

Memorandum

November 10, 2011

To: File

From: Carol Piening

Subject: Notes from 11/9/2011 Meeting on WDFW HPA Rule Revisions

Organization representatives present:

Stephen Bernath, Washington Department of Ecology
 Robert Brenner, Port of Tacoma, for Johan Hellman, Washington Public Ports Association
 Van Collins, Association of General Contractors
 Robert RC Cunningham, Northwest Treasure Supply
 Doug Hooks, Washington Forest Protection Association
 Tim Hyatt, Skagit River System Cooperative
 Randy Kline, Washington State Parks and Recreation Commission
 Gayle Kreitman, NOAA Fisheries
 Christina Martinez for Ken Schlatter, Washington State Department of Transportation
 Michal Rechner, Washington Department of Natural Resources
 Gary Rowe, Washington State Association of Counties
 John Stuhlmiller, Washington Farm Bureau (by telephone)
 Bill Thomas, Washington Prospectors Mining Association
 Bruce Wishart, People for Puget Sound

Interested others present:

Rob Fanour, Rayonier
 Gregor Myhr, Washington State Department of Transportation
 Ted Parker, Snohomish County
 Annette Pearson, Pierce County
 Rob Wenman, Pierce County SWM

Agenda Items:

Topic	Status
General requirements (220-110-036)	Policy discussion
General construction provisions (220-110-037)	Policy discussion
Compensatory mitigation (220-110-038)	Policy discussion
Adaptive management/monitoring (220-110-039)	Policy discussion
Beaver dam management (220-110-213)	Presentation, clarifying questions, and policy discussion
Finalize list of definitions	Discussion and running list updated

Follow-ups:

WDFW will:

- Research the interactions between proposed HPA erosion control provisions and Ecology’s existing stormwater requirements.

Agenda Topic Discussions

Process: Participants stated their top concerns. A “show of hands” to prioritize the topics stopped when some participants pointed out that the diverse interests in the room were not equally represented. Instead, each of the topics that participants identified was opened for a five minute discussion.

220-110-036 General Requirements

Coordinated mitigation among state agencies

DNR’s proposal is that state agencies that require mitigation – notably DFW and DNR – will coordinate their requirements so that a project would need only one mitigation plan. DFW, because its authority is protection of fish life, sometimes has a narrower focus than DNR, which has additional priorities for projects that affect state-owned aquatic land. The mitigation plans would be developed jointly rather than sequentially. The process would be started by a project proponent going to DNR first, to get (preliminary) approval for use of a site from DNR as the agency responsible for land management.

The group identified potential advantages and precedents for coordinated mitigation planning:

- Coordinated standards would reduce burden on applicants.
- Coordination could minimize different agencies requiring different best management practices.
- The Multi-Agency Permit Team (MAPT) has shown that agencies can coordinate successfully on large projects.

The group also identified several questions and potential roadblocks:

- Would a coordinated process take longer?
- Will one agency be the lead? Will one agency sign the agreement?
- DFW and DNR have different functions, mandates, and jurisdictions that are important to retain, and that may make coordination difficult.
- Coordination needs to be appropriate to the scale of the project. A MAPT approach may not be appropriate for smaller projects, or if there are multiple permits that require compensatory mitigation plans.
- The concept of coordination is good, but how, specifically, would it be put into rule language?

Clarify jurisdiction (“near” water)

The current discussion of how HPAs apply to actions that take place “near” water is a continuation of a longer-running discussion about how far-reaching WDFW’s hydraulic project approval authority is, and how far-reaching it should be. The Ordinary High Water Line

(OHWL) is frequently mentioned as a landmark, and the question is often phrased in terms of where does hydraulic permitting authority lie with reference to the OHWL. Participants seemed to agree that WDFW should think hard about what sorts of activities should require an HPA because they occur “near” waters of the state. From there, opinions diverged.

As background information: “bed” is clearly defined in statute.¹ “Flow” is not defined. “Near” is not defined. Some projects, such as dikes, are intended to obstruct flow, and are constructed near state waters.

A summary of participants’ comments:

- Existing rule has included actions landward of the OHWL for a long time, and that authority has not been challenged.
- Actions taken landward of the OHWL can have a direct effect on fish habitat. Thus, WDFW’s authority to condition permits to protect fish applies.
- The concept of “near” may have made sense when the existing rules were written, but in the meantime other rules (such as shoreline management and critical areas) have come into existence.
- The greatest value of the HPA program is to protect fish life from the consequences of actions that take place landward of the OHWL; other regulations and jurisdictions are either limited to in-water work or do not consider impacts to fish life.
- The definition of HPA stands alone without saying “or near”; adding it only causes confusion.
- An example of work that could occur “near” water and impact fish life: constructing ditches landward of a watercourse during low water and the watercourse diverting to the ditch during the next flood.
- Consider echoing statutory language.

No net loss

a) *“No net loss” needs to be defined.*

- The definition needs to be more specific, and the term needs to be used consistently.
- The definition and the usage need to take into account that work within a channel will cause some loss of fish life.
- Pay attention to how the definition affects mitigation sequencing.
- Does WDFW’s use of “no net loss” result in more than one agency regulating the same thing?

b) *Moving “no net loss” to this general section has consequences.*

- In the existing rule, “no net loss” applies only to specific project types. It also says “no net loss of productive capacity,” implying area or habitat. Some participants preferred

¹ RCW 77.55.011 (1) “Bed” means the land below the ordinary high water lines of state waters. This definition does not include irrigation ditches, canals, storm water runoff devices, or other artificial watercourses except where they exist in a natural watercourse that has been altered by man.

the existing rule; others said that generalizing “no net loss” is a way to bring it into line with current regulations, including shoreline management.

In lieu fees

220-110-036 (3) (e) needs to be clarified. The types and locations of mitigation should be limited to benefit the same stock that is impacted by the project.

Mitigation sequence

The mitigation sequence described in 220-110-036 (3) calls for avoiding, minimizing, rectifying (repairing, rehabilitating, or restoring), preserving and maintaining, compensating, and finally monitoring. The policy concern is that project proponents neglect avoidance and minimization in favor of compensatory mitigation. The proposal was made that all HPAs should require applicants to demonstrate that it is not feasible to avoid or minimize impacts before moving to compensatory mitigation.

Only a small percentage of projects require compensatory mitigation. Under current practices, WDFW tends to increase compensatory mitigation requirements rather than deny permits outright. Less flexibility in how WDFW applies the mitigation sequence will result in more consistency, but perhaps also in more permits being denied.

Points raised in the discussion included:

- Define “avoidance” and describe how someone would document it.
- Demonstrating avoidance is not reasonable for every type of project, nor for every project proponent. There should be some scale criteria; small projects shouldn’t need to demonstrate avoidance.
- Often, proponents don’t indicate where they are on mitigation sequencing. With some consideration of scale, having proponents provide documentation is reasonable.
- Activities permitted by pamphlet may have small enough impacts to not need to document avoidance.
- Look at local jurisdictions’ critical area ordinances for examples.
- Putting requirements in rules will help WDFW biologists.
- Making the rules more precise will narrow the differences in interpretation that currently happens.

220-110-037 General construction provisions

BMP consistency between agencies/“immediate” erosion control

This discussion centered around 220-110-037 (2). Existing language has been edited to say “All disturbed areas shall be immediately protected from erosion.”

Points raised in the discussion included:

- Ecology has standards in stormwater permits; it is important to make sure the requirements in the two permits don’t conflict.

- Putting restrictions in rule (rather than relying on putting restrictions in pertinent permits) is less flexible.
- For permits pertaining to flood control, “immediate” is a tricky word; inserting it could have unintended consequences.
- The western Washington stormwater manual specifies protecting areas from erosion within seven days in dry weather, two days in wet weather. This is not in law, but it is very frequently put into stormwater permits.
- WDFW could state performance standards for erosion control; people could use the western Washington stormwater manual to find the appropriate BMPs.
- The people who do this work are familiar with the manuals; relying on them would be practicable.

Overlap of jurisdictions and duplication of regulations

This topic is part of an ongoing conversation about how HPA jurisdiction to protect fish life interacts with other jurisdictions to protect environmental features such as water quality, shorelines, and critical areas. Common themes in the ongoing discussion have been that overlapping requirements are undesirable, and conflicting requirements must be resolved.

Points raised in today’s discussion included:

- Jurisdiction is somewhat driven by the type of structure and location. For example, fish protection is pertinent to structures built in the 100-year flood plain.
- WDFW should show that these regulations do not duplicate other state or local regulations.
- It’s the legislature’s responsibility to distribute responsibilities.
- These general provisions do not really apply to all construction; for example, they do not apply to mineral prospecting.
- There are many locations and many programmatic situations where HPA provides protections for fish that no other regulations do.
- WDFW should think about what fish protection needs are covered by critical area ordinances and local permits.
- Several project types, including work on culverts, bridges, beaver dams, and bulkheads or bank protection landward of ordinary high water are not considered in such permits.

Dredging and depressions

220-110-037 (2) (e) says “Depressions in the substrate during project activities shall be reshaped to preproject level or other approved condition upon project completion.”

Participants raised the following points:

- Generalizing the language in may have unintended consequences. For example, in deepwater situations, “single and complete” bucket grabs that are required to limit turbidity result in depressions in the substrate, but because they are in deep water they will not trap fish. Dredging permits in deep water do not contain provisions discussing

the resulting topography of the bed. This rule language could result in permitting biologists spending time on unimportant details.

- Conversely, in freshwater and shallow marine water, depressions left as a result of dredging can strand fish.

Sediment management

220-110-037 (3) (g) says, “Project activities shall be conducted to prevent the delivery of silt or sediment-laden water to banks, beach areas, or waters of the state.” Meanwhile, 220-110-037 (11) says, “The department may allow placement of clean dredged material in areas for beneficial uses such as beach nourishment or cleanup of contaminated sediments.”

Participants raised the following points:

- These two statements conflict with one another. In combination, these two statements would prohibit moving dredged sediments to cap problem areas.
- WDFW should edit these sections with the goal of preventing sediment delivery except as allowed for specific purposes such as beach nourishment or contaminant capping.

Applicability – what measures apply to what project types

Participants raised the following points:

- WDFW should make it clearer which provisions apply to mineral prospecting.
- WDFW should define “repair” and “replace” carefully, so that projects can be characterized and regulated appropriately.
- Additional precision is a step in the right direction.

220-110-039 Adaptive management and monitoring

Purpose, goals, and process

Jeff Davis clarified that the purpose of this section is to commit WDFW to compliance and effectiveness monitoring, and to make appropriate adjustments using appropriate methods when necessary. Appropriate methods may include rule changes, policy/procedure changes, technical assistance, or training. Compliance monitoring is proposed as a component of adaptive management because a pilot project that WDFW conducted last year indicated that the content or organization of HPAs may contribute to non-compliance. This is a greater concern with people or organizations that do not do in-water work routinely than it is with “regular customers” such as WSDOT. Compliance is a necessary precursor to effectiveness monitoring; it’s not possible to tell if requirements are effective unless there are projects that comply with the requirements.

- WDFW should be cautious that the adaptive management program doesn’t turn into an excuse not to enforce against violators.
- WDFW needs access to property for monitoring purposes; this should be a condition of the permit.

- Property owners may have concerns about who has access to their property to carry out monitoring.

220-110-213 Beaver dam management

Carol Piening presented an overview of proposed rules for beaver dam management. WDFW is still considering whether it is necessary to include explicit rules for beaver dam management. WDFW recognizes that beavers create good fish habitat. In addition to beaver dam removal, other management methods are water leveling devices and beaver exclusion devices. WDFW has not developed draft language for exclusion devices yet. The provision stating that “a request to manage a beaver dam at the same location three times in three years” is an attempt to quantify the concept of “chronic” beaver dam management.

Jeff Davis clarified current WDFW approaches to beaver dam management. Currently, WDFW draws from requirements for other activities to write permits for beaver dam management. Developing and implementing a rule section for those requirements will not result in additional expenses. Permits are generally written for dams that are less than one year old; a proponent would have to provide justification for alterations to well-established dam.

Participants raised the following points:

- State Parks has expertise that they would be willing to share.
- Consider including a purpose statement: protect infrastructure while protecting fish life.
- Consider limiting permits for beaver dam removal to areas within the right-of-way (in the case of roads.)
- Consider limiting permits to dams that are one year old or less.
- Consider relying on counties to determine whether a dam needs to be removed.

Definitions list

Here is an alphabetized running list of definitions that have been mentioned for discussion (from meetings on October 31, November 4, and today) . Participants had varying opinions about how inclusive the definitions section should be.

Authorized agent
 Avoidance
 Changing conditions
 Chronic danger
 Chronic maintenance and repair
 Compensatory mitigation
 County legislative authority designee
 Design life
 Dredging (3x)
 Fish life
 Hydraulic project
 Low risk
 Maintain
 Minor modification

Near/vicinity
No net loss
Performance standard
Project specific
Qualified professional (with respect to monitoring)
Rehabilitate
Repair
Replacement
Simplified permit
Site specific

General clarifications

Streamlined fish enhancement projects will be clarified in a different venue than this rulemaking.

Not all rule sections will be discussed in these meetings. WDFW welcomes written comments on all sections.

Some entirely new sections that were proposed in the first draft that WDFW distributed have been dropped from further consideration, and some sections of existing rule that were proposed for editing in the first draft have reverted to existing rule language, as part of “focusing” this rulemaking to align with the Governor’s extension of the rule-writing moratorium.

Items for WDFW to consider

- Consider restructuring 220-110-036. Some elements would be better in a general HPA than as a rule requirement.

Marina/Parking Lot

- Discussion of jurisdiction with respect to general construction provisions. (Could be included in the discussion of “near” water.)
- Ecology is interested in discussions of streamlined fish enhancement and green projects. Please keep Ecology informed of opportunities to be involved in those “other venues.”
- Status of HPA fee bill