

Concise Explanatory Statement (CES)

WAC 220-110-085: Integration of Hydraulic Project Approvals and Forest Practices Applications

A. Reasons for adopting the rule:

Second Engrossed Substitute Senate Bill (2ESSB) 6406 (2012) mandated that fish protection standards, contained within WDFW's hydraulic code rules, be integrated into forest practices rules for hydraulic projects in fish-bearing waters on forest land. Thereafter, forest practices hydraulic projects (FPHPs) will be regulated under the forest practices rules. The 2ESSB 6406 also mandated that WDFW adopt rules establishing the procedures that WDFW biologists will use to review and provide concurrence determinations on specific forest practices hydraulic project types. These rules direct WDFW's internal procedures only and include guidelines for the manner in which WDFW biologists will work with the Department of Natural Resources (DNR) and applicants to help ensure that projects meet fish protection standards.

B. Differences between the text of the proposed rule and the text of the rule as adopted:

Section 2(b): The sentence: "Prior to commenting, *or as soon as reasonably practicable*, the department will communicate with the applicant regarding any concerns relating to consistency with fish protection standards." will be modified to say: "Prior to commenting, the department will *strive* to communicate with the applicant..."

Section 3(c): The sentence: "Within five business days following notification from DNR, or as soon as *reasonably practicable* thereafter, the department will determine whether all information, needed for assessing the hydraulic project's consistency with fish protection standards, is included in the application." will be modified to say: "Within five business days following notification from DNR, or as soon as *possible* thereafter, the department will determine whether all information..."

Section 3(d): The sentence: "If information is missing, the department will contact the applicant to request the missing information." will be modified to say: "If information is missing, the department will *immediately* contact the applicant to request the missing information."

Section 3(d): The sentence: "The department may issue non-concurrence on a proposed project if the applicant fails to provide missing information in time for the department to perform its thirty-day review." will be modified to say: "The department may issue non-concurrence on a proposed project if the applicant fails to provide missing information in a

timely manner so that the department can complete its review within the required thirty-day timeframe.”

C. Summary of comments and WDFW response and consideration for the comments:

Washington Forest Protection Association (WFPA/Pete Heidi)

(a) Subsection (2)(b) General Review and Comment on FPHPs, concerning the sentence:

“Prior to commenting, or as soon as reasonably practicable, the department will communicate with the applicant...”. WFPA believes if the department is concerned about the technical design of a FPHP, it is essential that they contact the applicant before commenting to the DNR. This contact will provide the applicant with the opportunity to address the department’s concerns by providing additional explanatory information and perhaps initiating design modification that satisfies the department’s concerns. Modifications can be added by DNR as conditions to the forest practices application (FPA) without delaying FPA approval. WFPA strongly recommends that the department’s concerns about FPHPs be communicated with the applicant before the department’s comments are forwarded to DNR.

WDFW Response: WDFW agrees with WFPA that in order to have successful outcomes for both the applicant and protection of aquatic resources, the department needs to strive to communicate with the applicant and to try to resolve any concerns associated with FPHPs prior to commenting to DNR. There may be situations, however, where work load, time restraints, or inability to directly reach the applicant, may prevent successful communication from occurring. WDFW hopes, however, that these circumstances will be infrequent. To address this specific concern, WDFW will modify the sentence to say: “Prior to commenting, the department will strive to communicate with the applicant regarding any concerns relating to consistency with fish protection standards.” As DNR, WDFW and the applicants work through integration, we will continue to evaluate where improvements are needed to assure that we have successful outcomes for the applicant and for protection of fish and their habitats.

(b) Subsection (3)(c) Concurrence Review Process, concerning the sentence: “Within five business days following notification from DNR, or as soon as reasonably practicable thereafter, the department will determine whether all information ...”. WFPA believes that it is essential that the department quickly determine whether all information for concurrence review is included in an FPA, and that the five business days should be a maximum period allowed for making this determination.

WDFW Response: WDFW agrees that as soon as possible after staff receives notification from DNR, it is essential that they determine whether all information necessary for

conducting their assessment is included within the application. With integration, WDFW staff has a reduced time period (30 days as opposed to the original 45 days) to assess the forest practices hydraulic project for consistency with fish protection standards, and to work with the applicant to attempt to resolve any concerns. For this reason, these rule procedures stress the importance of making that assessment as early as possible (within a 5-day timeframe) so that attempts can be made to obtain any missing information in time to complete the assessment, as well as to work with the applicant. Though WDFW staff will strive to meet this timeline, the department does not believe that this 5-day time period should be a requirement in rule. WDFW is also working with DNR and stakeholders to provide training and to assure that adequate guidance is included in the Forest Practices Hydraulic Project Board Manual so that applicants will be more likely to include the necessary information in designs and applications. In order to clarify WDFW's intent, the rule language will be revised to say: "Within five business days following notification from DNR, *or as soon as possible thereafter*, the department will determine whether all information, needed for assessing the hydraulic project's consistency with fish protection standards, is included in the application."

- (c) Subsection (3)(d) Concurrence Review Process, concerning the sentence: "If information is missing, the department will contact the applicant to request the missing information." WFPA proposes that the contact with the applicant should be immediate through telephone or email and not wait for the "written notification to DNR" to be prepared and sent. They suggest that the rule be modified to: "If information is missing, the department will contact the applicant immediately to request the missing information."

WDFW Response: WDFW agrees that the applicant should be contacted immediately after determining that information is missing, in order to have a higher likelihood of obtaining the missing information in time to complete the concurrence review. WDFW will include the word "immediately" in the rule language.

- (d) Subsection (3) Concurrence Review Process, concerning the last sentence in subsection (d). WFPA believes that this sentence is confusing and that it could be interpreted to mean that the department would have 30 days to complete the review after the additional information was received. WFPA proposes clarifying language to say: "The department may issue a non-concurrence on a proposed project if the applicant fails to provide the missing information in a timely manner so that the department can complete its 30-day review."

WDFW Response: WDFW agrees that this proposed language provides clarification and will modify the rule language to say "The department may issue a non-concurrence on a proposed project if the applicant fails to provide the missing information in a timely manner so that the department can complete its review within the thirty-day timeframe."

Forest and Fish Conservation Caucus (Mary Scurlock)

- (a) Maintenance of WDFW Capacity to effectively review those projects it is statutorily obligated to review (concurrence review), as well as projects within its authority and discretion to review: The Conservation Caucus believes that it is critical that WDFW's capacity is adequately maintained even though HPA permit authority is being transferred to DNR. This will now be a function of the funding made available under an interagency contract with DNR as specified in the 12/20/12 MOA. The Conservation Caucus understands that this is not an issue that is within the purview of the administrative rulemaking currently underway, but it is a critical part of maintaining fish protection.

WDFW Response: WDFW agrees that this is an issue of concern, but not applicable to the current rule-making.

- (b) Full expression of fish protection standards in the Forest Practices Rules: The Conservation Caucus is expressing their interest/concern that fish protection standards not be weakened as a result of integration. They express their interest in DNR's revision of the forest practices rules and board manual and the concern that the rules fully include fish protection standards. They also express their concern that WDFW's level of participation be maintained.

WDFW Response: WDFW agrees with the Conservation Caucus's concerns; however, these particular concerns are not relevant to the current rule-making.

- (c) WDFW's 30-day period to determine whether a project is consistent with fish protection standards includes the time period for determining if an application is complete. The Conservation Caucus is concerned that regardless of when the application is determined to be complete by WDFW (the 5-day completeness review), it must transmit its concurrence/non-concurrence decision in writing within 30 days to DNR (effectively reducing the review period to 25 days or less). This is a significant change from WDFW's current procedures (from 45 days to 30 days), and seems likely to diminish WDFW's ability to fully evaluate FPHPs, as well as increasing the likelihood for non-concurrence. The Conservation Caucus believes that existing statutorily mandated approval timelines constrain WDFW to the 30-day review and concurrence timeline; however they also believe that the statutes do not necessary constrain WDFW from having additional time to determine if the application is complete. The Conservation Caucus proposes that the rules be changed to start the 30-day WDFW review clock after the 5-day completeness determination is made.

WDFW Response: WDFW shares the concerns that the Conservation Caucus has expressed; however, no rule modifications are needed. During development of these rules, WDFW and DNR staff reviewed the relevant statutes and sought legal consultation

for this issue. Based on current statutes (RCW 76.09.490, RCW 76.09.050(5), and RCW 76.09.060(1)(f)):

- DNR is responsible for determining if FPAs are complete, including the forest practices hydraulic projects included as part of the FPA.
- DNR has two days to determine if the FPA is complete and to transmit the application to WDFW.
- DNR is authorized to dictate the form and contents of the FPA, including plans and specifications for forest practices hydraulic projects.

In order to address this concern, WDFW and DNR are working together to make sure that: adequate guidance is included in the Board Manual pertaining to complete and high quality designs and applications; adequate training is provided to agency staff, applicants, and stakeholders; checklists are developed for DNR staff who screen FPAs for completeness; FPAs and instructions for completing applications are revised to include hydraulic project needs; and pre-application consultation is strongly encouraged so that forest practices hydraulic project proposals/designs are appropriate for meeting fish protection standards before the application is submitted to DNR.

Mike Maudlin, Nooksack Indian Tribe

- (a) Since there is no requirement for coordination with fisheries co-managers or other state and federal agencies in the hydraulic code, it is critical that other stakeholders are kept informed of decisions, regarding management of aquatic resources. The tribes would like to see improved coordination between the WDFW and DNR forest practices foresters, fisheries co-managers and other stakeholders. Decisions regarding aquatic resources need to be made more cooperatively with fisheries co-managers, particularly, guidance from the department on mitigation requirements associated with the impacts of forest practices hydraulic projects.

WDFW Response: WDFW does not believe it is necessary to modify the rules for the concurrence procedures in order to address this concern. WDFW does, however, value tribal expertise in protection of aquatic resources and is interested in looking for additional opportunities for improving coordination with the tribes. As we look for opportunities to improve coordination, we must also take into account that WDFW has a reduced timeline for assessing consistency with fish protection standards, working with applicants to address concerns, and getting comments or concurrence determinations to DNR. With DNR's current process, tribes will be able to receive the same or similar notification as WDFW through FPARS. If after reviewing FPAs and the associated forest practices hydraulic projects, the tribes have concerns, they can contact the WDFW biologist to provide those concerns and recommendations for solutions. WDFW is also

currently working on an improved on-line hydraulic project application process, which will hopefully also help to improve coordination and efficiency of forest practices hydraulic project reviews.

- (b) The tribes believe that in addition to the cases identified in subsection 3(a), it is critical that WDFW biologists carefully review and provide written comment on all forest practices hydraulic projects that deal with culverts, regardless of the channel slope (5%). The lower gradients tend to be the most productive habitats and culvert installations can have unique challenges, such as channel migration or avulsion. Providing written comments will help provide assurances that these projects have undergone adequate review and allow co-reviewers to track the decision-making process.

WDFW Response: No modifications to the rules are needed. WDFW agrees with the tribe's concerns. As specified in subsection 2(b), the department must review all forest practices hydraulic projects pertaining to fish-bearing streams and provide comments to DNR or document that the review has occurred. The project types identified in subsection 3(a) for the concurrence review process were specified in Senate Bill 6406, and thus required in rule; however, WDFW agrees that hydraulic projects in lower gradient streams can also be a high priority and will need review and, in many cases, comments to DNR. It will also be important for tribal review, comment and coordination on these hydraulic projects.

Alex Nagygyor (Department of Natural Resources)

- (a) Alex believes that, in general, the concurrence review should give more responsibilities to DNR Forest Practices personnel and allow WDFW to spend their time on the more challenging projects.

WDFW Response: Comment noted; no need for rule modification. The project types specified for WDFW's concurrence review were specified in Senate Bill 6406.

- (b) Alex requests that the reference to 5% gradient be removed and replaced with 10% and a BFW greater than 5 ft. He mentions that many streams exceed 5% and have a BFW of less than 5 ft., and that these smaller streams can be designed easily following the stream simulation process. He believes that trained forest practices staff will be able to determine very quickly when they have a proposal for a stream that does not meet WDFW criteria and then engage the expertise of WDFW.

WDFW Response: Comment noted; no need for rule modification. As mentioned in the comment above, the 5% gradient was specified in Senate Bill 6406. Over time, we may be able to adapt the rules and processes, as we learn what is and isn't working well.

(c) Alex believes that bridge repairs and maintenance outside of the wetted perimeter do not need WDFW expertise. Forest practices foresters should be able to condition forest practices to meet environmental protection needs. For example, replacing guard rail, decking or placing or removing a temporary bridge on existing footing is an activity that forest practice foresters could permit.

WDFW Response: Comment noted; no rule revisions are needed. After DNR staff has had training and experience with hydraulic projects, WDFW staff will most likely be prioritizing their efforts towards those hydraulic projects with highest risk and complexity.

(d) Alex asks the question: Are fish protection standards laws, guidance, or something else?

WDFW Response: Fish protection standards (performance objectives or required outcomes) are required in rule. WDFW also has provisions for meeting the fish protection standards, which are also contained in rule. The Forest Practices Board Manual for forest practices hydraulic projects contains guidance for meeting fish protection standards. A greater part of the guidance provides more clarity on the provisions for meeting the standards.