



RULE-MAKING ORDER

CR-103E (May 2009)
(Implements RCW 34.05.360)

Agency: Washington Department of Fish and Wildlife

Emergency Rule Only

Effective date of rule:

Emergency Rules 10-147

- Immediately upon filing.
- Later (specify) July 1, 2010

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

- Yes
 - No
- If Yes, explain:

Purpose: Amend rules for HPA appeals, consistent with Substitute House Bill 2935, the pertinent portions of which take effect on July 1, 2010. The department is in the process of developing permanent rules on this subject.

Citation of existing rules affected by this order:

Repealed:
 Amended: WAC 220-110-030, 220-110-340, and 220-110-350
 Suspended:

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

Other authority : SHB 2935

EMERGENCY RULE

Under RCW 34.05.350 the agency for good cause finds:

- That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.
- That in order to implement the requirements or reductions in appropriations enacted in any budget for fiscal years 2009, 2010, or 2011, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency.

Reasons for this finding:

SHB 2935 eliminates the Hydraulic Appeals Board and replaces it with the Pollution Control Hearings Board created in Chapter 43.21B RCW, effective July 1, 2010. 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. The Washington Department of Fish and Wildlife (WDFW) must amend its HPA appeal rules to be consistent with the changes that SHB 2935 makes to Chapter 77.55 RCW. In addition, WDFW is clarifying its rules for informal appeals. The department is in the process of developing permanent rules on this subject, but they will not be adopted by July 1, 2010. These emergency rules will implement the changes until the permanent rules are adopted.

Date adopted: June 16, 2010

NAME (TYPE OR PRINT)

Philip Anderson

SIGNATURE

TITLE

Director

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: June 16, 2010

TIME: 3:05 PM

WSR 10-13-093

(COMPLETE REVERSE SIDE)

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	_____	Amended	_____	Repealed	_____
Federal rules or standards:	New	_____	Amended	_____	Repealed	_____
Recently enacted state statutes:	New	<u>3</u>	Amended	_____	Repealed	_____

The number of sections adopted at the request of a nongovernmental entity:

New	_____	Amended	_____	Repealed	_____
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The number of sections adopted in the agency's own initiative:

New	<u>3</u>	Amended	_____	Repealed	_____
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	_____	Amended	_____	Repealed	_____
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The number of sections adopted using:

Negotiated rule making:	New	_____	Amended	_____	Repealed	_____
Pilot rule making:	New	_____	Amended	_____	Repealed	_____
Other alternative rule making:	New	_____	Amended	_____	Repealed	_____

NEW SECTION

WAC 220-110-03000A Hydraulic project approvals--Procedures.

Notwithstanding the provisions of WAC 220-110-030, effective immediately until further notice:

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

(2) The department may, after consultation with the permittee, modify an HPA due to changed conditions. The modification becomes effective unless appealed as specified in RCW 77.55.021(4) and WACs 220-110-340 and 220-110-350.

NEW SECTION

WAC 220-110-34000A Informal appeal of administrative actions.

Notwithstanding the provisions of WAC 220-110-340, effective immediately until further notice:

The department recommends that a party aggrieved by the issuance, denial, conditioning, or modification of an HPA contact the department employee responsible for making the decision on the HPA before initiating an informal appeal. Discussion of concerns with the department employee often results in a resolution of the problem without the need for an informal appeal.

The department encourages aggrieved parties to take advantage of the informal appeal process 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) This rule does not apply to any provisions or conditions in pamphlet HPAs or supplemental approvals as defined in WAC 220-110-020. A person who disagrees with a provision or condition in a pamphlet HPA or its supplemental approval may apply for an individual, written HPA.

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

(a) The issuance, denial, conditioning, or modification of an HPA; or

(b) An order imposing civil penalties.

(3) A request for an informal appeal shall be in writing and shall be received by the department within thirty days 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, 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 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 include the following:

(a) The appellant's name, address, e-mail address (if available), and phone number;

(b) The specific department action that the appellant contests;

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

(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 appellant is the permittee, HPA applicant, landowner, resident, or another person with an interest in the department action in question;

(h) The specific relief requested;

(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.

(6) Upon receipt of a valid request for an informal appeal, the department may initiate a review of the department action. If 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, the 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 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.

(8) If 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 completion of the informal appeal process, the appellant may initiate a formal appeal under WAC 220-110-350. Formal review must be requested within the time periods specified in WAC 220-110-350.

NEW SECTION

WAC 220-110-35000A Formal appeal of administrative actions.

Notwithstanding the provisions of WAC 220-110-350, effective immediately until further notice:

The department recommends that a party aggrieved by the issuance, denial, conditioning, or modification of an HPA contact the department employee responsible for making the decision on the HPA before 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

pamphlet HPAs or supplemental approvals as defined in WAC 220-110-020. A person who disagrees with a provision or condition in a pamphlet HPA or its supplemental approval may apply for an individual, written HPA.

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

(a) The issuance, denial, conditioning, or modification of an HPA; or

(b) An order imposing civil penalties.

(3) As required by the Administrative Procedure Act, Chapter 34.05 RCW, the department shall inform the HPA permittee 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.

(4) A request for a formal appeal shall be in writing and shall be filed with the clerk of the pollution control hearings board (PCHB) and served on the department within thirty days 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, 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; 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.

(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 from the date of receipt of the department's written decision in response to the informal appeal.

(7) The request for formal appeal shall contain the 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.