



PROPOSED RULE MAKING

CR-102 (June 2004)

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

Agency: Washington Department of Fish and Wildlife

Preproposal Statement of Inquiry was filed as WSR 10-10-050 on April 29, 2010; or

Expedited Rule Making--Proposed notice was filed as WSR _____; or

Proposal is exempt under RCW 34.05.310(4).

Original Notice

Supplemental Notice to WSR _____

Continuance of WSR _____

Title of rule and other identifying information: (Describe Subject) Appeals of the issuance, denial, conditioning, or modification of hydraulic project approvals (HPAs). Includes WAC 220-110-030, -340, and -350.

Hearing location(s): Natural Resources Building
1111 Washington Street, SE
Olympia, WA 98504

Date: August 6-7, 2010 Time: 8:30 a.m.

Date of intended adoption: August 6, 2010

(Note: This is **NOT** the **effective** date)

Submit written comments to:

Name: Lisa Wood

Address: 600 Capitol Way North
Olympia, WA 98501-1091

e-mail lisa.wood@dfw.wa.gov

fax (360) 902-2946 by (date) July 27, 2010

Assistance for persons with disabilities: Contact

Susan Yeager by July 27, 2010 at _____

TTY (360) 902-2207 or (360) 902-2267

Purpose of the proposal and its anticipated effects, including any changes in existing rules:

SHB 2935 eliminates the Hydraulic Appeals Board and replaces it with the Pollution Control Hearings Board created in chapter 43.21B RCW. All formal appeals of HPA decisions and orders imposing civil penalties formerly heard by the Hydraulic Appeals Board or an administrative law judge through the Office of Administrative Hearings will now be heard by the Pollution Control Hearings Board. SHB 2935 also allows appeals of issued, denied, conditioned, or modified HPAs, as well as orders imposing civil penalties for violations of chapter 77.55 RCW, to be informally made to WDFW. WDFW must amend its HPA rules to be consistent with SHB 2935. In addition, technological advances enable appeal requests to be submitted in ways not currently allowed by rule. The proposed rules accommodate these additional methods of submitting appeal requests. The proposed rules also clarify various administrative procedures associated with appealing HPA decisions and orders imposing civil penalties.

Reasons supporting proposal:

SHB 2935 and the need for additional filing methods mandate these changes.

Statutory authority for adoption: RCW 77.12.047 and 77.55.021 as amended by SHB 2935.

Statute being implemented: RCW 77.12.047 and 77.55.021 as amended by SHB 2935.

Is rule necessary because of a:

Federal Law?

Yes No

Federal Court Decision?

Yes No

State Court Decision?

Yes No

If yes, CITATION:

DATE

June 23, 2010

NAME (type or print)

Lori Preuss

SIGNATURE

TITLE

Rules Coordinator

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: June 23, 2010

TIME: 11:15 AM

WSR 10-13-179

(COMPLETE REVERSE SIDE)

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:

N/A

Name of proponent: (person or organization) Washington Department of Fish and Wildlife

- Private
 Public
 Governmental

Name of agency personnel responsible for:

Name	Office Location	Phone
Drafting..... Lisa Wood and Pat Chapman	1111 Washington Street, Olympia	(360) 902-2260 and (360) 902 -2571
Implementation..... Lisa Veneroso	1111 Washington Street, Olympia	(360) 902-2416
Enforcement..... Bruce Bjork	1111 Washington Street, Olympia	(360) 902-2373

Has a small business economic impact statement been prepared under chapter 19.85 RCW?

Yes. Attach copy of small business economic impact statement.

A copy of the statement may be obtained by contacting:

Name:

Address:

phone () _____

fax () _____

e-mail _____

No. Explain why no statement was prepared.

The Washington Department of Fish and Wildlife has determined that the rules will not significantly impact businesses required to follow the rules.

Is a cost-benefit analysis required under RCW 34.05.328?

Yes A preliminary cost-benefit analysis may be obtained by contacting:

Name: Lisa Wood

Address: 600 Capitol Way North
Olympia, WA 98501-1091

phone (360) 902-2260

fax (360) 902-2946

e-mail lisa.wood@dfw.wa.gov

No: Please explain:

AMENDATORY SECTION (Amending Order 08-318, filed 12/29/08, effective 4/3/09)

WAC 220-110-030 Hydraulic project approvals--Procedures. (1)

A person shall obtain an HPA before conducting a hydraulic project.

(2) Receipt by the department of any one of the following documents constitutes an application for a written HPA:

(a) A joint aquatic resources permit application (JARPA) submitted to the department;

(b) A forest practice application submitted to the department of natural resources, if the hydraulic project is part of a forest practice as defined in WAC 222-16-010; or

(c) A section 10 or 404 public notice circulated by the United States Army Corps of Engineers or United States Coast Guard.

(3) You shall request a written HPA by submitting a complete written application to the department. You shall request a pamphlet HPA by following the procedures in WAC 220-110-031. Your application for a written HPA shall contain general plans for the overall project, complete plans and specifications for the proposed construction or work waterward of the MHHW line in salt water, or waterward of the OHWL in fresh water, complete plans and specifications for the proper protection of fish life, and notice of compliance with any applicable requirements of the State Environmental Policy Act, chapter 43.21C RCW, unless otherwise provided for in chapter 77.55 RCW. You and your authorized agent, if one is acting for you, must sign and date the application.

(4) The department shall grant or deny approval within forty-five calendar days of the receipt of a complete written application. The department shall strive to issue HPAs in less than thirty days. The forty-five day requirement shall be suspended if:

(a) The site is physically inaccessible for inspection;

(b) You or your authorized agent, if one is acting for you, remains unavailable or unable to arrange for a timely field evaluation of the proposed project after ten working days of the department's receipt of the application;

(c) You or your authorized agent, if one is acting for you, requests a delay;

(d) The department is issuing a permit for a storm water discharge and is complying with the requirements of RCW 77.55.161 (3) (b); or

(e) The department is reviewing the application as part of a multiagency permit streamlining effort and all participating permitting agencies and the permit applicant agree to an extended timeline longer than forty-five calendar days.

(5) Immediately upon determination that the forty-five day period is suspended, the department shall notify the applicant in

writing of the reasons for the delay.

(6) The department or the county legislative authority may determine an imminent danger exists. The county legislative authority shall notify the department, in writing, if it determines that an imminent danger exists. In cases of imminent danger, the department shall issue an expedited written permit, upon request, for work to remove any obstructions, repair existing structures, restore banks, protect fish resources, or protect property.

(7) The department may issue an expedited written HPA in those instances where normal processing would result in significant hardship for the applicant, or unacceptable environmental damage would occur.

(8) Expedited HPA requests require a complete written application and shall take precedence over other nonemergency applications. These will be issued within fifteen calendar days of receipt of a complete written application. The provisions of the State Environmental Policy Act, chapter 43.21C RCW, are not required for expedited written HPAs.

(9) The county legislative authority or the department may declare an emergency or continue an existing declaration of an emergency where there is an immediate threat to life, the public, property, or of environmental degradation. Upon the declaration of an emergency, the department shall grant verbal approval immediately upon request for a stream crossing, or work to remove any obstructions, repair existing obstructions, restore streambanks, protect fish life, or protect property threatened by the stream or a change in the stream flow. The verbal approval shall be obtained prior to commencing emergency work and the department must issue a written HPA reflecting the conditions of the verbal approval within thirty days. The provisions of the State Environmental Policy Act, chapter 43.21C RCW, are not required for emergency HPAs.

(10) The department may accept written or verbal requests for time extensions, renewals, or alterations of an existing HPA. The request must be processed within forty-five calendar days of receipt of the request. Approvals of such requests shall be in writing. Transfer of an HPA to a new permittee requires written request by the original permittee or their authorized agent, if one is acting for the permittee, and such request shall include the HPA number. This written request shall be in a form acceptable to the department and shall include a statement that the new permittee agrees to be bound by the conditions in the HPA. The new permittee shall not conduct any project activities until the department has issued approval.

(11) Each HPA is usually specific to a watercourse, stating the exact location of the project site, and usually consists of general, technical, and special provisions.

(12) The written HPA, or clear reproduction, shall be on the project site when work is being conducted and shall be immediately available for inspection.

(13) The department may grant HPAs for a period of up to five years. Permittees shall demonstrate substantial progress on

construction of that portion of the project relating to the HPA within two years of the date of issuance. The following types of HPAs issued under RCW 77.55.021 shall remain in effect without the need for periodic renewal, provided the permittee notifies the department before commencing work each year:

(a) Work of a seasonal nature that diverts water for irrigation or stock watering purposes; and

(b) Stream-bank stabilization projects if the problem causing the erosion occurs on an annual or more frequent basis as demonstrated by the applicant. Evidence of erosion may include, but is not limited to, history of permit application, approval, or photographs. Periodic floodwaters by themselves do not constitute a problem that requires an HPA.

(14) An HPA shall be denied when, in the judgment of the department, the project will result in direct or indirect harm to fish life, unless adequate mitigation can be assured by conditioning the HPA or modifying the proposal. If approval is denied, the department shall provide the applicant, in writing, a statement of the specific reason(s) why and how the proposed project would adversely affect fish life.

(15) Protection of fish life shall be the only grounds upon which the department may deny or condition an HPA.

(16) The department may place specific time limitations on project activities in HPAs to protect fish life.

(17) HPAs do not exempt the applicant from obtaining other appropriate permits and following the rules or regulations of local, federal, and other Washington state agencies.

(18) The department shall administer this chapter in compliance with SEPA, chapter 43.21C RCW, and chapters 197-11((7)) and 220-100((~~7~~ and ~~232-19~~)) WAC.

(19) The department may, after consultation with the permittee, modify an HPA due to changed conditions. The modification becomes effective unless appealed ((to the department or the hydraulic appeals board)) as specified in RCW 77.55.021(4)((~~7~~, ~~77.55.301(5)~~,)) and WAC 220-110-340 and 220-110-350.

AMENDATORY SECTION (Amending Order 08-318, filed 12/29/08, effective 4/3/09)

WAC 220-110-340 Informal appeal of ((adverse)) administrative ((decisions)) actions. ((It is recommended)) The department recommends that ((an)) a party aggrieved ((party)) by the issuance, denial, conditioning, or modification of an HPA contact the ((local habitat biologist)) department employee responsible for ((granting or denying)) making the decision on the HPA ((prior to)) before initiating an informal ((or formal)) appeal. Discussion of concerns with the ((habitat biologist)) department employee often

results in a resolution of the problem without the need for an informal (~~or formal~~) appeal. (~~The habitat biologist may request review of your concerns by his or her supervisor.~~

All) The department encourages aggrieved parties (~~are encouraged~~) to take advantage of the informal appeal process (~~prior to~~) before initiating a formal appeal. However, the informal appeal process is not mandatory, and a person may proceed directly to a formal appeal under WAC 220-110-350.

(1) (~~The following procedures shall govern informal appeals of department actions taken under RCW 77.55.021, 77.55.141, 77.55.151, 77.55.161(2), 77.55.181, and 77.55.291.~~) This rule does not apply to (~~the department's decisions regarding whether hydraulic projects qualify for processing under RCW 77.55.181, governing certain fish habitat enhancement projects. This rule also does not apply to~~) any provisions or conditions in pamphlet HPAs or supplemental approvals as defined in WAC 220-110-020 (~~(53)(c) and (96)~~). A person who disagrees with a provision or condition in a pamphlet HPA or its supplemental approval may apply for an individual, written HPA. (~~A person who is aggrieved or adversely affected by the following department actions may request an informal appeal.~~)

(2) Any person with standing may request an informal appeal of the following department actions:

(a) The issuance, denial, conditioning, or (~~issuance of an HPA, or the conditions or provisions made part~~) modification of an HPA; or

(b) An order imposing civil penalties.

(~~2~~) (3) A request for an informal appeal shall be in writing and shall be received by the department within thirty days (~~of the denial or issuance of an HPA or receipt of an order imposing civil penalties. The thirty-day time requirement may be stayed by the department if negotiations are occurring between the aggrieved party and the habitat biologist and/or their supervisor. Requests for informal appeal shall be mailed to HPA Appeals Coordinator, Department of Fish and Wildlife, Habitat Program, 600 Capitol Way, N., Olympia, Washington 98501-1091, or hand-delivered to 1111 Washington Street, S.E., Habitat Program, Fifth floor.~~

(3) from the date of receipt of the decision or order. "Date of receipt" means:

(a) Five business days after the date of mailing; or

(b) The (~~written request~~) date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence. The recipient's sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the agency, shall constitute sufficient evidence of actual receipt. The date of actual receipt; however, may not exceed forty-five days from the date of mailing.

(4) Requests for (~~an~~) informal appeal shall be mailed to the HPA Appeals Coordinator, Department of Fish and Wildlife, Habitat Program, 600 Capitol Way N., Olympia, Washington 98501-1091; e-mailed to HPAapplications@dfw.wa.gov; faxed to 360-902-2946; or hand-delivered to the Natural Resources Building, 1111 Washington

Street S.E., Habitat Program, Fifth floor.

(5) The request shall be plainly labeled as "Request for Informal Appeal" and shall ~~((contain))~~ include the following:

(a) The appellant's name, address, e-mail address (if available), and phone number ~~((of the person requesting the appeal))~~;

(b) The specific ~~((agency))~~ department action that the ~~((person))~~ appellant contests ~~((, such as denial of an HPA, a particular condition in))~~;

(c) The date the department issued, denied, conditioned, or modified an HPA, or ~~((an))~~ the date the department issued the order imposing civil penalties;

~~((c))~~ (d) The log number or a copy of the HPA, or a copy of the order imposing civil penalties;

(e) A short and plain statement explaining why the appellant considers the department action or order to provide inadequate protection of fish life or to be otherwise unlawful;

(f) A clear and concise statement of facts to explain the appellant's grounds for appeal;

(g) Whether the ~~((person))~~ appellant is the permittee, HPA applicant, landowner, resident, or ~~((other basis for the person's))~~ another person with an interest in the ~~((agency))~~ department action in question;

~~((d))~~ The date of denial, issuance, or condition of an HPA, or date the department issued the notice of civil penalty;

~~((e))~~ (h) The specific relief requested; ~~((and~~

~~((f))~~ (i) The attorney's name, address, e-mail address (if available) and phone number, if the person is represented by legal counsel; and

(j) The signature of the appellant or his or her attorney.

~~((4))~~ (6) Upon receipt of a ~~((written))~~ valid request for an informal appeal, the department ~~((shall))~~ may initiate a review of the ~~((agency decision))~~ department action. If ~~((agreed to by))~~ the appellant agrees, and the appellant applied for the HPA, resolution of the appeal may be facilitated through an informal conference. The informal conference is an optional part of the informal appeal and is normally a discussion between the appellant ~~((and the area habitat biologist mediated by)),~~ the ~~((biologist's))~~ department employee responsible for the decision, and a supervisor. The time period for the department to issue a decision on an informal appeal is suspended during the informal conference process.

(7) If a resolution is not reached through the informal conference ~~((7))~~ process, or the appellant is not the person who applied for the HPA, or the appeal involves an order imposing civil penalties, an informal appeal hearing shall be conducted by the HPA appeals coordinator or designee. Upon completion of the informal appeal hearing, the HPA appeals coordinator, or designee shall recommend a decision to the director or the director's designee. This recommended decision shall be approved or disapproved by the director or the director's designee within sixty days of the date the informal appeal was received by the department, unless an extension of time is agreed to by the appellant. The department

shall notify the appellant in writing of the decision of the director or the director's designee.

~~((5))~~ (8) If ~~(7)~~ the department declines to initiate an informal review of its action after receipt of a valid request, or the appellant still wishes to contest the department action following ~~(this)~~ completion of the informal appeal process, the appellant ~~((still wishes to contest the agency action,))~~ may initiate a formal appeal ~~((may be initiated))~~ under WAC 220-110-350. Formal review must be requested within the time periods specified in WAC 220-110-350.

AMENDATORY SECTION (Amending Order 08-318, filed 12/29/08, effective 4/3/09)

WAC 220-110-350 Formal appeal of administrative ~~((decisions))~~ actions. ~~((1))~~ The ~~((following procedures shall govern formal appeals of))~~ department ~~((actions taken under RCW 77.55.021, except as indicated in RCW 77.55.301(5)(a), 77.55.151, 77.55.161(2),))~~ recommends that a party aggrieved by the issuance, denial, conditioning, or ~~((77.55.291. Subsection (2) of this section addresses appeals))~~ modification of an HPA contact the department employee responsible for making the decision on the HPA before ~~((the hydraulic appeals board.))~~ initiating a formal appeal. Discussion of concerns with the department employee often results in a resolution of the problem without the need for a formal appeal.

The department encourages aggrieved parties to take advantage of the informal appeal process under WAC 220-110-340 before initiating a formal appeal. However, the informal appeal process is not mandatory, and a person may proceed directly to a formal appeal.

(1) This rule does not apply to any provisions or conditions in ~~((pamphlets,))~~ pamphlet HPAs or supplemental approvals as defined in WAC 220-110-020 ~~((53)(c) and (96))~~. A person who disagrees with a provision or condition in a pamphlet HPA or its supplemental approval may apply for an individual, written HPA.

~~((a) A))~~ (2) Any person ~~((who is aggrieved or adversely affected by))~~ with standing may request a formal appeal of the following department actions ~~((may request a formal appeal))~~:

~~((i))~~ (a) The ~~((denial or))~~ issuance ~~((of an HPA, or the conditions or provisions made part)),~~ denial, conditioning, or modification of an HPA; or

~~((iii))~~ (b) An order imposing civil penalties ~~((7 or~~ (iii) Any other agency action by the department's habitat program for which an adjudicative proceeding is required under the Administrative Procedure Act, chapter 34.05 RCW).

~~((b))~~ (3) As required by the Administrative Procedure Act, chapter 34.05 RCW, the department shall inform the HPA permittee ~~((7~~

HPA) or applicant, or person subject to civil penalty order of the department, of the opportunity for appeal, the time within which to file a written request for an appeal, and the place to file it.

~~((c))~~ (4) A request for (an) a formal appeal shall be in writing and shall be (received during office hours by) filed with the clerk of the pollution control hearings board (PCHB) and served on the department within thirty days (of the) from the date of receipt of the decision or order. "Date of receipt" means:

(a) Five business days after the date of mailing; or

(b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence. The recipient's sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the agency ((action that is being challenged. Requests for appeal)), shall constitute sufficient evidence of actual receipt. The date of actual receipt; however, may not exceed forty-five days from the date of mailing.

(5) Service on the department shall be mailed to the HPA Appeals Coordinator, Department of Fish and Wildlife, Habitat Program, 600 Capitol Way N., Olympia, Washington 98501-1091((r)); e-mailed to HPAapplications@dfw.wa.gov; faxed to 360-902-2946; or hand-delivered to the Natural Resources Building, 1111 Washington Street S.E., Habitat Program, Fifth floor. ((If there is no timely request for an appeal, the agency action shall be final and unappealable.

~~(d))~~ (6) The time period for requesting a formal appeal is suspended during consideration of a timely informal appeal. If there has been an informal appeal, the deadline for requesting a formal appeal shall be within thirty days ((of)) from the date of receipt of the department's written decision in response to the informal appeal.

~~((e))~~ (7) The ((written)) request for ((an)) formal appeal ((shall be plainly labeled as "Request for Formal Appeal" and)) shall contain the ((following):

~~(i) The name, address, e-mail address (if available) and phone number of the person requesting the appeal;~~

~~(ii) The specific agency action that the person contests, such as denial of an HPA, a particular condition in an HPA, an order imposing civil penalties, etc.;~~

~~(iii) Whether the person is the permittee, HPA applicant, landowner, resident, or other basis for the person's interest in the agency action in question;~~

~~(iv) The date of denial, issuance, or condition of an HPA, if the person is contesting denial, issuance, or conditioning of an HPA;~~

~~(v) Specific relief requested; and~~

~~(vi) The attorney's name, address, e-mail address (if available) and phone number, if the person is represented by legal counsel.~~

~~(f) The appeal may be conducted by the director, the director's designee, or by an administrative law judge (ALJ) appointed by the office of administrative hearings. If conducted by an ALJ, the ALJ shall issue an initial order under RCW~~

~~34.05.461. The director or the director's designee shall review the initial order and enter a final order as provided by RCW 34.05.464.~~

~~(g) All hearings conducted by the director, the director's designee, or an ALJ under subsection (6) of this section, shall comply with the Administrative Procedure Act and the model rules of procedure, chapter 10-08 WAC.~~

~~(2) The hydraulic appeals board hears appeals of the following permits:~~

~~(a) Under RCW 77.55.021 for the diversion of water for agricultural irrigation or stock watering purposes or when associated with streambank stabilization to protect farm and agricultural land as defined in RCW 84.34.020;~~

~~(b) Under RCW 77.55.241 for offsite mitigation proposals;~~

~~(c) Under RCW 77.55.141 for single family marine bulkheads or rockwalls;~~

~~(d) Under RCW 77.55.181 for fish habitat enhancement project HPA conditions or denials.~~

~~The appeal procedures for the board are found in WAC 259-04-060 and chapter 371-08 WAC) information required by WAC 371-08-340.~~

~~(8) The department in its discretion may stay the effectiveness of any decision or order that has been appealed to the PCHB. The department will use the standards in WAC 371-08-415(4) to make a decision on any stay request. At any time during the appeal to the PCHB, the appellant may apply to the PCHB for a stay of the decision or order, or removal of a stay imposed by the department.~~

~~(9) If there is no timely request for an appeal, the department action shall be final and unappealable.~~