feedback to HCICAG regarding how Habitat Program uses the group's input.

### **Role of HCICAG**

HCICAG members will provide the following advice to WDFW staff, as requested:

- Provide recommendations on implementation of the HPA Program.
- Communicate stakeholder opinions, attitudes, and needs relating to HPA implementation.
- Identify areas of concern about, and recommend changes to, HPA implementation.
- Assist the Department in developing communication strategies and communicating with members of the public regarding the issues that come before the HCICAG.
- Review materials and come to meetings prepared to discuss the assigned topic.

### **Role of HCICAG Facilitator:**

- Work with staff to develop productive agendas that clearly outline the desired outcomes of each meeting.
- Facilitate group meetings
- Distribute materials in advance of HCICAG meetings, to the extent possible.
- Develop and distribute HCICAG meeting notes that summarize the key discussion points, conclusions, next steps. Distribute draft meeting notes for review, and finalize for adoption prior to or at the next group meeting.
- Assist with HCICAG work planning and member interviews as needed.

## **HCICAG Bylaws**

### ***Membership***

HCICAG should have between nine and twelve members. Members are selected through an open process requiring letters of interest and review and selection by the department director, with the following considerations:

- Members represent a group or organization affected or impacted, by and/or interested in improving hydraulic code implementation;
- Members are committed to sharing information and bringing to the group feedback from their respective organizations/constituents;
- Members are committed to working collaboratively;
- Members understand the mission of HPA Program implementation, the goals and objectives of the HCICAG, and are comfortable serving in an advisory capacity.

Members represent:

- Key customers (HPA applicants);
- Western Washington / marine interests;
- Eastern Washington interests;
- Fishing, landowner, contractor, and environmental interests.

Members are expected to serve for no more than two years. Members can apply to be considered for subsequent terms.

HCICAG members are expected to attend all advisory group meetings. Members may identify and brief an alternate to participate and/or take notes at the meeting. Members will notify Randi Thurston (Dan Doty) if unable to attend and indicate whether an alternate will attend in their place.

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.

HCICAG members are responsible for their own travel and meal expenses unless otherwise previously provided.

### ***Operating Guidelines***

#### ***Meeting Frequency and Location***

HCICAG will meet approximately quarterly, typically in March, June, September, and November. Meeting times are generally from 10 a.m. to 3 p.m. on weekdays. Meeting locations will alternate, as much as possible, between Olympia and North Sound, including locations in Tacoma, Seattle and/or Mill Creek. In-person participation is preferred. Webinars might be used when appropriate to the subject matter. A conference telephone line may be provided in extenuating circumstances, but phone attendance is discouraged.



## **Meeting Discussion Guidelines**

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

- All members are expected and encouraged to participate.
- No member, perspective, or coalition should dominate.
- Raise your hand or tent card to indicate desire to speak.
- Keep an open mind.
- Actively listen.
- 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.

## **Public comment at HCICAG meetings**

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. HCICAG meetings are open to the public and an opportunity for public input will be provided at each meeting having public in attendance. Members of the public will be recognized at the beginning of each HCICAG meeting, and time for public comment will be provided at the end of the meeting, as time allows. If necessary, time limits may be imposed to allow members enough time for HCICAG discussion.

## **Guidelines for External Communications**

- HCICAG members can cite their participation on HCICAG as one basis for their expertise relating to implementation of the HPA Program.
- HCICAG members should not convey HCICAG recommendations or opinions, as such, outside the department. Nothing prevents an individual advisor from expressing their views as a private citizen or as a representative of their organization.
- HCICAG members should not communicate concern about HCICAG member opinions or advisory group operations to entities outside the Department without first notifying staff of those concerns.
- The HCICAG should not meet as a formal group with outside entities unless it has prior approval from Department staff.

## ***Decisionmaking / Advice***

The HCICAG is not a decision-making body or voting group. Members are expected to advise staff about their views on HPA Program 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 HCICAG input before making and implementing decisions about the hydraulic code.

HCICAG staff and facilitator will capture recommendations, viewpoints and opinions by HCICAG members including divergent or dissenting views. A member can abstain or recuse themselves if necessary.

Recommendations will be expressed in meeting notes or other form of statement from the group. Members will be given time to review the statement prior to its being passed along or acted upon.

Staff will typically implement HCICAG advice directly or convey HCICAG recommendations to the Habitat Program Senior Management Team. How or whether the advice is used will be reported back to the HCICAG along with reasons for partial or non-implementation.

### ***HCICAG Roster, Agendas, Meeting Materials, Meeting Notes***

An HCICAG roster, identifying members' names and organizations, in addition to WDFW staff and facilitator contact information, will be posted on the agency website, along with agendas, meeting materials, and meeting notes at <http://wdfw.wa.gov/about/advisory/hcicag/>. Background information requested by the HCICAG can also be posted at this location.

### **HCICAG Contact Information**

Washington Department of Fish and Wildlife  
Habitat Program, Protection Division, HPA Program  
P.O. Box 43200  
Olympia, WA 98504-3200

HCICAG Chair: Randi Thurston  
Protection Division Manager  
(360) 902-2602 [randi.thurston@dfw.wa.gov](mailto:randi.thurston@dfw.wa.gov)

HCICAG Facilitator  
Neil Aaland  
Aaland Planning Services  
(360) 791-8905 [naaland@comcast.net](mailto:naaland@comcast.net)

HCICAG staff coordinator: Dan Doty  
Environmental Planner 5  
(360) 902-8120 [dan.doty@dfw.wa.gov](mailto:dan.doty@dfw.wa.gov)

# Enforcement

Construction projects in state waters (Chapter 77.55 RCW)

Hydraulic Code Rules (Chapter 220-660 WAC)

# Orca Task Force Recommendations

**Habitat protection and enforcement: Protect habitat through improved enforcement of existing laws, strengthening laws and ensuring compliance**

**Recommendation 3: Apply and enforce laws that protect habitat.**

- Washington Department of Fish and Wildlife, Washington Department of National Resources and Washington Department of Ecology must strongly apply and enforce existing habitat protection and water quality regulations. Provide WDFW, DNR and Ecology with the capacity for implementation and enforcement of violations.
- Enhance penalties and WDFW's enforcement of the state Hydraulic Code and fish passage regulations.
- Increase prosecution of violations of state and local habitat protection and water quality regulations, including seeking to hold both property owners and contractors accountable, when appropriate.

WDFW and Ecology should work with the Attorney General's Office and local prosecutors to increase compliance with habitat protection and water quality regulations. The number of WDFW and Ecology staff should be increased to improve implementation, compliance and civil enforcement.

The Legislature should amend WDFW's civil penalty statute (chapter 77.55.291 RCW) to provide the department with enforcement tools equivalent to those of local governments, Ecology and DNR.

Most environmental regulations are self-implementing - this means knowledge of and voluntary compliance with environmental regulations by the regulated community is required and expected

# Role of “Enforcement”

- Enforcement is a one tool for protecting fish life
- Enforcement actions must be based in fact and law, well documented, appropriate to the violation, and issued professionally and fairly



# Technical Assistance

- Since regulations are complicated, we have a responsibility to help the regulated community understand how to comply
- We achieve voluntary compliance through education and technical assistance as we advise and consult on permits, conduct inspections, perform on-site technical visits, or provide regulatory guidance materials



# Enforcement Tools

Where instances of noncompliance are found, WDFW is authorized by the state Legislature to take administrative (civil) enforcement actions and conduct criminal investigations, or both

- Education, technical assistance, and administrative enforcement actions are all used to gain compliance
- Intentional and serious violations may be referred for criminal prosecution



# Two Enforcement Paths

## Administrative Civil Enforcement

**Purpose** – deter non-compliant behavior

**Tools** – letters of non-compliance, notices, and civil penalties (\$100/day)

**Process** – letters, notices and civil penalties issued by WDFW – penalties may be appealed to the Pollution Control Hearings Board

## Criminal Enforcement

**Purpose** – punish

**Tools** – gross misdemeanor (\$5000 fine, 1 year in jail)

**Process** - FWO investigates and refers suitable cases to the local prosecutor. Prosecutor determines whether a case will or will not be prosecuted

# HPA Compliance in Practice





# What obstacles are in our way

- Lack of deterrence tools (civil)
- Statute lacks clarity
- Competing priorities
  - Biologist time
  - Enforcement time
- Unpermitted work isn't detected or reported
- Lack of prosecution (criminal)
- Lack of positive outcomes for time investment

# Questions for Members

1. What steps should WDFW take to increase compliance?
  - Which project types should be inspected? How frequently?
  - What is compliance? Should there be tolerances?
  - If we use our existing capacity, what work should decreased or go away to increase compliance inspections?



# Questions for Members

## 2. What steps should WDFW take to improve prosecution?

- When should a violation be civil and when should it be criminal?
- What compliance or prosecution information should be publicly viewable?



## **FISH & WILDLIFE ENFORCEMENT AT A GLANCE**

### *Major highlights of DFW's Diverse Law Enforcement Program*

- 132 General Authority Law Enforcement Commission Officers statewide - RCW 77.15.075
- Perform inspection without Warrant - RCW 77.15.080
- Jurisdiction extends 200 miles off WA coast from Canadian border to Mexican border under Magnuson-Stevens Fishery Conservation & Management Act (MSFCMA)
- Unique duties include enforcement of sanitary shellfish laws, eradicating illegal marijuana grows on public lands, responding to dangerous wildlife interactions, combating Aquatic Invasive Species (AIS), enforcement of the state's hydraulic code and ensuring public boating safety
- Liaison with federal agencies including US Fish and Wildlife Service, National Oceanic and Atmospheric Administration, Coast Guard, US Forest Service, Bureau of Customs and Border Protection, Drug Enforcement Agency, Bureau of Land Management, and Federal Bureau of Investigation
- Participate in Columbia Basin Law Enforcement Council (CBLEC) and Puget Sound Law Enforcement Council (PSLEC) to meet and share intelligence on ongoing investigations and prevention of resource poaching
- Liaison with the Pacific Fishery Management Council on developing strategies to improve compliance with sport and commercial fishing regulations in offshore waters
- State and County Task Forces including SWAT teams, Department of Corrections (DOC), Washington State Patrol -DFW Marijuana Eradication

## *DFW Enforcement Operates in a Complex Environment*

“Paint the true picture despite the challenges”

- Inadequate staffing: One officer per 46,156 citizens; one officer per 300,000 acres
- Measuring illegal activities is difficult: we cannot know what we don't know
  - violations transcend borders (jurisdictional reach)
- Severity: some violations are worse than others (illicit market, unaccounted catch and spree killings)
- Modern cases are complex and require more extensive investigations over longer periods
- Challenges in WA surpass all but one state (Florida)
- No increase in officers while large population increase (over 7.3 million state residents)
- Smallest land base of western states, but second largest human population
- Complex marine and freshwater fisheries
- International boundaries
- Tribal co-management and jurisdiction complexities
- Current workload requires almost twice the current allotted officers



## *Prosecuting Challenges – Realities Facing Local Elected Prosecutors in Handling Hydraulic Cases*

Local elected prosecutors face multiple challenges in handling growing caseloads driven by population growth and decreasing county budgets. These challenges include but are not limited to the following factors:

- Revolving door of deputy prosecutors seeking short-term experience in prosecuting misdemeanors (district court) before moving onto opportunities in private practice or handling felony cases (superior court)
- Time-intensive nature of prosecuting hydraulic cases requiring staff resources that don't exist to do document collection and review, work with agency experts, prepare case (solo)
- Challenge on educating and convincing a jury *why hydraulic cases matter to the community and local environment vs. more visceral and understandable case crimes against people or property* (rape, homicide, aggravated assault, DUI, financial exploitation of aged adults) - political reality that elected prosecutors must face
- Absence of experienced deputy prosecutors to handle hydraulic cases from intake to appeal, if necessary
- Subtle political pressure and reality in smaller, rural counties – large county employer, triable business or influential individual may affect decision to move forward on case and likelihood of success in trial
- “Our cause is the most important, if only you really understood!” Ok, pick a number... Short list of other state agencies or organization seeking more support from local prosecutors – DSHS (elder & child abuse, benefits fraud), DOR, L&I and ESD - state tax and workers' comp fraud, etc.

# *Variety and Magnitude of Criminal Cases - 2017*

## Statewide Statistics at a Glance

Crimes against Persons showed an increase of 0.4% with 84,145 offenses reported; compared to 2016 offenses reported of 83,771.

Crimes against Society showed an increase of 5.9% with 32,011 offenses reported; compared to 30,230 offenses reported in 2016.

- 25,400 people arrested for DUI, including 163 juveniles
- 531 hate crime incidents were reported
- 1,643 assaults on law enforcement officers
- 11,986 arrests for drug abuse violations; of that number, 10.2% were persons under 18 years of age
- 6,212 sexual assault (forcible and non-forcible) incidents reported
- 54,294 domestic violence incidents reported; 12,023 of these incidents were Violations of Protection or No Contact Orders
- 12,974 Aggravated Assault Offenses Reported
- 23,669 Simple Assault Offenses Reported
- 15,556 Violation of No Contact/Protection Order Offenses Reported
- 337,128 Crimes Against Property Offenses Reported

## **Proposal to Hydraulic Code Citizen Advisory Committee**

Be it proposed:

That WDFW seek amendment to RCW 77.55.021 giving the department authority to issue after the fact permits under the following conditions:

1. That the project as exists, or as modified by conditions imposed by the Agency, is fully compliant with all statutes and regulations.
2. That such permit only be authorized for nonintentional violations.
3. Applicant's intent may be demonstrated by acquisition of authorizations and permits from other regulatory bodies, or authorization of a contractor to complete project work in which the contractor is directed to acquire all necessary permits, or where the landowner reasonably assumed the contractor would obtain permits, or where the contractor has advised the landowner no permits are required.
4. That an application processing fee of \$1000.00 be authorized.
5. Provide that the fee may be waived if a mitigation agreement is reached consistent with former policy POL-M5002, which should be reinstated.
6. Policy 5212 should be modified to deemphasize criminal enforcement for nonintentional violations where the property owner takes appropriate steps to obtain an after the fact permit.