

HPA Citizens Advisory Group – Meeting Notes

Date: January 23, 2020

Time: 10 am to 3 pm

Place: Thurston County Fairgrounds Expo Center, Lacey, Washington

Summary: Follow-up actions

Item	Follow-up
Information on technical assistance pages	For next meeting, CAG members look this over and think about what else is needed
Legislative update	For next meeting agenda

Attendance:

Ted Burns	Jim Shellooe (phone)
Ashlee Delaney	Kimbal Sundberg
Kim McDonald	Tony Warfield
Norm Peck	Steve West
Jennie Rotsten	

Staff: Randi Thurston, Neil Aaland (Facilitator)

Welcome/Introductions/Agenda Review: Neil Aaland, Facilitator, opened the meeting. The agenda was reviewed.

Administrative Items

- Update on staffing:
 - Margen Carlson has been named permanent Director of Habitat Programs
 - Chris Conklin is now Deputy Director of Habitat Programs; Randi will work on getting him to a future CAG meeting
 - In the process of filling Teresa Scott’s position and a training position
 - Kimbal mentioned the Governor’s budget fully funds WDFW
- Summary of supplemental budget request for compliance positions:
 - Requested 8 compliance specialists and a supervisory position
- Other:
 - Tracking several bills:
 - Requiring net ecological gains with regulations
 - Fish habitat enhancement project still alive from last session
 - Least impactful options for marine protective bulkheads
 - Two bills around motorized mining activities – Clean Water Act discharges
 - Lots of bills related to Growth Management Act (not directly related to HPA)
- At this point in the meeting, introductions were made around the room for the benefit of new BIAW representative Ashlee Delaney.

Rulemaking comments: The comment period closed on January 15. Randi will go through section by section and Neil will record comments from the CAG. See Attachment for comments.

Lunch break was taken.

Technical Assistance Documents: This topic is to look at the WDFW website and discuss the technical assistance documents. Randi is interested in seeing what types of documents are missing. Randi said they rely on field bios for technical assistance. She realizes WDFW needs more information to help. She's going to show what they have and wants feedback on what they need. We're not going through the documents today; there will be a homework assignment for CAG members to review those later.

Randi started by viewing HPA web page. It has info about HPAs in general, technical assistance program piece. Kimbal said the web page looks very bureaucratic." No pictures of fish, something to grab people.

Randi said they've recently hired a consulting company to update the website. The update was recently completed.

She clicked on "what is an HPA" and reviewed that content. There is a map that shows all HPA's have been issued. She then clicked on the "Technical Assistance" webpage. It has links to district fish bio, planning and mapping info, project guidelines. She reviewed other docs available under this item. Marine and freshwater projects.

She knows they need to add a list of tech service providers; start with getting names of companies that have applied to us. She asked for advice on who should be on that list. People that can help with design and construction.

Not really anything else. They need to do some training to contractors. Ashlee said BIAW has an education department. Kim McDonald mentioned training on motorized mining best practices. Norm suggested video-taping any workshops they give.

Steve thinks this technical assistance is the most important thing the division does, and that the HPA is a good tool to convey this information. Would be helpful to provide background on other information sources, including WDNR mapping resources (water resources and LiDAR), Regional Recovery Plans, etc. It would also be beneficial to provide background information, such as white papers.

Randi asked regulated community folks: what would you want on the website?

- Tony said intertidal culverts is a tough one and could use help.
- Steve said regarding mitigation, list nonprofits who know how to do that. For example, Conservation Districts (CDs), fish enhancement groups (FEGs), etc.
- Tony said they try to do bigger mitigation projects covering separate projects, rather than separate stand-alone ones.

Enviro side:

- Kim said best practices info would be helpful. Mining community needs that. Trout unlimited would probably be willing to help.
- Norm asked about interface between WDFW and Ag: it's through the VSP these days.
- Kimbal does not think that's the best way to deal with at this point; he sees some problems with VSP implementation in his area
- Norm says that might be a place that Ecology, WDFW, Ag, DNR can coordinate. Can provide an example.
- Kimbal re: mitigation: also include list of salmon lead entities.

Jim suggested linking to fish passage pages; there's a map of known barriers.

Randi asked all to look through the technical assistance web page. She will be reaching out to the CAG to see if there are other providers to add to list. They'll think about training to other groups as well.

Steve asked if there is consideration being given to updating work windows; some discussions happening internally.

She mentioned the handout they want to get out to planning departments and other places. For next meeting, don't look at the guidelines, look at things like project drawings.

Neil asked the CAG to look this information over and think about what's not there for your stakeholder groups, what would be helpful. Think about that before the next meeting. Think about how WDFW could provide alternative ways of getting the information out to people.

A suggestion was made for the next (May) meeting to have a legislative update – what came out of the session.

Roundtable: No items of interest were raised.

The meeting adjourned at 1:10 pm.

Next meeting: Thursday, May 14, 2020

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HCICAG Worksheet for January 23, 2020 Meeting – CAG Member recommendations

Topic or WAC	Organization	Comment	HCICAG Recommendation
220-660-050(9)(c)	Env Com	Retain “habitat that supports fish life” to clarify that the application requirements include specific evaluation of impacts to habitat that supports fish life.	<ul style="list-style-type: none"> • Kimbal wants to retain “habitat”; statutes have evolved over time to reflect habitat is what supports populations. If just narrowly focused on fish, de-emphasizes the whole structure. • Kim McDonald agrees. • Norm agrees and added the courts will interpret plain language of statute or rule. • Tony said he would put it in definition and move on; others thought that could work. • Steve West thinks need to protect “the habitat” is important. • Kim McDonald says habitat degradation can be considered a “taking”. • Tony thinks keep rules simple and clean
220-660-050(13)(b)	Env Comm	Add “and” to the following “Based on current rules the procedure for an emergency, imminent danger, chronic danger, or an expedited HPA requires that these projects meet the mitigation provisions and requirements in WAC 220-660-080 <u>AND</u> the provisions in WAC 220-660-100 through 220-660-450 that are included in an HPA.”	Norm agrees with this.
220-660-050(13)(b)	Env Comm	We suggest the language be revised to require that projects meet the mitigation provisions in WAC 220-660-080 <i>and the applicable technical provisions in WAC 220-660-100 through 220-660-450.</i>	<ul style="list-style-type: none"> • Norm: it’s already in certain places in the statute. Wording in 480 should be changed. Should be responsible for complying with regulation regardless whether it’s in the HPA or not. If DFW disagrees, then wording in 664-80-2 should be changed. Rule wording should be consistent throughout. • Kim agrees with Norm and the letter. They should be required to follow regs even if not in the letter. • Kimbal: you’re giving a permit to allow use of a public resources; not getting a get out of jail free card from other regulations.

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			<ul style="list-style-type: none"> • Steve: if you assume all other WACs and provisions are read and understood, it could be a problem. His concern is relying on them to have read and understood all provisions, or having a hundred-page HPA. If too many provisions, some provisions are competing; less can be more. • Kim: DFW lack of authority to reinforce other statutes (not theirs) she does not get, but DFW should be at least alerting applicants they need to look at other regs which is critical.
220-660-050(13)(c)	BIAW	Builders may have inconsistent work schedules due to inclement weather or poor working conditions causing to put the project on hold. Working against the department's time limitation makes it more difficult to ensure quality work in order to comply, thus subjecting them to high fines.	<ul style="list-style-type: none"> • Randi: depends on the specific species timing and what they're doing. • Norm: if someone asks for extension past five years, can that happen? [Randi says no, it's statutory limit; but if extending beyond a 2 year, for example, can do] • Issue is fish windows; habitat biologist can go out to site and if runs haven't occurred habitat bios have discretion to adjust. • Jenny: can also take into consideration status of project, e.g. discretion
220-660-050(19)(a)	WSDOT	We would like clarification that state agency applicants are included in the "project proponent" definition.	<ul style="list-style-type: none"> • Randi: Yes, state agency applicants are included in definition of project proponent • Norm: does DOT do own applications? [It's a mix between them and between contractors]
220-220-050(19)(b)	WSDOT	If a WSDOT contractor fails to comply with an order or notice will the department refuse to accept an HPA application from WSDOT?	<ul style="list-style-type: none"> • Randi: can't imagine refusing to accept them from DOT • Tony: don't share their level of paranoia, but goes back to discussion about public contracts • Randi: not considering new language, just clarify in writing • Kimbal: make sure DOT puts in contract they must comply with permits and language
220-660-370			Norm generally commented that agency is trying to have list of preferred approaches to shoreline protection; that seems like a reasonable response. Soft options need to be considered in selecting approaches.

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220-660-370(1)	WSDOT	We appreciate and support the change from “bulkhead” to “bank protection structure” because it’s a clearer description.	Randi: we revised section to reflect statutory changes
220-660-370	Env Comm	While soft armoring may not have the same impact as hard armoring, impacts and changes to beach processes and fish habitat are still created and should be reflected in the description.	<ul style="list-style-type: none"> • Env comm suggesting some changes to reflect that soft options also have some impacts • Kim thinks they wanted something eliminated; it’s a philosophical change. • Kimbal thinks it’s a fine line
220-660-370(2)	Env Comm	Language should not suggest that soft shore techniques eliminate physical alteration of the beach. This is not accurate and should be amended.	Kim noted that Amy suggests revising this to “as well as soft shore techniques...” eliminate “as some” [but keep “as”]
220-660-370(3)(b)	BIAW	Removal of "bulkhead" to "hard structure" and "beach nourishment/woody material" to "soft structure" may cause lack of clarity and lacks specificity for builders.	<p>CAG members were not sure why this would be the case; Ashlee will get info from BIAW back to the group</p> <ul style="list-style-type: none"> • Kimbal: use “include but not limited to”? <ul style="list-style-type: none"> ○ Randi: doesn’t really fit “plan talk” principles
220-660-370(3)(b)	Env Comm	This section should lead with the rules related to the requirement for a risk and needs assessment and evaluation of the least impacting method report should a protection need be documented.	<ul style="list-style-type: none"> • They thought it should lead with the requirement for a report <ul style="list-style-type: none"> ○ Norm: at least three groups have similar concerns ○ Norm: this section should make clear the order of priorities ○ Tony: what is “prove”? How do you prove? ○ Randi: Whether an upland retaining wall is less impacting would be site specific. ○ Steve: it is site specific and every project is different, but there are temporary vs permanent impacts. BUT Hard armoring has a much longer life than soft armoring.
220-660-370(3)(b)	WEC	Add language to require an applicant to prove that the lesser impacting techniques within the hierarchy have	See above

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		been used or are not possible before moving on to subsequent levels in hierarchy	
220-660-370(3)(b)	WEC and Env Comm	Move the hierarchy position of construction of an upland retaining wall to be less impacting than soft armoring techniques, if that construction is well beyond the shoreline jurisdiction.	See above
220-660-370(3)(d)	WSDOT	Regional designers may not always be licensed geologists or geomorphologists. Would the department allow designs from non-licensed geologists or geomorphologists?	<ul style="list-style-type: none"> • Definition of qualified professional is in rule, these are just meant to be examples <ul style="list-style-type: none"> ○ Does DFW maintain list of qualified professionals? Yes [but Randi wants to discuss later today] ○ Randi not opposed to adding “coastal engineer” to list but she’s not sure it’s necessary ○ Tony argues against getting too prescriptive; Norm agrees ○ Kim – what are you looking for? [Randi wants person writing report to have relevant expertise] ○ Looking for persons who know about structural impacts rather than biology ○ Kim: evaluated by? [the biologists]
220-660-370(3)(d)	Phillips and Env Comm	The discipline of “coastal engineer” should be added as that is one of the critical professional disciplines needed for this type of assessment.	See above
220-660-370(4)	WSDOT	Clarify that maintenance of existing projects is exempt from these requirements.	<ul style="list-style-type: none"> • Randi: can revise to clarify • Kimbal: but maintenance can scour streambeds out? • Randi: maintenance is defined elsewhere; there’s a MOA in place
220-660-370(5)	WEC and Env Comm	Require that specific project location coordinates be added in project plans to allow for more streamlined	<ul style="list-style-type: none"> • Project coordinates are required in app form, won’t accept app without them. • Don’t require survey benchmarks. Not asking DOT to hire a surveyor.

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		mapping and documentation of armoring for monitoring and recovery efforts.	<ul style="list-style-type: none"> ○ Norm: suggests that a GPS to 1/10 of meter be included in requirements
220-660-370(5)	WSDOT	Provide more leeway on the benchmark requirement depending on the scale and location of the project since it requires survey crews. The rule should also clarify the frequency of measuring the benchmarks.	Included in above comments; don't require a survey
220-660-370(5)	Phillips	Confirm in the rule language that it's a local benchmark.	See above.
220-660-460(9)	WSDOT	Will an informally appealed permit be withheld or suspended? Clarify when the department will send a response in writing.	<ul style="list-style-type: none"> ● DOT concerned about informal appeals. ● Existing language, not proposing changes. DFW does not hold up permits that are appealed. Someone would have to file a formal appeal and ask the PCHB to issue a stay.
220-660-470	WSDOT	Include state agencies as project proponents if the definition of person does not include state agencies.	This section is about the formal appeal procedure. Answer is yes.
220-660-480			<p>This section is about compliance.</p> <p>Norm: we have notices to comply and correction requests. How do those relate to notice of correction in 43.05.100?</p> <ul style="list-style-type: none"> ● Randi: Tech Assistance statute – ensures that business have opportunity to voluntarily comply before penalties issues. Two different notices that department can issue. These are akin to a warning. Specify what needs to be done to come into compliance. “Notice of violation” says how violations are corrected and timeline for doing that. With notice of correction, if they are on a compliance visit and notice this, issue a notice of correction. Negotiate a timeframe for correction. Correction request. In rules, the correction request specifies how to voluntarily get in compliance; it's not a formal enforcement action so it's not appealable.

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220-660-480	DNR	Change forest practice HPA to Forest Practices Hydraulic Project (FPHP).	
220-660-480	WSDOT	The introduction should clarify what action would trigger each specific compliance action.	
220-660-480(2)	WSDOT	Define what is meant by “more than minor harm” to fish life.	
220-660-480(3)	WSDOT	We are concerned about actions from one WDSOT HPA activity negatively impacting other WSDOT projects statewide. If a W. WA project received a warning or a violation, would a project in E. WA immediately be issued a civil penalty?	Randi wants to go back to them and discuss what they need.
220-660-480(4)(a)	WSAC	The term “Correction Request” should not replace the terms “Notice of Violation” and “Notice of Correction”.	WSAC comment: keep the two terms. They thought it might be too confusing, would be NOT using statutory language and creating a new action. <ul style="list-style-type: none"> • Norm: changing the statutory terms might cause confusion • Randi: DFW will have to think about this
220-660-480(5)(1)(a)	WSDOT	Define “significant harm to fish life”.	This relates to stop work orders <ul style="list-style-type: none"> • Specifies when WDFW can issue stop work order • Want “sig harm to fish life” to be defined <ul style="list-style-type: none"> • Include a definition. of what’s being done to fish life on the stop work order but don’t need to define in regulation
220-660-480(5)(f)	WSDOT	How is an immediate stop work order issued in the field if the manager who has authorization to issue it is not in the field?	DOT question: who has authorization to issue? Compliance inspector must get authorization from manager to issue; would likely be a phone call to manager <ul style="list-style-type: none"> • Norm pointed out you could send a photo or video to the manager. Can happen in field • Randi: it’s a implementation issue, does not have to be in rule
220-660-480(5)(f)	WSDOT	How is the authority to issue a stop work order and the specific directives	This is another implementation issue. Could add authorizing manager’s contact information. Seems relatively clear in statute.

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		relayed to the project proponent in the field?	
220-660-480(6)	WSDOT and WSAC	Clarify who can issue Notices to Comply.	Statute told DFW to clarify who could issue other items; didn't say who can issue Notices to Comply. Which staff people have authority to issue? Randi would be okay to define that in rule.
220-660-480(6)(b)	WSAC	The notice to comply as described in 2SHB 1579 (2019) Section 7 (1) (a) does not include such an expanded "scope of notice to comply" as stated here which allows "additional action to prevent, correct, or compensate for adverse impacts to fish life caused by the violation."	Randi thinks the statute has that language; see page 4. She will get back to WSAC and clarify.
220-660-480(7)(a)	BIAW	Clarify the civil penalty is per violation.	Randi is willing to consider how to make that clearer (not a per day violation) <ul style="list-style-type: none"> • Norm: agency has discretion to decide duration of violation <ul style="list-style-type: none"> • Randi: agrees that agency has that discretion. A longer duration could result in a more severe impact. • Kimbal; define that violation in definitions <ul style="list-style-type: none"> • Randi: definitions section is not currently open
220-660-480(8)(a)(i)	WSAC	We do not believe that civil penalties should be issued with the basis of non-compliance with a correction request.	Randi agrees with this. Statutorily we can issue a penalty to someone who fails to comply but it's not how we discussed implementing the program, need to talk with Executives about this. She's going to take this back. <ul style="list-style-type: none"> • Norm: RCW clearly states you cannot issue a penalty unless they've been given a chance to comply
220-660-480(8)(c)	WSAC	The proposed penalty schedule does not have a specific list (i.e. schedule) of possible violations and their corresponding penalty amounts.	Doesn't agree this is a penalty schedule. <ul style="list-style-type: none"> • Kimbal: argues against this, could have people make an economic decision about penalties. Need discretion, it's about fish life. • Randi: didn't set a base amount, figured it would be low. • Norm: table sets criteria for penalty, not the actual penalty • Steve: he would not even attempt to do this.

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220-660-480(8)(d)(iii)	BIAW	Clarify that a penalty could be divided between project proponents (if more than one) based on their contribution to the violation.	Randi thinks they need to clarify some language. Not the intent for it to be additive. <ul style="list-style-type: none">• Norm agrees with the clarity, they're asking DFW to apportion liability which is difficult• Kim agrees• Randi: agrees this is difficult to do. Just need to clarify that the penalty is not additive, not per individual.
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