

Memorandum

December 1, 2011

To: File

From: Carol Piening

Subject: Notes from 11/29/2011 Meeting on WDFW HPA Rule Revisions

**Organization representatives present:**

Stephen Bernath, Washington Department of Ecology  
Robert RC Cunningham, Northwest Treasure Supply  
Johan Hellman, Washington Public Ports Association  
Tim Hyatt, Skagit River System Cooperative (by telephone)  
Randy Kline, Washington State Parks  
Gayle Kreitman, NOAA Fisheries  
Gary Rowe, Washington State Association of Counties  
Ken Schlatter, Washington State Department of Transportation  
Bill Thomas, Washington Prospectors Mining Association  
Lance Winecka, Regional Fish Enhancement Groups

**Interested others present:**

Dave Molenaar, NOAA Fisheries  
Gregor Myhr, Washington Department of Transportation  
Janet Sutter, WDFW Wildlife Program  
(illegible)

**WDFW staff present:**

Pat Chapman  
Kelly Craig  
Jeff Davis  
Carol Piening  
Randi Thurston

Alan Bogner, Governor's Office of Regulatory Assistance, facilitated.

**Agenda Items:**

<b>Topic</b>	<b>Status</b>
Definitions (WAC 220-110-020)	Policy discussion
Simplified permits	Presentation, questions, and policy discussion

## **Follow-ups:**

*WDFW will:*

- Find out how frequently “chronic danger” permits are issued.
  - WDFW has issued three HPAs (an original and two modifications) for a single chronic danger project under RCW 77.55.021 (11). This was a project for Sauk River bank stabilization and riprap removal.
- Share a more-extensive list of possible project types for simplified permits.

*Interested parties will:*

- Provide comments to WDFW as soon as possible to facilitate work on a second draft; the deadline for written comment is December 23, 2011.

## **Agenda Topic Discussions**

Process: WDFW is considering the pros and cons of including extensive definitions, keeping in mind the points raised at an earlier meeting. The further point was raised that it would be helpful to reviewers to know the context that the term is being used in.

For today’s meeting, WDFW grouped definitions into six categories, which were discussed in turn.

1. Maintenance and repair: chronic maintenance, design life, maintain, rehabilitate, repair, replace

Participants raised the following points:

### Chronic maintenance

- The definition for “chronic maintenance” comes from WDFW’s Integrated Streambank Protection Guidelines (ISPG). It was put in as a link to WDFW’s compensatory mitigation guidelines; the idea is that structures that require “chronic maintenance” may trigger additional compensatory mitigation.
- Some sorts of maintenance ought to be exempt from needing an HPA.
- How to determine what “exceeds expectations...identified in the initial project” is unknown. DOT’s “chronic environmental deficiency” definition uses three repairs or maintenance activities at the same location in a ten year period, but this is in the context of a Memorandum of Understanding with WDFW and is not likely pertinent to the rule definition. However, this draft’s “exceeds expectations” is too imprecise to be workable.

### Design life

- “Design life” was added to definitions as a link to WDFW’s compensatory mitigation guidelines. ISPG gives the following as an example of reconstruction that would

trigger compensatory mitigation: “work that extends the design life of the project including reconstruction of a project”. The definition is based on the Federal Highway Administration (FHWA) Bridge Preservation Guide expected life of bridges. Similar definitions are in BusinessDictionary .com and FinanceDictionary.com. The underlying purpose is to figure out when additional compensatory mitigation should be required for repairs to a structure that does not comply with the existing WAC.

- WSDOT does not manage infrastructure to a set “design life,” rather, it maintains structures so they continue to function for as long as possible. Design life is a theoretical concept, rather than one with a time span that can be readily identified. It should be the responsibility of the bridge’s owner and/or engineer to determine its “design life,” rather than something WDFW sets.
- Changing an existing structure to meet current transportation needs, for example, by adding a lane to a bridge, could trigger compensatory mitigation. The Department of Ecology’s stormwater regulations may provide an example; under those regulations, when the surface area of pavement is increased, that triggers mitigation for the increase.

#### Maintain, rehabilitate, repair and replace

- It might be more useful to classify these activities as “major” and “minor,” rather than defining the differences between maintenance, rehabilitation, repair, and replacement. On the other hand, clear distinctions among these categories could be useful. The US Army Corps of Engineers categorizes “replacement” as a part of “repair”; WDFW considers them to be different.
- WDFW should require mitigation for those maintenance or repair projects that affect the waterbody or bed. WDFW should clarify what kinds of activities trigger compensatory mitigation.
- WDFW should not require HPAs for those activities that do not affect the “bed, flow or waters of the state.” Street sweeping is an example of something that should not require an HPA.
- As with “design life,” the owner/engineer should decide if an action is “maintenance” or “repair”, rather than WDFW.
- Examples were raised: Should replacing a structural member of a bridge trigger compensatory mitigation? Should slip-lining an undersized culvert?

2. Mitigation: avoid, compensatory mitigation, no net loss.

Participants raised the following points:

#### Avoid, compensatory mitigation

- Mitigation has often been the responsibility of the project proponent. Alternatives such as in-lieu fees and mitigation banking are becoming more available. They were

originally developed for wetland mitigation. For the purposes of mitigating losses to fish life, the watershed is often considered to be the appropriate scale. Local jurisdictions prefer that mitigation take place within the same jurisdiction where the impact occurred. Private individuals can buy credits in mitigation banks, although an appropriate bank is not always available. Multi-watershed mitigation bank projects are under development in the Columbia River system.

### No net loss

- Clarification: The draft “no net loss” definition refers to “fish life” in two instances and to “habitat” in two instances. That’s *fish* habitat.
- Consider calculating whether the “no net loss” standard has been met on a broad basis; for example, whether a given agency has met the standard for all its projects in a year, rather than calculating no net loss for each project individually.
- No net loss is a very important concept and a crucial driver to make sure that hydraulic permits do, in fact, protect fish life. No net loss makes it difficult to do a hydraulic project, and from the standpoint of fish protection, that’s a good thing. However, the draft definition is not clear.

3. How precise should the rule be: hydraulic project, near, performance standard, site-specific.

Participants raised the following points:

- “Near” should be site specific, scaled to the area that will be affected by the project.
- The ordinary high water level is too narrow a limit on HPA applicability; it includes only a one- or two-year flood event, and many structures are being built to pass the 100-year flood plus debris.
- The integrated streambank protection guidelines might be useful, where it talks about “reach” effects.
- WDFW has stated that it does not intend to extend the limit of its authority with these rule revisions. Attempting to define “near” may be viewed as trying to expand the area where HPAs are needed. Defining it clearly without expanding authority may be elusive.
- WDFW has not made a regular practice of requiring permits for projects that are being constructed on dry land. There are elements of this draft that contemplate requiring permits for structures within the channel migration zone. An example of a project that would be in WDFW’s jurisdiction on dry land is a groin constructed in the channel migration zone in order to affect the (future anticipated) flow of the river.

4. Terms for people and activities: authorized agent, county legislative authority designee, dredging, fish life, qualified professional.

Participants raised the following points:

- WDFW’s intention for including “*county legislative authority designee*” is to be clear about who, specifically, has authority to declare an emergency. Area habitat biologists are already authorized to declare an emergency.
- Adding the “*county designee*” language could have unintended consequences, including people declaring emergencies inappropriately, people being prevented from declaring emergencies when it would be appropriate to do so, or subverting legislative intent. Consider striking the “designee” language.
- The current rule contains definitions for “*dredging*,” “*diver-operated dredging*,” and “*suction dredging*”. These pertain to dredging to maintain a channel, to remove aquatic vegetation, and to recover gold and other minerals, respectively. From a fish-protection standpoint, the type of dredging equipment and method, and the amount of material being moved, make a bigger difference than the reason for doing the dredging. Consider either one definition, or reworking the definition(s) to emphasize the impacts of different equipment types.
- The definition for “*qualified professional*” should specify that people who electroshock fish are properly trained. Oversight by a “qualified professional” is not sufficient to protect fish.

#### 5. Miscellaneous: changed conditions, chronic danger.

Participants raised the following points:

- Both “*changed conditions*” and “*chronic danger*” are used in RCW.
- Participants would like to know how many “*chronic danger*” HPAs have been issued. (See Follow-ups, above.)
- The intent of the “*changed conditions*” requirements is not to allow WDFW to reach back in time and change the requirements for a structure that is already in existence. Rather, it is meant to allow adjustments when conditions change during the course of an active permit. For example, someone could have a permit to do work year-round, because there are no anadromous fish present. During the course of that permit, a downstream blockage is repaired, allowing anadromous fish to move into the permitted site. This is a “changed” condition, and the permit would be modified to incorporate a work timing window to protect the anadromous fish.

#### 6. Simplified permits: simplified permit, low risk, minor modification

Jeff Davis explained the strategy behind simplified permits. The simplified permit would identify the project applicant, location, and the applicant would agree to specific provisions. Simplified permits would save time for both applicants and WDFW staff. The staff time freed would be used for more-complex projects, monitoring, and adaptive management.

The rule would not specify “simplified” projects, in order to facilitate changing the list as we learn what works. WDFW will work with stakeholders to identify appropriate “simplified” project types and permit requirements. Examples might include permits for docks in freshwater

lakes that contain only stocked fish, or permits for mooring buoys that are not located in or near eelgrass. The “simplified” program would include monitoring to make sure that project conditions match the application.

Participants raised the following points:

- The concept sounds good.
- There needs to be a way to move proposals from the “simplified” process to the standard process.
- Applicants may have to meet other agencies’ requirements and/or use JARPA for projects that would qualify for a simplified application; this would be a drawback.
- Consider using JARPA as a simplified application.
- Consider using email notification rather than mailing a letter.
- Make sure the “simplified” process does not preclude the use of “general” permits.
- Consider doing a SEPA analysis on simplified permits programmatically, so SEPA is not required for each individual simplified project.
- Setting very precise circumstances where “simplified” permits are possible may preclude their use.

#### Open discussion

Question: How does WDFW know if construction done under an emergency permit has been mitigated? Answer: Sometimes, the mitigation is included as an element of the emergency permit. At other times, WDFW issues a written permit within 30 days of the emergency. Mitigation is included as necessary in the written permit. Tracking, and assuring full mitigation, is challenging.

Question: What is the tribes’ role in reviewing HPAs? Answer: The Governor issued an executive order under the Centennial Accord directing WDFW to allow time for tribal review of projects. A tool called “HPMS Viewer” is used to notify tribes of pending projects. It allows them to review applications and send comments to WDFW for consideration during permitting.

Participants raised the following points:

- WAC uses the term “large woody material;” RCW uses the term “large woody debris.” This is a potentially important inconsistency.
- Requiring that a permittee notify WDFW before starting work can be seen as either an invasion of privacy or an infringement of property rights.

#### *Marina/Parking Lot*

There is an HPA fee bill under discussion in the legislature. HB 2135 includes a \$150 application fee for most types of HPAs, but no policy amendments.