Washington Department of FISH and WILDLIFE

Concise Explanatory Statement

Hydraulic Code Rules Chapter 220-660 WAC

Incorporating elements of 2SHB 1579 into HPA rules

WAC 220-660-050 - Procedures - Hydraulic Project Approvals
WAC 220-660-370 - Bank Protection in saltwater areas
WAC 220-660-460 - Informal appeal of administrative actions
WAC 220-660-470 - Formal appeal of administrative actions
WAC 220-660-480 - Compliance with HPA Provisions

Washington Department of Fish and Wildlife
Habitat Program
Protection Division
Olympia, Washington

April 24, 2020

Mission
of the
Washington Department of Fish and Wildlife

To preserve, protect and perpetuate fish, wildlife, and ecosystems while providing sustainable fish and wildlife recreational and commercial opportunities.

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INTRODUCTION

This report presents Washington Department of Fish and Wildlife (department) concise explanatory statement for 2020 rule adoption that incorporates elements of Second Substitute House Bill 1579 (2SHB 1579) into the Hydraulic Code rules, pursuant to the Administrative Procedure Act (APA) Revised Code of Washington (RCW) section 34.05.325 - *Public Participation - Concise Explanatory Statement*. Rules proposed for amendment include Hydraulic Code Rules in sections 220-660-050, 220-660-370, 220-660-460, 220-660-470 and 220-660-480 of the Washington Administrative Code (WAC). The department writes and adopts Hydraulic Code Rules to implement Chapter 77.55 RCW titled *Construction Projects in State Waters*.

Analyses relating to APA sections RCW 34.05.320 - Notice of proposed rule and RCW 34.05.328 - significant legislative rules are provided in a separate document entitled *Incorporating Elements of 2SHB 1579 into HPA Rules Regulatory Analyses.* Analyses relating to the Regulatory Fairness Act, chapter 19.85 RCW, are also provided in the *Regulatory Analyses* document. This document is available on the department's HPA rule making web page at https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking.

This *Concise Explanatory Statement* is organized in relation to APA section 34.05.325 Public Participation - Concise Explanatory Statement, as follows:

Section 1 Describes the rules affected as part of this rule making

Section 2 Background - Summary of Rule Making

Section 3 Reasons for adopting these rules

Section 4 Differences between proposed rules and rules as adopted

Section 5 Comments received during the official public comment period

Documents relating to this rule making include WSR 19-19-056 (CR-101) filed September 16, 2019 and appearing in Washington State Register 19-19 published on October 2, 2019; WSR 19-24-081 (CR-102) filed December 3, 2019 and appearing in Washington State Register 19-24 published on December 18, 2019; and WSR 20-06-053 (Supplemental CR-102) filed March 2, 2020 and appearing in Washington State Register 20-06 published on March 18, 2020.

The public comment period for this rule making was open from December 3, 2019 through 5pm January 21, 2020. The Washington Fish and Wildlife Commission held a public hearing on January 17, 2020 at 12:30 p.m. in Olympia, Washington. A second public comment period for this rule making was open from March 5, 2020 through 5pm April 10, 2020. The Washington Fish and Wildlife Commission held a second public hearing on April 10, 2020 at 10:45 a.m. by a live video conference. An audio transcript of both hearings is available at https://wdfw.wa.gov/about/commission/meetings/2020.

SECTION 1: Rules affected by this rule making

Amended Sections:	WAC 220-660-050 - Procedures - Hydraulic Project Approvals WAC 220-660-370 - Bank Protection in saltwater areas WAC 220-660-460 - Informal appeal of administrative actions WAC 220-660-470 - Formal appeal of administrative actions WAC 220-660-480 - Compliance with HPA Provisions
New Sections:	None
Repealed Sections:	None

SECTION 2: Describe the proposed rule and its history

Rule amendments are proposed as necessary to implement elements of 2SHB 1579[1] - a bill passed by the legislature during the 2019 legislative session. This bill implements recommendations of the Southern Resident Orca Task Force (task force) related to increasing chinook abundance. The bill adds a procedure for potential applicants to request a preapplication determination of whether a project proposed landward of the ordinary high water line (OHWL) requires a Hydraulic Project Approval (HPA). The bill also enhanced authority for the department's civil compliance program and repealed a statute relating to marine beach front protective bulkheads or rockwalls for single-family residences.

2.1 Specific Objectives for this Rule Making

In order to implement 2SHB 1579, the department's objectives in this rule making include the following:

- ✓ Add a procedure for prospective applicants to request and receive a determination of whether a project proposed landward of the OHWL requires an HPA;
- ✓ Add language clarifying that the department can disapprove a new application if the applicant has failed to pay a civil penalty, respond to a stop-work order, or respond to a notice to comply;
- ✓ Strike language from rule that references the repealed marine beach front protective bulkheads or rockwalls statute (RCW 77.55.141);
- ✓ Require saltwater bank protection location benchmarks to be recorded on plans as part of a complete HPA application;
- ✓ Clarify the compliance sequence, which ranges from seeking voluntary compliance through technical assistance and correction requests to the use of increasingly stronger civil enforcement tools and add the new compliance tools to the rules;
    - Stop Work Orders;

[1] Laws of 2019, chapter 290; Codified as RCWs 77.55.400 through 77.55.470.

- Notice to Comply;
- Notice of Civil Penalty;

✓ Specify a maximum civil penalty amount; and

✓ Provide a civil penalty schedule and specify signature authority for certain compliance tools, as directed by 2SHB 1579.

2.3 History of this Rule Making Action

Southern Resident Killer Whale Task Force.

In 2018, Governor Inslee issued Executive Order 18-02 which, among other things, created the Southern Resident Killer Whale Task Force (Task Force). Executive Order 18-02 directed the Task Force to identify, prioritize, and support the implementation of a plan to address three threats to southern resident orca whales as identified by the Executive Order: (1) prey availability; (2) contaminants; and (3) disturbance from vessel noise.

The Task Force issued its report and recommendations on November 16, 2018. In its report, the Task Force recommended increased application and enforcement of laws that protect salmon and forage fish habitat. This included the recommendation that the department, together with the Washington Departments of Natural Resources (DNR) and Ecology, strongly apply and enforce existing habitat protection and water quality regulations and provide the department, DNR, and Ecology with the capacity for implementation and enforcement of violations. The Task Force specifically recommended that the department be equipped with civil enforcement tools equivalent to those of local governments, Ecology, and DNR, to ensure compliance with chapter 77.55 RCW and chapter 220-660 WAC.

2019 legislative session

2SHB 1579 (Laws of 2019, c. 290) implements recommendations of the Task Force related to increasing chinook abundance. The original bill focused on implementing Task Force recommendations by providing tools to protect salmon habitat when development permits are issued along marine and freshwater shorelines. Strengthening the Hydraulic Code Statute helps ensure development projects that affect Chinook salmon and their habitats do no harm. The bill set a maximum civil penalty amount of $10,000 per violation of chapter 77.55 RCW or chapter 220-660 WAC.

On April 10, 2019, the Senate amended the bill through a striker amendment, which added an entirely new section providing for the construction of three river management demonstration suction dredging projects “to test the effectiveness and costs of river management strategies and techniques.” (Section 13 of the bill). These demonstration projects were not among the Task Force’s November 16, 2018, recommendations. The striker amendment also made the maximum penalty amount for violations of the Hydraulic Code Statute contingent upon the passage of the newly added section. More specifically, the amendment provided that if the new section passed,

penalty amounts would be capped at $10,000 per violation, but if it did not pass, penalty amounts would be capped at $100 per violation of chapter 77.55 RCW or chapter 220-660 WAC.

The Governor vetoed the new section and contingency language, providing the following veto message:

> *I am vetoing Section 13, which would require certain state agencies and local governments to identify river management demonstration projects in Whatcom, Snohomish, and Grays Harbor counties, because it is not a recommendation of the task force. As such, it is outside of both the title and scope of the bill, in violation of Article 2, Sections 19 and 38 of our constitution. Section 13 is unrelated, unnecessary and an unfortunate addition to this important bill about salmon and orca habitat and recovery.*
>
> *In addition, I am also vetoing Section 8(1)(a), which establishes maximum civil penalty amounts for violations of Chapter 77.55 RCW (Construction Projects in State Waters). Consistent with the task force's recommendations, the original bill established a maximum civil penalty of up to ten thousand dollars for each violation. When the Legislature amended the bill to add Section 13, it simultaneously amended Section 8 and tied the original civil penalty amount to passage of Section 13. It did so by reducing the maximum civil penalty to "up to one hundred dollars" if Section 13 is not enacted by June 30, 2019. By making the original civil penalty amount contingent on passage of an unconstitutional section of the bill, the Legislature further compounded the constitutional violation. In addition, by structuring the contingency language within a subsection of Section 8, the Legislature intentionally attempted to circumvent and impede my veto authority by entangling an unrelated and unconstitutional provision within a recommendation of the task force. In vetoing this subsection, I direct the department to continue to use its authority to secure the effect of the statute, to establish a maximum civil penalty not to exceed the penalty amount established in the original bill, and to use its rulemaking authority to support these efforts as needed.*

Maximum penalties are thus proposed pursuant to the legislature's original language for HB 1579. 2SHB 1579 as enacted directs the department to adopt a penalty schedule in rule. The department determined that other statutory elements presented the bill as enacted should also be reflected in rule to reduce confusion and increase transparency for those affected by the changes.

Rulemaking Chronology

July 28, 2019: 2SHB 1579 became effective.

September 13, 2019: The department initiated government-to-government consultation, inviting tribes with questions or comments about the proposal to meet with the department.

September 16, 2019: Filed CR-101 Preproposal Statement of Inquiry with the Washington State Code Reviser, and the notice published in Washington State Register (WSR) 19-19 on October 2, 2019.

September 16 and 17, 2019: Notified state and federal agencies and key stakeholders that it had filed a Preproposal Statement of Inquiry (CR-101) this rule proposal, inviting comments on scoping the rules.

September 26, 2019: Presented rule change objectives and penalty schedule alternatives to the Hydraulic Code Implementation Citizen Advisory Group members for their feedback to aid in shaping the proposed rules.

October 16, 2019: Received a State Environmental Policy Act exemption for the rule making.

October 22, 2019: Held a conference call with the Hydraulic Code Implementation Citizen Advisory Group members to discuss proposed rule language.

November 19, 2019: Shared the proposed rule changes with the Hydraulic Code Implementation Citizen Advisory Group members and received member comments on the draft language.

December 3, 2019: Filed a CR-102 with the Washington State Code Reviser, which published in WSR 19-24 on December 18, 2019.

December 3, 2019 through January 21, 2020: Public comment period open for 2SHB 1579 rule making. Materials were posted online at https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking.

December 16 and 17, 2019: Notified state and federal agencies and key stakeholders that the department had filed a Notice of Proposed Rule Making (CR-102) for this rule proposal, inviting comments the rules.

January 16, 2020: Sent reminder to Tribes regarding the public comment period.

January 17, 2020: Washington Fish and Wildlife Commission conducted a public hearing on the rule proposals.

January 23, 2020: Hydraulic Code Implementation Citizen Advisory Group members reviewed the public comments received and provided recommendations on how the department should address them.

February 21, 2020: Fish and Wildlife Commission briefed on the supplemental CR-102 and the revised rule making timeline.

March 2 - 4, 2020: Filed a CR-102 with the Washington State Code Reviser, which published in WSR 20-06 on April 7, 2020.

February 27 – March 4, 2020: Notified Tribes, state and federal agencies and key stakeholders including those who previously commented that the department had filed a supplemental Notice of Proposed Rule Making (CR-102) for this rule proposal, inviting comments those proposed changes.

March 5, 2020 through April 10, 2020: Public comment period open for 2SHB 1579 rule making supplemental CR-102. Materials were posted online at https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking.

April 10, 2020: Washington Fish and Wildlife Commission conducted a public hearing on the rule proposals.

April 24, 2020: Washington Fish and Wildlife Commission adopted rule changes proposed.

SECTION 3: Reasons for Adopting these Rules

RCW 34.05.328 (1)(b): "[A]n agency must … Determine that the rule is needed to achieve the general goals and specific objectives stated under [RCW 34.05.328(1)(a) – referencing to the statute the rule implements], and analyze alternatives to rule making and the consequences of not adopting the rule;"

3.1 Why is the Proposed Rule Needed to Achieve the General Goals and Specific Objectives of RCW 77.55?

1. **The proposed rule is needed to implement elements of 2SHB 1579, as enacted, into chapter 220-660 WAC, because those elements establish and/or alter compliance and enforcement tools to help ensure that hydraulic projects provide adequate protection of fish life.** The proposed rule clarifies how the department will provide preapplication determinations of whether an HPA is needed for specific projects and implements new civil enforcement authorities, such as Stop Work Orders, Notices to Comply and Notices of Civil Penalty. In addition, rules that implemented special permitting exceptions for single-family residence marine beach front protective bulkheads or rockwalls are removed because the enabling statute for such exemptions was repealed by 2SHB 1579.
2. **The proposed rule is needed to implement a penalty schedule and to specify signature authorities for certain compliance and enforcement tools, as required in 2SHB 1579.** A penalty schedule is provided so permittees can understand how civil penalties are assessed for certain violations of chapter 77.55 RCW and chapter 220-660 WAC. The legislature directed the department to specify what is meant by the "senior or executive department personnel" language stated in the statute, and the proposed rule is needed in order to comply with this legislative direction.
3. **The proposed rule is needed to change the provision benchmarks for saltwater bank protection projects from a discretionary HPA provision to a required element included on plans submitted as part of a complete HPA application.** Research has concluded that benchmarks are necessary in order to implement the other compliance elements of 2SHB 1579. In addition, requiring benchmarks on the plans will eliminate the need for a project proponent to conduct an additional site visit to establish the benchmarks after the HPA is issued but before construction of the proposed project subject to the HPA. If benchmarks are established by the project proponent during the design phase, this will eliminate the cost of such an additional site visit. It will also allow the biologist to confirm prior to issuing the HPA that the location of the bank protection complies with the regulations, thereby helping the permittee ensure compliance with chapter 220-660 WAC.

3.2 Consequences of not adopting the rule

Declining to adopt rules would be inconsistent with statute with respect to compliance tools, penalties, pre-application determinations, and single-family residence marine beach front protective bulkheads or rockwalls.

Considerations for assessing the penalty amount would not be as transparent for people receiving civil penalty notices from the department without doing so through formal rulemaking procedures.

Lack of a benchmark requirement means that a project proponent must conduct an additional site visit to establish the benchmarks after the HPA is issued but prior to construction. It also means the biologist cannot confirm the location of the bank protection prior to issuing the HPA. Research suggests this leads to increased noncompliance.

SECTION 4 Differences between Proposed and Adopted Rules

4.1 Describe the proposed rule and indicate adoption changes

Table 1 presents differences between the rule proposed in the CR-102 and the Supplemental CR-102. The table presents changes prior to adoption in bright yellow shading.

Table 1: Differences between CR-102 version and he Supplemental CR-102

WAC Section	Proposed change from CR-102	Reason for change
220-660-050(9)(c)(iii)(D)	A description of the measures that will be implemented for the protection of fish life, including any reports assessing impacts from the hydraulic project to fish life and their habitat ((~~and habitat that supports fish life~~)), and plans to mitigate those impacts to ensure the project results in no net loss;	This change is needed to reinforce that habitat that supports fish life must be protected as well.
220-660-370	Appropriate methods to assess the need for marine bank protection and, if needed, to design marine bank protection are available in the department's *Marine Shoreline Design Guidelines*, as well as other published manuals and guidelines.	A change is needed to clarify that the *Marine Shoreline Design Guidelines* is also an assessment tool.
220-660-370(3)(d)	An HPA application for ((~~a~~)) new ((~~bulkhead or other~~)) bank protection, ((~~work~~)) or the replacement or rehabilitation of ((~~a bulkhead or other~~)) bank protection ((~~structure~~)) that extends waterward of ((~~the~~)) an existing bank protection structure must include a site assessment, alternatives analysis and design rationale for the	To eliminate confusion about who is a qualified professional the examples are removed. Qualified professional is defined in WAC 220-660-030(121).

WAC Section	Proposed change from CR-102	Reason for change
	proposed method prepared by a qualified professional ~~(((such as a)) e.g., coastal geologist, geomorphologist((, etc.))) for the proposed ((project and selected technique)) method~~. The department may grant an exemption depending on the scale and nature of the project. ((~~In addition, this requirement does not apply to projects processed under RCW 77.55.141. This report must include~~)) The applicant must submit ~~a~~ the qualified professional's report to the department as part of a complete application for an HPA that includes:	
220-660-370(5)(a)	The department ((~~may require a person to establish~~)) requires that plans submitted as part of a complete application show the horizontal distances of the structure(s) from ((~~a~~)) permanent local benchmark(s) (fixed objects) ((~~before starting work on the project~~)). Each horizontal distance shown must include the length and compass bearing from the benchmark to the waterward face of the structure(s). The benchmark(s) must be located, marked, and protected to serve as a post-project reference for at least ten years from the date the HPA application is submitted to the department.	Proposed change is needed to clarify these are local benchmarks so a survey with designated vertical or horizontal datum is not required.
220-660-480	A project proponent must comply with all provisions of chapter 77.55 RCW, this chapter, and the HPA. If a project proponent violates chapter 77.55 RCW or this chapter or deviates from any provision of an HPA issued by the department, the department may issue a correction request, a stop work order, a notice to comply, or a notice of civil penalty. The term "project proponent" has the same definition as in RCW 77.55.410. This section does not apply to a project, or to that portion of a project, that has received a forest practices HPA from the department of natural resources under chapter 76.09 RCW. The department is responsible to help the regulated community understand how to comply. The department achieves voluntary compliance through	Proposed change is needed to clarify the compliance sequence in the compliance section introduction.

WAC Section	Proposed change from CR-102	Reason for change
	education and technical assistance when the department advises and consults on permits, conducts compliance checks, performs on-site technical visits, or provides guidance materials written in easily understood language. When the department cannot get voluntary compliance by issuing a correction request, the department may use a range of increasingly strict enforcement tools. This ranges from issuing notices of correction and stop work orders to penalties and, when appropriate, criminal prosecution.	
220-660-480	This section does not apply to a project, or to that portion of a project, that has received a forest practices ~~HPA~~ hydraulic project (FPHP) permit from the department of natural resources under chapter 76.09 RCW.	A change is needed to avoid confusion because the Department of Natural Resources calls their permit a Forest Practices Hydraulic Project (FPHP).
220-660-480(6)(e)	Signature authority for a notice to comply: A notice to comply must be authorized by a regional habitat program manager, regional director, habitat program division manager, habitat program director, habitat program deputy director, or department director.	The change is needed to clarify who is authorized to issue a notice to comply.
220-660-480(7)(a)	The department may levy civil penalties of up to ten thousand dollars for each and every violation of chapter 77.55 RCW, this chapter, or provisions of an HPA. Each and every violation is a separate and distinct civil offense. Penalties are issued in accordance with the penalty schedule provided in subsection (8) of this section.	The change is needed clarify the civil penalty is per violation and not per violation per day.
220-660-480 (8)(d)(iii)	~~Where more than one person has committed or contributed to a violation, and the department issues a civil penalty for that violation, the department may allocate penalty amounts to each person having committed or contributed to the violation.~~ The department will determine whether all or a portion of a penalty should be assessed against a landowner, lessee, contractor or another project proponent. The department should consider the responsible party, the degree of control, the	A change is needed to clarify how a penalty amount could be divided among multiple violators.

WAC Section	Proposed change from CR-102	Reason for change
	sophistication of the party, and whether different parties conducted different violations.	
220-660-480(8)(c)	The department amended the penalty schedule to include a base penalty and numeric penalty values corresponding to the considerations listed in RCW 77.55.440: previous violation history, severity and repairability of the impacts, intent, cooperation, and reparability of adverse effects. The sum of the base civil penalty and penalty amount calculated for the considerations will determine the total civil penalty amount not to exceed $10,000 for each violation. Please refer to the proposed rule language.	A change is needed to clarify how a manager will calculate the penalty amount.

Table 2 presents differences between the rules proposed in the Supplemental CR-102 and the version adopted by the Fish and Wildlife Commission on April 24, 2020. The table presents changes prior to adoption in bright yellow shading.

Table 2: Differences between the Supplemental CR-102 and the version adopted on April 24, 2020

WAC Section	Proposed change from CR-102	Reason for change
220-660-050(13)(d)	The department may require a person to notify the department before hydraulic project construction or other hydraulic project work starts…	
220-660-480(5)(c)	Scope of a stop work order: A stop work order may require that any person stop all work connected with the ~~project~~ violation until corrective action is taken, and the department has indicated that work may resume.	

SECTION 5: Comments Received and WDFW Responses

5.1 Comments Received During the December 3, 2019 through January 21, 2020 Public Comment Period and WDFW Responses

Proposed rules were filed with the Washington State Code Reviser as WSR 19-24-081 (CR-102) on December 3, 2019 and appeared in WSR 19-24 published on December 18, 2019. The public comment period for this rule making was open from December 3, 2019 through 5 p.m. on January 21, 2020. The Commission held a public hearing on January 17, 2020 at 12:30 p.m. in Olympia, Washington.

The department emailed state and federal agencies and key stakeholders on December 17, 2020, to inform them that the proposed rules had been filed with the Code Reviser.

The related rule making documents were posted on the department's HPA Rule Making web page[2] on December 3, 2019, including copies of the CR-102, the proposed rule language, the draft Regulatory Analysis document for significant legislative rule making pursuant to the Administrative Procedure Act, and a Small Business Economic Impact Statement (SBEIS) pursuant to the Regulatory Fairness Act. The department provided an email address and postal address to which comments could be sent, as well as an online commenting form.

Names of people and organizations submitting comments are provided in Appendix A. Copies of the comment letters received are provided in Appendix C. Three letters had multiple signatures. One of those letters was signed by ten organizations that represent the environmental community.

Numbers of comments received are provided on Table 3. A total of 9 written comments were received during the formal comment period, plus four comments were given orally at the Commission's public hearing on January 17, 2020.

Table 3: Descriptive statistics for comments received

Category	Number
Support	6
Oppose	3
Other	4

Following is a summary of comments received during the formal comment period and the department responses to those comments. Comments that are not specific to the proposed rules at WAC 220-660-050, -370, -460, -470 or -480 are grouped in sections A - F. Rule-specific comments are provided on Table 4 in Section 5.3.

5.2 Non-Rule-Specific Comments Received During the December 3, 2019 through January 21, 2020 Public Comment Period

Comments in this section are grouped by topic.

A. Agency Lacks Statutory Authority to Impose Civil Penalty

One commenter requested that the department refrain from adopting the proposed rule or hold off on rulemaking pending a court decision on the validity of the Governor's veto of a portion of 2SHB 1579.

Commenter:

Building Industry Association of Washington

[2] https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking .

WDFW Response:

Rulemaking is needed for the reasons set forth in Section 3.2 of this Concise Explanatory Statement. The department presumes the constitutionality of duly enacted statutes and respectfully disagrees that it lacks statutory authority to issue civil penalties for hydraulic code violations. If rulemaking becomes necessary for the department to comply with a valid and lawful court order, then the department will engage in that process as necessary.

How the final rule reflects this comment:

No change to the rule proposal is made as a result of this comment because the comment address policy concerns that are outside the scope of the proposed rules.

B. Proposed Fine Violates Federal and State Constitutions

One commenter opposed the proposed rule because they believe the proposed maximum civil penalty amount is excessive under both the federal and state constitutional excessive fine provisions.

Commenter:

Building Industry Association of Washington

WDFW Response:

One of the Task Force's recommendations was specifically to amend the department's civil penalty statute (Former RCW 77.55.291) to provide it with enforcement tools equivalent to those of local governments, Ecology, and DNR.

The department denies any allegation that its proposed maximum amount of $10,000 for hydraulic code violations is unconstitutional. The department researched maximum civil penalty amounts imposed by other natural resources agencies in Washington state. This research showed that the department's proposed maximum civil penalty amount of $10,000 is the same as the maximum civil penalty amount that DNR may impose for violations of forest practice statutes and rules. This research also showed that the proposed maximum amount of $10,000 is less than maximum amounts the Ecology is authorized to impose for water quality violations and negligent discharges of oil to water.

Table 4: Civil penalty amounts imposed by other natural resource agencies

Agency and Topic	Civil penalty amount	Applies to…	Statutorily-prescribed basis for civil penalty adjustments	Statute citation (RCW)	Civil penalty schedule citation (WAC)
Agriculture **Pesticide Application & Sales**	$7,500 maximum	Per separate and distinct violation	Median	Chapter 17.21 RCW; RCW 15.58.335	Chapter 16-228 WAC
Agriculture **Dairy Nutrient**	Not more than $5,000 in a calendar year A discharge of pollutants into the waters of the state may be subject to a civil penalty in the amount of up to ten thousand dollars per violation per day	Paperwork: per violation "Continuing" discharge of pollutants: per violation per day	Median	RCW 90.64.102	Chapter 16-611 WAC
Ecology **Water Quality**	Minimum $500; Maximum $10,000 per violation per day	Each and every violation is a separate and distinct offense (i.e. "per violation per day")	Maximum	RCW 90.48.144	n/a
Ecology **Negligent Discharge of Oil to Water**	$100,000 per violation per day Intentional or reckless discharges of oil to water may be penalized up to $500,000 per violation per day			RCW 90.56.330	
DNR **Forest Practices**	Minimum $500 to $2,000 Maximum $10,000	Per violation	Minimum or "Base"	RCW 76.09.170 through 76.09.280	WAC 222-46-065

How the final rule reflects this comment:

No change to the proposed rule language is planned as a result of this comment. The department's proposed maximum $10,000 civil penalty amount for hydraulic code violations is consistent with amounts imposed by other natural resources agencies in the State of Washington

for violations of environmental laws and regulations, and it is consistent with Task Force recommendations.

C. Environmental protection

One commenter encouraged the department to use and incorporate language throughout the chapter to reduce impacts to fish life and habitat, strengthen mitigation, and stress the importance of healthy shorelines for salmon.

Commenter:

Washington Environmental Council

WDFW Response:

Five sections are proposed for amendment. We believe these sections achieve protection of fish life per the department's statutory authority (Chapter 77.55 RCW).

How the final rule reflects this comment:

No change is proposed because commenter's suggestion is already incorporated into the proposed rule as written. We believe the proposed rules incorporate the suggestion in a manner that is consistent with our statutory authority and the scope of this rulemaking.

D. Evaluation of Small Business Size

One commenter suggested that the department should consider using the Median rather than the Mean (Average). There are many businesses registered that have very little to no activity. Those businesses bring the mean numbers down but have little effect on the median. For the purpose the statistics are being conducted, median would be a better measure.

Commenter:

Shane Phillips

WDFW Response:

Using the median rather than the mean of the annual revenue or income and annual payroll would increase the minor cost threshold amount if businesses with very little to no activity are skewing the mean. However, a few very large businesses could also decrease the minor cost threshold. In either case, the $100 minor cost threshold for individuals/landowners and nonprofit businesses would remain unchanged. This threshold determines whether the cost is more than minor and potentially disproportionate.

The Small Business Economic Impact Statement minor-cost threshold calculator created by the State Auditor's Office calculates 1% of the average annual payroll and 0.3% of the average annual revenue for each 4- or 6-digit North American Industry Classification System (NAICS) code[3].

[3] Small Business Economic Impact Statement (SBEIS) – Minor Cost Threshold Calculator https://www.oria.wa.gov/Portals/_oria/VersionedDocuments/RFA/Regulatory_Fairness_Act/Minor%20Cost%20Threshold%20Calculator%20Instructions.pdf

How the final rule reflects this comment:

No change to the rule proposal is made as a result of this comment because the comment addresses the economic analysis, not the substance of the proposed rules.

E. Costs to comply with the rules

One commenter stated that the department is using labor rate information incorrectly. Labor rate statistics cover what an employee is paid, not the cost is to the business. The cost of a WDFW employee is much greater than what shows up in their payroll check due to costs for benefits, overhead (building, working space, power, etc.). So, there is an overhead that gets marked up on that labor rate. The hourly rate charged by a licensed civil engineer for this type of work varies from $85 to $150 per hour. Costs for compliance should be based on an hourly rate of $100 and not $46.47 billable.

Commenter:

Shane Phillips

WDFW Response:

The department is trying to determine what the cost to a small business would be if it hired a qualified professional to establish and document the local benchmarks on plans submitted as part of an HPA application. The hourly cost provided in the SBEIS is from a reliable source; however, we will also include the $100 hourly rate in the analysis in an abundance of caution.

How the final rule reflects this comment:

No change to the rule proposal is made as a result of this comment because the comment addresses the economic analysis. However, the final SBEIS and Cost/Benefit Analysis will be amended to also include the hourly rate suggested by the commenter.

F. Outreach and Education

Two commenters testified that the department should provide technical assistance materials and training to businesses.

Commenter:

Building Industry Association of Washington

WDFW Response:

The department will provide technical assistance materials and training to businesses.

How the final rule reflects this comment:

No change to the rule proposal is made as a result of this comment because the comment addresses implementation of the rules. However, the Implementation Plan will include this activity.

5.3 Comments on Specific Rule Language Received from December 3, 2019 through January 21, 2020

WDFW received several comments about individual subsections of the proposed rules during the public comment period from December 3, 2019 through January 21, 2020. These comments and responses are presented in Table 5.

Table 5: Comments received about specific rule language

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
WAC 220-660-050 – Procedures – Hydraulic Project Approvals			
220-660-050(9)(c)	Retain "habitat that supports fish life" to clarity that the application requirements include specific evaluation of impacts to habitat that supports fish life.	The rules refer to "fish life" and "fish life and habitat that supports fish life". There is not a consistent use of one or the other. Since "Protection of fish life" is defined in 030(19) this language is superfluous. However, since this language applies to how to get an HPA, we'll retain the concept.	Final proposed rule reflects this change to reinforce that habitat must be protected to protect fish life.
220-660-050(13)(b)	Add "and" to the following: "Based on current rules the procedure for an emergency, imminent danger, chronic danger, or an expedited HPA requires that these projects meet the mitigation provisions and requirements in WAC 220-660-080 AND the provisions in WAC 220-660-100 through 220-660-450 that are included in an HPA."	The proposed change reads "However, these projects must ((~~meet the mitigation~~)) comply with the provisions in ((~~WAC 220-660-080 and the provisions in WAC 220-660-100 through 220-660-450~~)) this chapter that are included in an HPA." The proposed language is more encompassing than just listing the specific sections that were called out. Any mitigation required must be included specifically or by reference in the HPA.	No change is proposed because commenters' language is interchangeable with WDFW's language.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-050(13)(b)	There are times when provisions are not written into the HPA. To resolve this problem, we suggest the language be revised to require that projects meet the mitigation provisions in WAC 220-660-080 *and the applicable technical provisions in WAC 220-660-100* through *220-660-450.*	The department must include all applicable provisions of WAC 220-660 in an HPA. However, in situations where an applicable provision is omitted, the department will not enforce the omitted provision against the permittee.	No change is proposed because the department will not enforce a provision omitted from an HPA against a permittee.
220-660-050(13)(c)	Builders may have inconsistent work schedules due to inclement weather or poor working conditions causing them to put the project on hold. Working against the department's time limitation makes it more difficult to ensure quality work in order to comply, thus subjecting them to high fines.	Timing limitations are necessary to protect fish life during vulnerable life history stages. However, we do work with permittees to accommodate work schedules if we can meet our legal mandate. 220-660-050(13)(e) allows a permittee to request a minor modification of the work timing without requiring the reissuance of the HPA, and 220-660-050(15) allows a permittee to request a major time extension or permit extension. This requires the reissuance of the HPA.	No change is proposed because no specific changes to proposed rules were recommended.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-050(19)(a)	WSDOT would like clarification that state agency applicants are included in the "project proponent" definition.	The definition of project proponent in RCW 77.55.420(3) does include state agencies. The term "project proponent" means a person who has applied for a hydraulic project approval, a person identified as an authorized agent on an application for a hydraulic project approval, a person who has obtained a hydraulic project approval, or a person who undertakes a hydraulic project without a hydraulic project approval. A "person" is defined in WAC 220-660-030(113) as an applicant, authorized agent, permittee, or contractor. The term person includes an individual, a public or private entity, or organization.	No change is required because a state agency is a project proponent.
220-220-050(19)(b)	If a WSDOT contractor fails to comply with an order or notice, will the department refuse to accept an HPA application from WSDOT?	As the permittee and easement holder, WSDOT would be notified by the department if we issued an order or notice to a contractor. We assume that WSDOT would ensure that a WSDOT contractor complied with an order or notice.	No change is proposed. WDFW and WSDOT have a history of effectively working together to quickly resolve contractor issues. WDFW doesn't anticipate any change to our working relationship.
WAC 220-660-370			
220-660-370	The reference to the *Marine Shoreline Design Guidelines* should first emphasize the use of the guidelines to determine if protection is needed at all.	The department acknowledges reference to the *Marine Shoreline Design Guidelines* doesn't state it's also an assessment tool.	Final proposed rule reflects this change to clarify the purpose of the MSDG.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-370(1)	WSDOT appreciates and supports the change from "bulkhead" to "bank protection structure" because it's a clearer description.	Comment noted.	No change is proposed because no specific change to proposed rules was recommended.
220-660-370(1)	Language should not suggest that soft shore techniques eliminate physical alteration of the beach. This is not accurate and should be amended. While soft armoring may not have the same impact as hard armoring, impacts and changes to beach processes and fish habitat are still created and should be reflected in the description.	The proposed language aligns with *Your Marine Waterfront: a guide to protecting your property while promoting healthy shorelines.* The second to the last sentence in the subsection states "Each type of approach has varying degrees of impact." While some soft shore techniques can physically alter the beach (often temporarily) and disrupt (slow) beach process, soft bank projects do not eliminate the beach processes or fish habitat. In addition, many soft shore techniques are also used in beach restoration. Examples include the placement of large wood and beach nourishment. For this reason, the proposed language is more appropriate.	No change proposed because WDFW's language is consistent with published guidance and the commenters' language does not change the effect of the rules.
220-660-370(2)	Existing rule language outlining armoring related impacts to fish life should be retained and should be expanded to include other ecosystem features and functions.	The proposed language aligns with *Your Marine Waterfront: a guide to protecting your property while promoting healthy shorelines.* The risk to fish life from a given project is project specific. As a result, the fish life subsections are not intended to be an exhaustive list of concerns.	No change proposed because WDFW's language is consistent with published guidance and the commenters' language does not change the effect of the rules.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-370(3)(b)	Removal of "bulkhead" to "hard structure" and "beach nourishment/woody material" to "soft structure" may cause lack of clarity and lacks specificity for builders.	WDFW sought additional clarification from the commenter about this comment. WDFW received the following "It is unclear how to remove the structure. How do builders prove that the first option is not available and therefore need to move on to the next option"? The site assessment, alternative analysis, and design rationale included in the report prepared by a qualified professional will specify the least impacting technical feasible alternative. An HPA issued for removal of a bank protection structure will have provisions that instruct the permittee how to remove the structure.	No change is proposed. However, clarification is provided.
220-660-370(3)(b)	This section should lead with the rules related to the requirement for a risk and needs assessment and evaluation of the least impacting method report should a protection need be documented.	The standard pattern for the rules is to specify what needs to be done followed by how it must be done. The proposed language follows this pattern.	No change is proposed because the proposed language follows the standard pattern.
220-660-370(3)(b)	Add language to require an applicant to prove that the lesser impacting techniques within the hierarchy have been used or are not possible before moving on to subsequent levels in hierarchy	The modified existing language states "A person must use the least impacting technically feasible bank protection alternative". The justification for the proposed bank protection design is documented in the required report prepared by a qualified professional.	No change is proposed because the intent of the commenters' recommendation is captured in the proposed language.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-370(3)(b)	Move the hierarchy position of construction of an upland retaining wall to be less impacting than soft armoring techniques, if that construction is well beyond the shoreline jurisdiction.	The hierarchy in the proposed rules assumes the purpose of the upland retaining wall is to stop bank erosion. The construction of retaining walls on the slope often requires the removal of riparian vegetation. Soft structures are designed to slow but don't stop erosion. In addition, riparian vegetation is usually not or minimally impacted by the construction of soft structures.	No change is proposed because the intent of the commenters' recommendation is captured in the proposed language.
220-660-370(3)(d)	Designers may not always be licensed geologists or geomorphologists. Would the department allow designs from non-licensed geologists or geomorphologists?	Qualified professional is defined in WAC 220-660-030(121). The current rule language provides examples of qualified professionals the performs this type of work. To eliminate confusion about who is a qualified professional, the department will remove the examples from the rule language and rely on the definition in WAC.	Final proposed rule reflects this change to eliminate confusion.
220-660-370(3)(d)	Require the risk analysis and related evaluation be performed by a coastal geologist or coastal geomorphologist.		
220-660-370(3)(d)	The discipline of "coastal engineer" should be added as that is one of the critical professional disciplines needed for this type of assessment.		

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-370(4)	Clarify that maintenance of existing projects is exempt from these requirements.	This subsection states that this applies to new bank protection or replacement or rehabilitation of bank protection that extends waterward of the existing bank protection structure. WAC 220-660-030(123) defines rehabilitation as major work required to restore the integrity of a structurally deficient or functionally obsolete structure. This can include partial replacement of a structure. WAC 220-660-030(124) defines replacement as the complete removal of an existing structure and construction of a substitute structure in the same general location. Maintenance is defined in WAC 220-660-030(87) as repairing, remodeling, or making minor alterations to a facility or project to keep the facility or project in properly functioning and safe condition. The requirements in this subdivision do not apply maintenance work as defined in this chapter.	No change is proposed because commenters' suggestion is already incorporated into the proposed rule as written.
220-660-370(5)	Require that specific project location coordinates be added in project plans to allow for more streamlined mapping and documentation of armoring for monitoring and recovery efforts.	The distance and bearing from benchmarks (fixed objects) to the waterward face of authorized bank protection structure is needed to verify that the location of the structure complies with the plans cited in the HPA. A benchmark can be a corner of a house, a tree or another object	Final proposed rules will reflect these are local benchmarks.
220-660-370(5)	Specific location coordinates should be a required with the benchmarks.		

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-370(5)	Provide more leeway on the benchmark requirement depending on the scale and location of the project since it requires survey crews. The rule should also clarify the frequency of measuring the benchmarks.	that's unlikely to move over time. A property owner, contractor or other layperson can establish benchmark(s) and measure to the waterward face of the structure. A formal survey is not needed. The distance and bearing from each benchmark should only have to be measured once by the applicant so they can include the information on the plans submitted with their application. The biologist and/or the compliance inspector will likely verify the benchmark information before the project is constructed. WDFW doesn't believe that specific coordinates would be precise enough to verify compliance.	
220-660-370(5)	Confirm in the rule language that it's a local benchmark.		
WAC 220-660-460 Informal Appeal and WAC 220-660-470 Formal Appeal			
220-660-460(9)	Will an informally appealed permit be withheld or suspended? Clarify when the department will send a response in writing.	The department has not issued stays on permits under informal appeal and WAC 220-660-460 does not give the department the authority to do so. The director or designee has sixty days to approve or decline to approve the HPA Appeals Coordinator's recommended decision following an informal appeal hearing. The department will notify the appellant and other interested parties in writing of the signed decision (220-660-460(9)) either the same day or the next business day.	No change is proposed. However, an answer to the question provided.
220-660-470	Include state agencies as project proponents if the definition of person does not include state agencies.	See previous comment in (050)(19)(a).	See previous comment in (050)(19)(a).
WAC 220-660-480 Compliance with HPA Provisions			

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-480	Change forest practice HPA to Forest Practices Hydraulic Project (FPHP).	The department recognizes the need for consistency and alignment with the statutory language.	Final proposed rule reflects this change to clarify the permit referenced is an FPHP.
220-660-480	The introduction should clarify what action would trigger each specific compliance action.	The department is responsible to help the regulated community understand how to comply. We use a range of tools as our roles move from educator to enforcer. We achieve voluntary compliance through education and technical assistance when we advise and consult on permits, conduct compliance checks, perform on-site technical visits, or provide guidance materials written in easily understood language. When we cannot get voluntary compliance by issuing a correction request, department staff may use a range of increasingly strict enforcement tools. This ranges from issuing notices to comply and stop work orders to penalties and, when appropriate, criminal prosecution. Effective and equitable enforcement requires using the appropriate tool for the violation.	Final proposed rules will reflect this compliance sequencing.
220-660-480(2)	Define what is meant by “more than minor harm” to fish life.	The legislature did not define “more than minor harm” to fish life in Chapter 77.55 RCW. The current rulemaking doesn’t include amendments to WAC 220-660-030 Definitions.	No change proposed because the proposal is beyond the scope of the current rule making activity.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-480(3)	We are concerned about actions from one WSDOT HPA activity negatively impacting other WSDOT projects statewide. If a western Washington project received a warning or a violation, would a project in eastern Washington immediately be issued a civil penalty?	No, a project in eastern Washington would not be issued a civil penalty because of a western Washington project violation. Each project is treated independently from other projects. As the permittee and easement holder, WSDOT would be notified by the department if we issued an order or notice to a contractor. The department assumes that WSDOT would ensure that a WSDOT contractor complies with an order or notice.	No change is proposed. The department and WSDOT have a history of effectively working together to quickly resolve contractor issues. The department doesn't anticipate any change to our working relationship.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-480(4)(a)	The term "Correction Request" should not replace the terms "Notice of Violation" and "Notice of Correction".	A lesson learned from the Hood Canal Compliance Pilot Project was that permittees were willing to correct noncompliant actions. However, many of these permittees were offended by the terms Notice of Correction or a Notice of Violation because they misunderstood that the department's intent was to document voluntary correction of noncompliant actions. Since these are not formal enforcement actions, the main purpose of the notices is to document the noncompliance, what needs to be done to voluntarily come into compliance and by when compliance must be achieved. Per statute, both notices must contain the same information. If voluntary compliance is not achieved the notice serves as a public record. The term "Correction Request" has a less formal feel and the department's administration of it will comply with the Technical Assistance Program Statute Chapter 43.05 RCW.	No change is proposed. However, the department will add a field to the Correction Request form to indicate whether the request is being issued in response to a technical assistance visit or a compliance visit.
220-660-480(5)(1)(a)	Define "significant harm to fish life".	The legislature did not define "significant harm to fish life" in Chapter 77.55 RCW. The current rulemaking doesn't include amendments to WAC 220-660-030 Definitions.	No change proposed because the proposal is beyond the scope of the current rule making activity.
220-660-480(5)(f)	How is an immediate stop work order issued in the field if the manager who has authorization to issue it is not in the field?	The compliance inspector would contact the appropriate senior or executive manager to obtain authorization. The compliance inspector would need to	No change is proposed; however, the Stop Work Order form will have the name and contact

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-480(5)(f)	How is the authority to issue a stop work order and the specific directives relayed to the project proponent in the field?	describe those elements listed in (5)(a), (c), and (d) before a manager would give authorization.	information for the manager who authorized the stop work.
220-660-480(6)	Clarify who can issue Notices to Comply.	2SHB 1579 and the resulting statutes did not require the department to identify which staff are authorized to issue Notices to Comply in this chapter. However, the proposed rules will be amended to specify that a Notice to Comply must be authorized by a regional habitat program manager, regional director, habitat program division manager, habitat program director, habitat program deputy director, or department director. The compliance inspector would need to describe those elements listed in (6)(a), (b), (c), and (d) before manager would give authorization.	Final proposed rules will include which staff can authorize a Notice to Comply.
220-660-480(6)(b)	The notice to comply as described in 2SHB 1579 (2019) Section 7 (1) (a) does not include such an expanded "scope of notice to comply" as stated here which allows "additional action to prevent, correct, or compensate for adverse impacts to fish life caused by the violation."	RCW 77.55.430(1)(b) states "The notice to comply may require that any project proponent take corrective action to prevent, correct, or compensate for adverse impacts to fish life or fish habitat."	No change is proposed because this rule language is from the statute.
220-660-480(7)(a)	Clarify the civil penalty is per violation.	The civil penalty is per violation.	Final proposed rules will clarify that the civil penalty is per violation.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-480(8)(a)(i)	We do not believe that civil penalties should be issued for non-compliance with a correction request.	RCW's 43.05.040, 050, 100 authorize the department to issue a civil penalty if the responsible party fails to comply with the Notices of Violation and Correction. Since the Correction Request enforces the requirements of these notices these sections authorize the department to issue penalties if the responsible party fails to comply with a Correction Request. When we cannot get voluntary compliance by issuing a correction request, staff will issue a Notice to Comply in most cases before issuing a civil penalty.	No change is proposed because this rule language reflects language from the statute.
220-660-480(8)(c)	The proposed civil penalty schedule does not have a specific list (i.e. schedule) of possible violations and their corresponding civil penalty amounts.	The proposed penalty schedule is modeled after the forest practices rules for civil penalties (WAC 222-46-060). The department will include a base penalty schedule. The base penalty may be adjusted using factors specific to the violation and the site. The example in Chapter 77.15 RCW referenced by the commenter are for natural resource infractions. The considerations in RCW 77.55.440(6) will be specific to the violation and the site. As a result, the infraction example is not practical.	Final proposed rules will include a numeric penalty schedule.
220-660-480(8)(d)(iii)	Clarify that a civil penalty could be divided between project proponents (if more than one) based on their contribution to the violation.	The civil penalty amount is determined for each violation. An individual could be required to pay that amount or the amount could be divided among violators based on their role in the violation.	Final proposed rules will include additional clarity about how a civil penalty amount could be divided.

5.4 *Comments Received During the March 5, 2020 through April 10, 2020 Public Comment Period and WDFW Responses*

Proposed rules were filed with the Washington State Code Reviser as WSR 20-06-053 (CR-102) on March 2, 2020 and appeared in WSR 20-06 published on March 18, 2020. The public comment period for this rule making was open from March 5, 2020 through 5 p.m. on April 10, 2020. The Commission held a public hearing on April 10, 2020 at 10:45 a.m. in by live video conference.

The department emailed Tribes, state and federal agencies, and key stakeholders, including those who had previously commented between February 27 – March 4, 2020, that the department had filed a supplemental Notice of Proposed Rule Making (CR-102) for this rule proposal, inviting comments those proposed changes.

The related rule making documents were posted on the department's HPA Rule Making web page[4] on March 5, 2020, including copies of the Supplemental CR-102, the proposed rule language, the draft Regulatory Analysis (version 2) document for significant legislative rule making pursuant to the Administrative Procedure Act, and a Small Business Economic Impact Statement (SBEIS) pursuant to the Regulatory Fairness Act. The department provided an email address and postal address to which comments could be sent, as well as an online commenting form.

Names of people and organizations submitting comments are provided in Appendix B. Copies of the comment letters received are provided in Appendix D. Two letters had multiple signatures. One of those letters was signed by ten organizations that represent the environmental community.

Numbers of comments received are provided on Table 6. A total of 6 written comments were received during the formal comment period, plus three comments were given orally at the Commission's public hearing on April 10, 2020.

Table 6: Descriptive statistics for comments received on Supplemental CR-102

Category	Number
Support	7
Oppose	1
Other	1

Following is a summary of comments received during the formal comment period and the department responses to those comments. Comments that are not specific to the proposed rules at WAC 220-660-050, -370, -460, -470 or -480 are grouped in section A. Rule-specific comments are provided on Table 7 in Section 5.6.

5.5 *Non-Rule-Specific Comments Received During the March 5, 2020 through April 10, 2020 Public Comment Period and WDFW Responses*

Comments in this section are grouped by topic.

[4] https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking .

A. Adaptive Management

Two commenters testified that the department should use an adaptive management process to determine if the civil compliance program is a successful deterrent.

Commenter:

Defenders of Wildlife

Friends of San Juan County

WDFW Response:

The department agrees with the importance of using adaptive management, which is a continual cycle consisting of planning, action, monitoring, evaluation, and adjustment to ensure the civil compliance program improves the protection of fish life.

How the final rule reflects this comment:

No change to the rule proposal is made as a result of this comment because the comment addresses implementation of the rules. However, the Implementation Plan will include an adaptive management process.

5.6 Comments on Specific Rule Language Received During the March 5, 2020 through April 10, 2020 Public Comment Period and WDFW Responses

WDFW received several comments about individual subsections of the proposed rules during the public comment period from March 5, 2020 through April 10, 2020. These comments and responses are presented in Table 7.

Table 7: Comments received about specific rule language

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
WAC 220-660-050 – Procedures – Hydraulic Project Approvals			
220-660-050(13)(d)	The current draft proposes to insert "or other work" after construction in order to better conform to the definition of hydraulic project -030 (77). Would you please consider amending the text as follows: "…department before a hydraulic project ((construction or other work)) starts…"?	The department agrees that adding "hydraulic project" before construction and between other work clarifies the intent.	Final proposed rule reflects this change to clarify this refers to hydraulic project construction or other hydraulic project work.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
WAC 220-660-480 Compliance with HPA Provisions			
220-660-480(4)(a)	The term "Correction Request" should not replace the terms "Notice of Violation" and "Notice of Correction".	A lesson learned from the Hood Canal Compliance Pilot Project was that permittees were willing to correct noncompliant actions. However, many of these permittees were offended by the terms Notice of Correction or a Notice of Violation because they misunderstood that the department's intent was to document voluntary correction of noncompliant actions. Since these are not formal enforcement actions, the main purpose of the notices is to document the noncompliance, what needs to be done to voluntarily come into compliance and by when compliance must be achieved. Per statute, both notices must contain the same information. If voluntary compliance is not achieved the notice serves as a public record. The term "Correction Request" has a less formal feel and the department's administration of it will comply with the Technical Assistance Program Statute Chapter 43.05 RCW.	No change is proposed. However, the department will add a field to the Correction Request form to indicate whether the request is being issued in response to a technical assistance visit or a compliance visit.
220-660-480(5)	Consider changing the first sentence of WAC 220-660-480(5)(c) as follows: "Scope of a stop work order: A stop work order may require that a person stop all work connected with the ((project)) violation until corrective action is taken…"?	The department recognizes the need for consistency and alignment with the statutory language.	Final proposed rule reflects this change to clarify a stop work order can only stop work connected with a violation.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-480(5)	Would you please clarify that section WAC 220-660-480(5)(c) applies to stop work orders issued under WAC 220-660-480(5)(f)? If a violation were to occur installation of immediate best management practices (BMPs) may help to prevent further adverse impacts to fish life caused by the violation.	(5)(f) states that the person receiving the stop work order must immediately comply with it. Any corrective actions required in (5)(c) would be listed in the stop work order. The proposed rule language doesn't prevent the use of BMPS to prevent further harm to fish life.	No change is proposed because the intent of the commenters' recommendation is captured in the proposed language.
220-660-480(6)(b)	The notice to comply as described in 2SHB 1579 (2019) Section 7(1)(a) does not include such an expanded "scope of notice to comply" as stated here which allows "additional action to prevent, correct, or compensate for adverse impacts to fish life caused by the violation."	RCW 77.55.430(1)(b) states "The notice to comply may require that any project proponent take corrective action to prevent, correct, or compensate for adverse impacts to fish life or fish habitat."	No change is proposed because this rule language is from the statute.
220-660-480(8)(a)(1)	We do not believe that civil penalties should be issued for non-compliance with a correction request.	RCW's 43.05.040, .050, and .100 authorize the department to issue a civil penalty if the responsible party fails to comply with the Notices of Violation and Correction. Since the Correction Request enforces the requirements of these notices these sections authorize the department to issue penalties if the responsible party fails to comply with a Correction Request. When we cannot get voluntary compliance by issuing a correction request, staff will issue a Notice to Comply in most cases before issuing a civil penalty.	No change is proposed because this rule language reflects language from the statute.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-480(8)(c)	The proposed civil penalty schedule does not have a specific list (i.e. schedule) of possible violations and their corresponding civil penalty amounts.	The proposed penalty schedule is modeled after the forest practices rules for civil penalties (WAC 222-46-060). The department included a base penalty schedule. The base penalty may be adjusted using factors specific to the violation and the site. The example in Chapter 77.15 RCW referenced by the commenter are for natural resource criminal infractions. The considerations in RCW 77.55.440(6) will be specific to the violation and the site. As a result, the infraction example is not practical.	No change is proposed because the proposed rules include a penalty schedule that clearly outlines the process for calculating a penalty.
220-660-480(8)(c)(ii)(A)	Consider reducing the review period to 3 years preceding the violation leading to the issuance of the penalty.	WAC 222-46-060 doesn't specify a timeframe previous violations of a forest practices rule or regulation. However, DNRs enforcement handbook recommends that violations more the 5 years old not be considered. Since HPAs are issued for up to five years the 5 year timeframe is reasonable for hydraulic code violations as well.	No change is proposed.
220-660-480(8)(c)(ii)(C)	The acceptance of technical assistance should not be viewed by the department as proof of an "intentional" violation; would you please consider striking "consultation, a technical or" from the civil penalty schedule WAC 220-660-480(8)(c)(ii)(C)? This revision would best conform to 2SHB 1579 Section 8(6) by restricting the consideration to penalties to intentional violations.	This proposed language describes a violation that is intentional. If the department documented that they informed a person that there was a violation or a protentional violation that required corrective action and the person failed to act this demonstrates intent to not comply.	No change is proposed because the intent of the commenters' recommendation is captured in the proposed language.

SECTION 6: Report Preparation

This report was prepared by:

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Appendix A - List of Commenters from December 3, 2019 through January 21, 2020

WDFW received nine comment letters, emails, and online submissions. Four commenters provided oral testimony at the public hearing.

Commenters sending individual letters, email, or online comments:

Jan Himebaugh, Building Industry Association of Washington; Marc Ratcliff, Department of Natural Resources; Michael Martinez, Northwest Indian Fisheries Commission; Paul Shively, The Pew Charitable Trusts and Gus Gate, Surfrider Foundation; Shane Phillips; Melia Paguirigan, Washington Environmental Council; Robert Gelder, Eric Pierson, and Erik Johansen, Washington State Association of Counties; and Megan White, Washington State Department of Transportation.

Commenters signing the environmental community letter:

Amy Carey, Sound Action; Quinn Read, Defenders of Wildlife; Shannon Wright, Re Sources; Melia Paguirigan, Washington Environmental Council; Whitney Neugebauer, Whale Scout; Kim McDonald, Fish Not Gold; Anne Shaffer, Coastal Watershed Institute; Joseph Bogaard, Save Our Wild Salmon; Alyssa Barton, Puget SoundKeeper; and Dave Werntz, Conservation Northwest.

Commenters providing oral testimony at the January 17, 2020 public hearing:

Amy Carey, Sound Action; Robb Krehbiel, Defenders of Wildlife; Hannah Marcley, Building Industry Association of Washington; and Jay Roberts, Building Industry Association of Washington.

Appendix B - List of Commenters from March 5, 2020 through April 10, 2020

WDFW received six comment letters, emails, and online submissions. Three commenters provided oral testimony at the public hearing.

Commenters sending individual letters, email, or online comments:

Melia Paguirigan, Washington Environmental Council; Tina hitman, Friends of the San Juans; Ted Parker, Snohomish County Roads Maintenance; Robert Gelder, Eric Pierson, and Erik Johansen, Washington State Association of Counties and Robb Krehbiel, Defenders of Wildlife.

Commenters signing the Orca Salmon Alliance letter:

Colleen Weiler and Jessica Rekos, Whale and Dolphin Conservation; Robb Krehbiel, Defenders of Wildlife; Alyssa Barton, Puget SoundKeeper; Joseph Bogaard, Save Our Wild Salmon; Howard Garrett, Orca Network; Whitney Neugebauer, Whale Scout; Lovel Pratt, Friends of the San Juans; Erin Meyer, Seattle Aquarium; Rein Atteman, Washington Environmental Council and Deborah Giles, Wild Orca.

Commenters providing oral testimony at the April 10, 2020 public hearing:

Robb Krehbiel, Defenders of Wildlife; Tina Whitman, Friends of San Juan County and Nora Nickum, Seattle Aquarium.

Appendix C – Written Comments Received from December 3, 2019 through January 21, 2020

From: Nikky Castillo
To: HPA Rules (DFW)
Cc: Jennifer Spall; Jan Himebaugh; Hannah Marcley; Jackson Maynard; Ashlee Delaney; jay@cascadecustomhomes.com; Greg Lane
Subject: Written Comments on Proposed Hydraulic Permit Rules
Date: Wednesday, January 15, 2020 4:40:18 PM
Attachments: 200114WDFW_1579_RulemakingCommentBIAW.docx

To whom it may concern:

Please find attached BIAW's written comments on the proposed Hydraulic Permit Rules. If you have any questions, please feel free to contact me directly at the extension below.

Thank you

Nikky Castillo
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January 15, 2020

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PO Box 43200
Olympia, WA 98504-3200

RE: Written Comments on Proposed Hydraulic Permit Rules

SUBMITTED VIA EMAIL: HPARules@dfw.wa.gov

Dear Ms. Thurston:

On behalf of the Building Industry Association of Washington (BIAW), I write to provide comment on the Proposed Hydraulic Permit Rules that the Washington Department of Fish and Wildlife (WDFW) is considering adopting pursuant to HB 1579. For the reasons outlined in this letter, WDFW should either: refrain from adopting the proposed rule; or in an abundance of caution, should hold off on rulemaking until the Court has had an opportunity to clarify the effective language of the statute upon which the Department's authority to enact the rule rests.

Background:

By way of background, BIAW is a state trade association representing 8,000 member companies engaged in all aspects of residential construction. BIAW has a strong commitment to ensuring Washingtonians can access homes. During the 2019 session BIAW opposed the passage of HB 1579. As originally introduced, the bill contained a penalty increase from the current law of $100 a day per violation to $10,000 per violation. The version of the bill that passed the legislature contained subsection 8(1)(a) that conditioned the fine increase and its

authorization on the enactment of section 13 of the bill. The Governor vetoed both section 13 and subsection 8(1)(a). The Governor in his veto message ordered WDFW to use its rulemaking authority to support a $10,000 per violation penalty.

In July of 2019, BIAW filed suit against the Department and Governor Jay Inslee alleging that the Governor's veto of a subsection 8(1)(a) of HB 1579 was unconstitutional because his veto authority was limited to vetoing an entire section of a bill. The issue of the veto is currently on appeal and has not been resolved by the courts of this state. Whether subsection 8(1)(a) is operative matters to this rulemaking process because if the provision is not vetoed, then the maximum authority of the agency to implement a civil penalty is $100 per day. If the Court upholds the Governor's veto of the subsection, then there is no statutory authority whatsoever for the fine.

1. **Agency Lacks Statutory Authority to Impose Fine:**

For the reasons stated above, under either version of HB 1579, no authority exists for the imposition of any fine. To make matters worse, the Department is poised to adopt a penalty that is in excess of anything ever contemplated by the Legislature: a civil fine of $10,000 per violation *per day*.[1] This fine amount appears in no previous version of any bill introduced by the legislature and is not a fine requested by the Governor in his veto message. This is the very definition of a rule adopted by an agency that is *ultra vires* and clearly prohibited under case law. *See eg* RCW 34.05.570; *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wn.2d 825 (2008)(holding that Dep't of Ecology exceeded statutory authority when it fined a developer without a statutory basis for such a fine, rather than challenging via LUPA appeal); *Shanlian v. Faulk*, 68 Wn. App. 320, 843 P.2d 535 (1992) (evaluating as dispositive the question of whether or not the relevant statute permitted an agency to levy fines against certain parties).

2. **Proposed Fine Violates Federal and State Constitutions:**

Assuming that a rule creating such fine was enacted under color of law, the fine is clearly excessive under both the federal and state constitutional excessive fines provisions. The Eighth Amendment of the United States Constitution prohibits

[1] The basis for this interpretation of the proposed rule is that p. 26 (7) describes civil penalties and includes the following language: "Each and every violation is a separate and distinct civil offense." BIAW staff obtained clarification from WDFW staff in a call that this provision of the rule was intended to allow for each new day in which a violation is ongoing to constitute a separate offense. If WDFW's position has changed, and the agency no longer intends to enforce each violation on a per day basis, BIAW requests that WDFW clarify the language in the rule to prohibit per day fines.

the imposition of excessive fines and federal courts have applied them to civil fines and forfeiture provisions of state law. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The state constitutional provision would likely be construed similarly.

WDFW is unilaterally and exponentially increasing a fine by $9,900 per violation per day. As a reminder, the average salary of a Washingtonian is $70,000. Assuming a single ongoing violation in one week, an entire year's salary would be forfeited. While the harm to the environment for an ongoing permit violation can be substantial and the purpose of protecting habitat for fish and orca is noble, this penalty seems unlikely to bear a relationship to the gravity of the offense when contrasted with the penal codes.

For example, if a person actually kills an orca whale, the maximum penalty under RCW 77.15.120 is $10,000 total for a Class C felony. If a person commits premediated murder of a human being, he is subject to a $50,000 maximum fine for a Class A felony which is still less than a week's penalty for an ongoing violation of a hydraulic permit. In short, it seems unlikely that the Department will be able to defend a higher potential penalty for protection of fish habitat than for the lives of orca (or people) under the state or federal constitutions.

3. **<u>Provisions within the rule are arbitrary and capricious</u>**

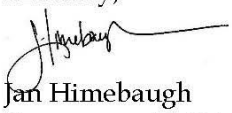
There are a number of provisions of the rule that are so problematic as to render the rule arbitrary and capricious. Under applicable authority, an agency action (including rulemaking) is arbitrary and capricious if the action is willful and unreasoning and taken without regard to attending facts and circumstances. *Wash. Independent Association v. Wash. Utilities and Transp. Comm*, 148 Wash. 2d 887, 904-5, 64 P.3d 606 (2003). Here are some examples of drafting issues within the rule that are unreasoning and taken without regard to facts and circumstances:

- *Possible time limitations* Under Pg. 8 Section 13.C. builders may have inconsistent work schedules due to inclement weather or poor working conditions causing to put the project on hold. Working against the department's time limitation makes it more difficult to ensure quality work in order to comply, thus subjecting them to high fines.
- *Unclear language* Under Pg. 13 subsection 3.B.1-8 removal of "bulkhead" to "hard structure" and "beach nourishment/woody material" to "soft structure" may cause lack of clarity and lacks specificity for builders.

- *Unclear language* Under Pg. 19 WAC 220-660-480, the WAC states that a project proponent may be issued a notice of civil penalties. But as defined in 77.55.410, project proponent includes the person who applies, an authorized agent on the application, a person who has obtained a HPA or a person who undertakes a HP without an HPA. It is unclear whether all that fit within the definition of "proponent" will be subject to the same penalties.

In conclusion, there are also a number of potential violations of the administrative procedures act that are under review. BIAW also reserves the right to add additional issues with the rule not listed here and is not waiving an issue not identified. The bottom line is that the WDFW should hit pause on rulemaking to allow the courts to clarify its statutory authority as well as give careful consideration to ensure the language of the rule is clear enough to be effective. Otherwise, BIAW will be forced to challenge the rule under the process afforded by law.

Sincerely,



Jan Himebaugh
Government Affairs Director

4

From: RATCLIFF, MARC (DNR)
To: Thurston, Randi L (DFW)
Subject: Hydraulic Code Rule Making 220-660 WAC
Date: Wednesday, January 08, 2020 8:52:41 AM

Randi

This is the term correction I mentioned on the phone – I may have gotten the #s wrong in my first message. The last sentence should read "…forest practices FPHP from the department of natural resources…". If FPHP is not defined in the definition section it probably needs to be unless the code spells in out once.. Forest Practices Hydraulic Projects.

WAC 220-660-480 Compliance with HPA provisions. A project proponent must comply with all provisions of chapter 77.55 RCW, this chapter, and the HPA. If a project proponent violates chapter 77.55 RCW or this chapter or deviates from any provision of an HPA issued by the department, the department may issue a correction request, a stop work order, a notice to comply, or a notice of civil penalty. The term "project proponent" has the same definition as in RCW 77.55.410. This section does not apply to a project, or to that portion of a project, that has received a forest practices HPA from the department of natural resources under chapter 76.09 RCW.

Let me know if this email works for Forest Practices' comments or shall we go through the formal comment process.

Thanks so much
Marc

Marc Ratcliff
Policy & Services Section Manager
Forest Practices Division
Washington State Dept. of Natural Resources
360.902.1410
Marc.ratcliff@dnr.wa.gov

From:	Amy Carey - Sound Action
To:	HPA Rules (DFW); Thurston, Randi L (DFW)
Subject:	Corrected Environmental Community Comment Letter on HPA Rulemaking
Date:	Wednesday, January 22, 2020 12:58:11 PM
Attachments:	Environmental Community Comment Letter Hydraulic Code Rulemaking 1.21.2020 -- Corrected File.pdf

Greetings,

Yesterday I sent a copy of a join environmental community comment letter on the WDFW HPA rulemaking. I inadvertently sent the wrong file and in doing so omitted several of the organizations submitting comment.

The corrected file is attached and we would ask that this corrected file be included in the record.

Amy Carey
Sound Action

Randi Thurston
WDFW
PO Box 43200
Olympia, WA 98504

January 21, 2020

Ms. Thurston,

The undersigned organizations, on behalf of thousands of our collective members, submit the following comments on the department's proposed Hydraulic Code rulemaking to implement 2SHB 1579, amending sections WAC 220-660-050, WAC 220-660-370, WAC 220-660-460, WAC 220-660-470 and WAC 220-660-480.

As you are aware, 2SHB 1579 created civil enforcement authority for WDFW and repealed RCW 77.55.141 regarding marine beachfront protective bulkheads or rock walls. 2SHB 1579 implements a top-level recommendation from Governor Inslee's Orca Task Force and the related Prey Availability Work Group to ensure habitat protection and increase salmon availability for the starving and endangered Southern Resident Orcas. The legislation and implementing rules in WAC-220-660 et. seq. are critical to salmon recovery. Since the passage of 2SHB 1579 in April of 2019, three more whales have died leaving a population of only 73 orcas. We cannot emphasize strongly enough how important nearshore habitat protection and the consistent and firm application of the Hydraulic Code is to both salmon and orca recovery.

We urge WDFW to expedite the finalization and implementation of the proposed rules but request the following minor revisions to the language to clarify habitat protection elements and better reflect the intent of both the Task Force and the legislation itself.

WAC 220-660-050 – PROCEDURES

The existing language in WAC 220-660-050(9)(c) should be retained. This rule section currently requires an HPA application to include a description of the measures that will be implemented for the protection of fish life, as well as any reports assessing impacts from the hydraulic project to both fish life and ***the habitat that supports fish life***.

Although the definition of "Protection of fish life" in WAC 220-660-030(119) includes language related to the habitat that supports fish life, it is presented in the context of a mitigation hierarchy only. Retaining the current language provides clarity that the application requirements include specific evaluation of impacts to habitat that supports fish life. This is an important distinction that should be retained.

With the exception of eliminating language related to RCW 77.55.141, the existing language in WAC 220-660-050(13)(b) should also be retained with one small amendment. Based on current rules the procedure for an emergency, imminent danger, chronic danger, or an expedited HPA requires that these projects meet the mitigation provisions and requirements in WAC 220-660-080 AND the provisions in WAC 220-660-100 through 220-660-450 that are included in an HPA.

WAC 220-660-080 generally outlines a range of guidelines or requirements related to project impacts and mitigation. In short, it is not a section that is typically "included in an HPA." Amending the language in WAC 220-660-050(13)(b) as proposed to read "These projects must comply with the provisions in this chapter that are included in an HPA" could be interpreted to mean that an emergency, imminent danger, chronic danger, or an expedited HPA was not required to comply with provisions in 220-660-080 unless the HPA itself specifies this – yet HPAs do not usually include or reference WAC 220-660-080. The end result would be that under these circumstances, permittees could avoid the requirements of WAC 220-660-080.

Likewise, the original rule language is also problematic because as written, WAC 220-660-080(13)(b) only requires a project to meet the technical conditions in WAC 220-660-100 through 220-660-450 that are included in an HPA. Unfortunately, again, there are times when these provisions are not written into the HPA. To resolve the problems identified above with the old and the proposed new language under WAC 220-660-050 (13)(b), we suggest the language be revised to require that projects meet the mitigation provisions in WAC 220-660-080 *and the applicable technical provisions in WAC 220-660-100 through 220-660-450.*

WAC 220-660-370: BANK PROTECTION IN SALTWATER AREAS

The Reference to the *Marine Shoreline Design Guidelines* (MSDG) in the introduction of WAC 220-660-370 should first emphasize the use of the guidelines to determine if protection is needed at all. By only referencing MSDG use to "design" bank protection, the proposed rules miss an important opportunity to both clarify the requirement for a detailed risk analysis and needs evaluation to be performed and to point the applicant to the high value information on this specific action that is contained in the MSDG.

Description

The proposed language in this subsection describes a range of soft shore techniques, and reports that use of this approach allows beach processes and fish habitat to remain intact. While soft armoring may not have the same impact as hard armoring, impacts and changes to beach processes and fish habitat are still created and should be reflected in final rule language.

Fish Life Concerns

Similar to comments outlined in the description subsection, language outlining fish life concerns should not suggest that soft shore techniques eliminate physical alteration of the beach. This is not accurate and should be amended.

Existing rule language outlining armoring related impacts to juvenile salmonids should be retained. And, based on the intent of both the Orca Task Force and 2SHB 1579, this section should not limit protection or approval considerations and concerns only to forage fish spawning or other habitats noted as a habitat of special concern – particularly as many beaches that are likely used as forage fish spawning areas have not been fully surveyed to formally document the presence or absence of habitat. Further, while habitats of special concern may warrant increased protections, there are a range of other ecosystem features and functions supporting fish life that require protection – for example, impacts to benthic and epibenthic assemblages – and rule language acknowledge that armoring results in wide ecosystem impacts.

Bank Protection Design

For both clarity and flow, this section should lead with the rules related to the requirement for a risk and needs assessment and evaluation of the least impacting method report should a protection need be documented. This requirement to determine risk and need is the first step in both the applicant's planning and subsequent review process, and should precede rule language related to protection methods. Rule language should also eliminate the generic reference to a "qualified professional" and establish that the risk analysis and related evaluation must be performed by a coastal geologist or coastal geomorphologist.

The discussion of the least impacting methods should move the hierarchy position of construction of an upland retaining wall to be less impacting that soft armoring techniques. Additional language should also be added to require an applicant to document that each lesser impacting technique or steps of the hierarchy have been used or are not possible before moving on to subsequent levels.

We applaud the new requirement that project plans show the location of benchmarks for armoring projects and would request that the specific location coordinates also be added as a requirement. This provision would both allow for easy linear documentation and mapping of armoring to use both as an additional evaluation and compliance tool and for monitoring armoring targets in state recovery planning.

Thank you for your consideration of these comments and the hopeful adoption of the requested amendments. We greatly appreciate the good work of the department and look forward to collaboration and partnership as we strive to improve habitat protection and increase salmon populations.

Sincerely,

Amy Carey, Executive Director
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Quinn Read, NW Director
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Dave Werntz, Science and Conservation Director
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From:	Martinez, Michael
To:	Thurston, Randi L (DFW); HPA Rules (DFW)
Cc:	Justin Parker; Fran Wilshusen; Todd Bolster
Subject:	HPA Civil Compliance Enhancements - Rulemaking Comment
Date:	Friday, January 17, 2020 12:25:13 PM
Attachments:	NWIFC Request for Partial Veto of Section 13 in SSHB 1579 Letter 5.1.19 (1).pdf

Randi Thurston, WDFW -

Dear Randi-

As indicated by the attached letter, NWIFC supports the legislative enactment of HPA civil compliance enhancements, and urges WDFW to proceed with this rulemaking to fulfill the legislative intent to protect habitat, fish life, orcas, and treaty resources which tribes rely on, with clear and enhanced civil protection authority. The proposed rule advances this objective. Please feel free to contact me with any comments or questions.

Thanks,

Mike
--
Michael Martinez
Habitat Policy Analyst
Northwest Indian Fisheries Commission
6730 Martin Way E
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(360) 528-4364

Northwest Indian Fisheries Commission
6730 Martin Way E., Olympia, Washington 98516-5540
Phone (360) 438-1180 www.nwifc.org FAX # 753-8659

May 1, 2019

Honorable Jay Inslee
Governor of Washington
P.O. Box 40002
Olympia, WA 98504

Re: Request for Partial Veto of Section 13 in SSHB 1579

Dear Governor Inslee:

The Northwest Indian Fisheries Commission respectfully urges you to exercise a partial veto of Second Substitute House Bill (SSHB) 1579, "an act relating to implementing recommendations of the southern resident killer whale task force related to increasing chinook abundance." We strongly supported your requested legislation throughout the session. At each committee hearing, we echoed our shared sentiments that we cannot recover orca unless we first recover salmon, and to recover salmon we must protect and restore the remaining habitat. We agree that modernizing WDFW's civil authorities is an important step toward achieving that goal. We do not, however, support the late addition of section 13 to the bill, which creates several problems.

Section 13 requires that the State Conservation Commission coordinate Washington's natural resource agencies for the purpose of "expeditious construction of three demonstration projects" and to create a new "model for river management." The proposed projects are aimed at floodplain management and clearly anticipate dredging streams since there are several references to the removal of gravel and sediment. Pilot projects are slotted for Whatcom, Grays Harbor and Snohomish Counties.

We are opposed to this section on several grounds:

1. The western Washington treaty tribes should not be relegated to stakeholder status in a process designed to, in part, manage the habitat of a treaty-reserved resource. Unfortunately, the proposed process appears to take this approach.

2. The tribes in the proposed watersheds were never consulted as to whether floodplain/dredging projects or a new model of river management are necessary or beneficial.

3. The proposed program was not, in fact, a recommendation of the task force, and does not necessarily contribute to the purpose of the Bill, which is to increase chinook abundance.

4. We already have several collaborative processes in Washington working toward the development and implementation of multiple benefit projects. It is not necessary to expend limited agency resources on a new and likely redundant process.

5. Some of the practices encouraged in section 13 – such as dredging – may be harmful to salmon habitat. Therefore, the proposed approach is counter to the stated intent of the bill.

In closing, we respectfully request you exercise a partial veto of section 13 to restore SSHB 1579 to its stated purpose of increasing chinook abundance by, in part, better protecting salmon habitat. We would also like to thank you for requesting this bill and taking steps to better protect salmon and orca. Should you have any questions regarding this matter please don't hesitate to contact me, or Todd Bolster from my staff at (360) 438-1180.

Sincerely,

Lorraine Loomis

Lorraine Loomis
Chairperson

cc: JT Austin, Senior Policy Advisor, Office of the Governor

From:	Steve Marx
To:	HPA Rules (DFW)
Cc:	Gus Gates
Subject:	Public Comment - HPA Rulemaking
Date:	Tuesday, January 21, 2020 3:06:22 PM
Attachments:	Pew_Surfrider - Comment Letter_HPA Rulemaking.pdf

Please accept the attached public comment letter submitted on behalf of the Pew Charitable Trusts and the Surfrider Foundation.

Thank you in advance for your consideration.

Steve Marx
Officer, U.S. Oceans, Pacific
The Pew Charitable Trusts
p: 503-230-1333 (main) 503-914-9012 (cell)
e: smarx@pewtrusts.org | www.pewtrusts.org
Sign up for our Pacific Fish e-newsletter.

January 21, 2020

Ms. Randi Thurston
Washington Department of Fish and Wildlife, Habitat Program, Protection Division
P.O. Box 43200
Olympia, WA 98504-3200

RE: New Hydraulic Code Rulemaking 220-660 WAC

Dear Ms. Thurston,

Thank you for the opportunity to offer public comment on the Washington Department of Fish and Wildlife's (WDFW) rulemaking to implement recommendations of the Southern Resident Orca Task Force related to conserving critical aquatic habitat and increasing Chinook salmon abundance. The proposed revisions to Hydraulic Code Rules in chapter 220-660 WAC will improve the state's ability to ensure that adverse impacts to ecologically important coastal and aquatic habitat are avoided, minimized and appropriately mitigated. We appreciate the work of WDFW in developing these revisions and we support strengthening Hydraulic Project Approval (HPA) rules as proposed to better protect Washington's coastal and aquatic ecosystems.

The Surfrider Foundation and the Pew Charitable Trusts work to advance the protection and restoration of ecologically important coastal habitat, including submerged aquatic vegetation (SAV) such as eelgrass and kelp. In Washington, vegetation that serves essential functions for the spawning and development of fish is defined as saltwater habitats of special concern, and includes eelgrass, kelp, and intertidal wetland plants[1]. Accordingly, the HPA permitting process provides for protection of these habitats by requiring avoidance, minimization, and mitigation of any adverse impacts. Ensuring a robust HPA permitting process is critically important, as construction and associated development along marine shorelines of Washington has the potential to impact eelgrass and other important vegetation and impair the function of this essential habitat, for both fish and wildlife as well as the communities that depend upon healthy marine ecosystems. By strengthening the HPA rules as proposed, protections for SAV and other ecologically important habitat will be greatly improved.

For these reasons, we support the incorporation of all rule change proposals evaluated in WDFW's draft regulatory analyses of December 15, 2019[2], to provide the greatest protection for Washington's marine and aquatic resources. As stated in the analysis, "This proposed rule is needed….to help enable WDFW ensure that hydraulic projects provide adequate protection of

[1] WAC 220-110-250 (3) (a, b, and c)
[2] Washington Department of Fish and Wildlife. December 2019. Regulatory Analysis: Incorporating Elements of 2SHB 1579 into HPA Rules.

fish life.[3]" With respect to the protection of coastal habitat and SAV, we particularly support the proposals by WDFW to:

- Enhance existing penalty schedule (up to $10,000 per violation) to better avoid non-compliance.
- Clarify that WDFW can disapprove new applications if the applicant has failed to pay a penalty, respond to a stop-work order, or respond to a notice to comply.
- Require saltwater bank protection location benchmarks as part of a complete HPA application.
- Strike language from rule that references the repealed marine beach front protective bulkheads or rockwalls statute[4].

Compliance

Absent robust enforcement and compliance mechanisms, regulatory protections are likely to be ineffective. For this reason, we support enhanced authority for WDFW's civil compliance program, including the use of new maximum civil penalties, up to $10,000 per violation, and the associated penalty schedule described in the proposed rule package. We also support the expansion of WDFW's authority to reject new HPA applications from applicants that have failed to comply with permitting regulations in the past. These regulatory improvements to the HPA process will provide both a deterrent for non-compliance and an enforcement tool to better protect marine habitats such as SAV that are essential for fish and which support coastal communities.

Requiring Benchmarks

It is important to ensure that regulatory agencies have the tools they need to adequately assess the effectiveness of required conservation and mitigation actions. For this reason, we are pleased to see WDFW's proposed requirement of benchmarks in HPA applications. We recognize that without such a requirement for fixed, permanent reference points, it would be very difficult for WDFW to adequately evaluate permit requirements for habitat mitigation and conservation, let alone determine compliance or measure the adequacy of permit provisions relative to the protection of fish and habitat. We agree with WDFW's assessment that benchmarks are necessary to implement the other compliance elements of 2SHB 1579 and welcome this requirement.

Bank Protection and Shoreline Armoring

Shore armor is known to profoundly alter coastal ecological processes and function and reduce coastal resilience to rising sea level[5]. That is why we support WDFW's proposed changes that enhance their authority to regulate bank protection to maintain the ecosystem function provided

[3] *Ibid*; Page 10
[4] RCW 77.55.141
[5] Johannessen, J., A. MacLennan, A. Blue, J. Waggoner, S. Williams, W. Gerstel, R. Barnard, R. Carman, and H. Shipman, 2014. Marine Shoreline Design Guidelines. Washington Department of Fish and Wildlife, Olympia, WA.

by intertidal zones by requiring the least impacting technically feasible alternative for every saltwater bank protection project, consistent with the 2SHB 1579 repeal for single-family residence marine beach front protective bulkheads or rockwalls. We know what a huge impact shoreline armoring has had on the function of Washington's nearshore ecosystems, particularly in Puget Sound. WDFW's enhanced authority will certainly help landowners identify and implement ecologically appropriate alternatives. Looking forward, we welcome the improvements to regulatory outcomes that we expect will follow.

Next Steps

While we fully support WDFW's current rulemaking, we encourage further strengthening habitat protections beyond the proposed rules. Looking forward, we support a shift from the current standard of "no net loss" of ecological function to a new standard of "net ecological gain" when it comes to protecting and restoring habitat, as recommended by the Southern Resident Orca Task Force and adopted as a component of the 2020 legislative priorities for Washington's Environmental Priorities Coalition. We agree that it is time to step up policies, incentives, and regulations that result in net ecological gain to regain habitat lost and increase salmon populations in the face of rising risks for Southern Resident orcas here in Washington. We are interested in supporting efforts to make this shift to "net ecological gain" a reality, recognizing that RCW 77.55 - Construction Projects in Washington State - is but one of a number of statutes where such a shift would apply.

Conclusion

We thank WDFW for their ongoing efforts to protect coastal and marine habitat, and fully support current and future rulemaking to implement recommendations of the Southern Resident Orca Taskforce. We look forward to continuing to participate in WDFW and other federal and state agency efforts to increase protections for ecologically important coastal habitat and conserve marine life.

Sincerely,

Paul Shively
Project Director, U.S. Oceans, Pacific
The Pew Charitable Trusts
pshively@pewtrusts.org

Gus Gates
Washington Policy Manager
Surfrider Foundation
ggates@surfrider.org

From:	shane phillips
To:	HPA Rules (DFW)
Cc:	Shane Phillips
Subject:	Hydraulic Code Rule Change Comments - CR102
Date:	Saturday, January 11, 2020 10:15:41 AM
Attachments:	WDFW Rule Making Comments.pdf

Find attached a summary of my comments. Thank you for soliciting input.

Shane Phillips

WDFW Rule Making Comments
Shane Phillips, P.E.

Introduction

Thank you for the opportunity to review the proposed rule-making regarding bank protection. I believe overall tightening up and refining the language makes good sense and will result in better protection of resources with hopefully a positive benefit to applicants and WDFW for processing and monitoring the permits. With that said, it's important that changes to the code are well understood. Sometimes the best intentions result in un-intended consequences if the new language effects or implications are not well understood. It's important that the major changes be reviewed or "tested" by those who work with these regulations on a regular basis. This can be done through running example scenarios and test cases through the process of review with the new policy. This is referred to as "Project the Outcomes" as a tool for effective problem solving in policy analysis work. This step is an important step prior to finalizing the proposed code changes. It would be good for WDFW to validate that this step has been conducted and who assisted (WDFW staff and/or outside parties) participated in that step. This could be a good task for the Hydraulic Code Citizens Advisory Committee to assist in collaboration with WDFW staff. Ask the committee to review new code relative to their constituency and come up with a list of hypothetical project scenarios that are submitted to WDFW for WDFW staff to run through the new code using those examples. This would help in the policy refinement process and add credibility to the tightness of the new language and alleviate concerns regarding the changes.

CR 102 Rule Making Memorandum Comments

- Section 3.3 0 Evaluation of Small Business Size
  Should be considered to use the Median rather than the Mean (Average). There are many businesses registered that have very little to no activity. Those businesses bring the mean numbers down but have little effect on the median. For the purpose the statistics are being conducted, median would be a better measure.

- Section 3.5 – Costs to Comply
  The labor rate information is correct in how it is being used. Labor rate statistics cover what an employee is paid not the cost is to the business. The cost of a WDFW employee is much greater than what shows up in their payroll check due to costs for benefits, overhead (building, working space, power, etc…). So, there is an overhead that gets marked up on that labor rate. The hourly rate charged by a licensed civil engineer for this type of work varies from $85 to $150 per hour. Costs for compliance should be based on an hourly rate of $100 and not $46.47 billable.

- General Benchmark Comment. It appears the benchmark is not required to be surveyed with a designated survey vertical or horizontal datum. That is fine to be just a local reference. If it were required to have traditional survey benchmarks, the cost of

compliance would go up by 1,000% or more. Setting survey control points to an accepted datum varies greatly but can be on the order of $500 to $5,000 per occurrence. Would be good to confirm in the code language that it is a local benchmark.

WAC 220-660-370 Bank protection in saltwater areas. Comments

Section 3.d (Bank Protection Design). There is discussion that assessment should be conducted by a coastal geologist, geomorphologist (etc..) for the proposed.... The discipline of "coastal engineer" should be added as that is one of the critical professional disciplines needed for this type of assessment. This term is used in coastal areas elsewhere in the US and Worldwide but not in WA. This is an opportunity to get it corrected to meet the future needs of our waterfront resources and habitat. See link to State of Florida coastal protection program for technical review of beach and shoreline work: https://floridadep.gov/rcp/coastal-engineering-geology. This language should state both the type of professional but what the intent is. See below the explanation from Florida agency website...."Technical expertise is provided in coastal hydrodynamics, sediment processes, and geology, and the related principles and practices of coastal engineering and geotechnical analysis." Suggest using something similar in the code.

Shane Phillips, P.E.
Civil Engineer
Hydraulic Code Implementation Citizen Advisory Committee Member

From: Melia Paguirigan
To: HPA Rules (DFW)
Subject: HPA Rulemaking Comment Letter
Date: Tuesday, January 21, 2020 1:58:32 PM
Attachments: WEC - HPA Comment Letter Final.pdf

Hello,

I would like to formally submit the attached comment letter from Washington Environmental Council to the Washington Department of Fish and Wildlife in regards to rulemaking for implementing 2SHB 1579.

Thank you,
Melia Paguirigan

Melia Paguirigan • Water & Shorelines Policy Manager
206.631.2619 • melia@wecprotects.org
Pronouns: she/her

Washington Environmental Council • wecprotects.org
1402 Third Avenue | Suite 1400 | Seattle, WA 98101

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January 21, 2020

Washington Department of Fish and Wildlife
Randi Thurston
PO Box 43200
Olympia, WA 98504-3200

Ms. Thurston,

Thank you for the opportunity to comment on the Washington Department of Fish and Wildlife's proposed Hydraulic Code rulemaking for implementing 2SHB 1579, which carries out the Governor's Orca Task Force recommendations for increasing chinook abundance. Washington Environmental Council (WEC) applauds the Department's timely adoption of these new rules and supports revisions to Hydraulic Code Rules in chapter 220-660 WAC.

WEC is a 501 (c)(3) organization founded in 1967. Our mission is to protect, restore and sustain Washington's environment for all, and we are committed to clean water protections for Puget Sound and for all Washington State waters.

WEC supports the Department's revisions for:

- Adopting a mechanism for pre-application determination in which a person can request information or a technical assistance site visit prior to submitting and HPA application *(WAC 220-660-050)*
- Removing references to repealed statues and ensuring that people must first use the least impacting, technically feasible, bank protection alternative *(WAC 220-660-370)*
- Changing administration actions for clarification and more efficient processes *(WAC 220-660-470)*
- Implementing enhancements for the department to uphold civil compliance to safeguard fish life and habitat that supports fish life *(WAC 220-660-480)*

While we are in support of these changes, WEC also recommends the following changes to further protect nearshore processes, fish life and habitat:

- Moving the hierarchy position of construction of an upland retaining wall to be less impacting than soft armoring techniques, as long as that construction is well beyond the shoreline jurisdiction
- Adding language to require an applicant to prove that the lesser impacting techniques within the hierarchy have been used or are not possible before moving on to subsequent levels in hierarchy
- Requiring that specific project location coordinates be added in project plans to allow for more streamlined mapping and documentation of armoring for monitoring and recovery efforts

Overall, WEC also encourages the Department to continue to use and incorporate language throughout the chapter that:

- Strengthens mitigation for impacts from hydraulic projects
- Emphasizes the negative impacts to fish life and habitat of hard armoring, and while to a lesser degree, but still present, soft shore armoring
- Stresses the importance of shoreline health across the food web from forage fish to juvenile salmon and adult salmon

Thank you for considering our comments as you continue to protect shoreline health for the critical role it plays in salmon and orca recovery.

Sincerely,

Melia Paguirigan

Water & Shorelines Policy Manager
Washington Environmental Council
Melia@wecprotects.org
(206)631-2619

From:	Paul Jewell
To:	HPA Rules (DFW)
Cc:	McAleenan, Mellani; Johnson, Eric; Jane Wall
Subject:	Comments on Hydraulic Code Amendments
Date:	Monday, January 20, 2020 4:54:40 PM
Attachments:	Comment Letter to WDFW on Hydraulic Code Amendments (002) - JW.docx

Good afternoon,

The attached document includes comments on the HPA rule-making process to implement 2SHB 1579.

Please let me know if you have any trouble accessing the document or if you need anything further.

Sincerely,

--
Paul Jewell | Policy Director – Water, Land Use, Environment & Solid Waste
Washington State Association of Counties | wsac.org
pjewell@wsac.org | 360.489.3024

This email may be considered subject to the Public Records Act and as such may be disclosed by WSAC to a third-party requestor.

WSAC WASHINGTON STATE ASSOCIATION of COUNTIES

206 Tenth Ave SE Olympia, WA 98501
(360) 753-1886 www.wsac.org

January 17, 2020

Washington Department of Fish and Wildlife
Randi Thurston, Habitat Program Protection Manager
1111 Washington Street SE
Olympia, WA 98501

Dear Randi,

The intent of this letter is to provide comments on the Washington Department of Fish and Wildlife (WDFW) proposed revisions to Hydraulic Code Rules in chapter 220-660 WAC.

The Washington State Association of Counties (WSAC) is a private, non-profit organization serving as the voice of Washington's counties. Our members include elected County Commissioners, Councilmembers, Councilors, and Executives from all 39 counties.

WSAC also represents the interests of several affiliate organizations, including the Washington State Association of County Engineers (WSACE) and the Washington State Association of County and Regional Planning Directors (WSACRPD). WSACE members are the county engineers that oversee construction and maintenance of the vast majority of our state's transportation infrastructure. WSACRPD's members include professionals who lead and operate the county and regional planning and permitting agencies across the state.

Please consider this letter as the official comments of WSAC, WSACE and WSACRPD.

First, we appreciate the amendments to sections 050, 370 and 470. We agree the amendments simplify and clarify to improve readability and understanding. Unfortunately, we do have some concerns and objections with amendments in section 480. They are as follows:

- Our first concern is with the amendments that create the new term "correction request". It is our understanding that "correction request" is intended to replace the terms "notice of correction" and "notice of violation". It is further stated in WAC 220-660-480 (1) (b) that "correction request" means a notice of violation or a notice of correction as defined in chapter 43.05 RCW.

  In a review of chapter 43.05 RCW a specific, clear definition of either "notice of correction" or "notice of violation" cannot be found, but rather a loose definition in several locations (RCW 43.05.060, 43.05.100,43.05.160 for "notice of correction" and 43.05.030 for "notice of violation") that describe how an agency shall inform a facility when the agency observes a violation of law or agency rule. It is important to note that RCW 43.05.100 specifically includes WDFW regarding notices of correction.

  One thing that is clear in current statute, however, is that there is a distinct difference between a "notice of correction" and a "notice of violation". A "notice of correction", according to RCW

43.05.060 and 43.05.100, cannot be issued as part of technical assistance visit. It is also specifically "not a formal enforcement action, is not subject to appeal...". A "notice of violation" however, is the proper way to inform a facility when a violation of law or agency rules are identified during a technical visit. It is unclear as to whether a "notice of violation" is subject to appeal, but it appears it may be as, unlike "notice of correction", it is not specifically stated otherwise. However, the proposed amendment to WAC 220-660-480 (4) (a) further defines "correction request" and specifically states it is not subject to appeal.

We are concerned that the new term "correction request" will create confusion and ambiguity in rule understanding and enforcement. The terms "correction request" proposes to replace, "notice of correction" and "notice of violation", are substantively different as described in various sections of RCW 43.05. Combining the two terms into one creates several questions including when a "correction request" can/should be issued – for instance only outside of technical assistance visit or during/after one – and whether it is an appealable action/decision.

The amendments adding "correction request", defining it as both "notice of correction" and "notice of violation" in RCW 43.05, and then further defining it as unappealable leaves too much to interpretation and may contradict state law. If these rule updates are needed, as stated in your CR-102 "to implement Laws of 2019, ch. 290 (2SHB 1579)", then why not simply utilize the same terms as used in the bill and existing statute, rather than developing the term "correction request" and creating uncertainty in its meaning?

- Our second concern is with the proposed amendments to WAC 220-660-480 (6) (b). The language in this subsection is very broad and doesn't occur anywhere in RCW 43.05. Further, the notice to comply as described in 2SHB 1579 (2019) Section 7 (1) (a) does not include such an expanded "scope of notice to comply" as stated here which allows "additional action to prevent, correct, or compensate for adverse impacts to fish life caused by the violation."

  Quite frankly, we question whether the rule can or should include this additional language. That aside, we also believe that language as broad as this should, at the least, also include the approval and signature of agency leadership like the proposals for stop work orders and civil penalties.

  During our testimony on 2SHB 1579, we stated more than once that our members are continuously frustrated with the varying interpretation and implementation of the HPA requirements and the State Hydraulic Code by local and regional agency staff. Our members continue to report varying opinions in agency legal requirements from region to region, county to county, and sometimes even among agency field staff. County engineers have reported receiving different interpretations of the regulations from different WDFW biologists from the same regional office. Others have even expressed that working with agency field staff can often feel like a negotiation rather than a well-defined, well-understood and predictable process.

  Language like what is proposed for amendment in this section will only exacerbate those experiences and concerns.

- Finally, we have objections to the proposed amendments in WAC 220-660-480 (8).

First, WAC 220-660-480 (8) (a) (i) proposes to allow the levy of a civil penalty if "the project proponent fails to complete actions required to be completed in a correction request, ..." We do not believe that civil penalties should be issued with the basis of a correction request. As stated earlier, it is unclear when and how a correction request can/should even be issued. However, if it is issued as part of, or after, a technical assistance visit, civil penalties should not be issued unless the violations meet the circumstances defined in RCW 43.05.050. As you know and as defined in RCW 43.05, a technical assistance visit is requested or is voluntarily accepted by the facility for business. It is not something that is a required inspection or compliance visit by the agency.

Section 5 (1) of 2SHB 1579 (2019) clearly states that the department "shall first attempt to achieve voluntary compliance." By issuing a "correction request" or whatever notice is ultimately decided upon as a first action in most cases of violations which don't meet more urgent action, the agency will be complying with that portion of the bill. However, we believe that violations which qualify for a "correction request" should first be elevated to a notice to comply before civil penalties are levied. We believe that such a requirement is progressive in nature and meets the overall spirit and intent of voluntary compliance.

Our second objection to the proposed amendments in this section are regarding what is missing, rather than what is included. The title of this proposed section is "Civil Penalty Schedule" yet no schedule of penalties is included in the proposed amendments.

While we appreciate inclusion here of an itemized list of considerations and circumstances which may be considered when the department decides if and what civil penalty amount to levy and whether to consider civil penalty adjustments, we also expected a specific list (i.e. schedule) of possible violations and their corresponding penalty amounts.

Section 8 (6) of 2SHB 1579 (2019) was very specific in stating "the department shall adopt by rule a penalty schedule to be effective January 1, 2020." What is proposed in WAC 220-660-480 (8) is by no means a penalty schedule. There are several excellent examples of penalty schedules for WDFW to refer to, including those governing Fish and Wildlife Enforcement (chapter 77.15 RCW).

Without a specific penalty schedule, agency staff is afforded too much discretion in assigning civil penalty amounts to a violation. Penalties, as proposed in these amendments, may be assessed from $0 to $10,000 per violation. How will the public be protected from arbitrary and capricious assessments without written, verifiable guidance that a proper penalty schedule will provide?

We believe that 2SHB 1579 was clear and specific in directing the department to adopt a penalty schedule. What is being proposed here is a far cry from meeting that directive and should be expanded upon to include a specific list of violations and the penalties associated with each one. Nothing less would be acceptable to our members and the citizens of Washington State.

Thank you for the opportunity to provide these comments. We trust you will find them helpful as you continue to develop these amendments and move forward in the rule-making process.

If you have any questions regarding these comments or if we can provide further information, please contact Paul Jewell, WSAC Policy Director at 360-753-1886 or pjewell@wsac.org.

We would also appreciate being notified of any changes to the proposed amendments, any further opportunities to provide comment and any final action being taken.

Respectfully submitted,

Robert Gelder
President
Washington State Association of Counties
Kitsap County Commissioner

Eric Pierson, P.E.
President
Washington State Association of County Engineers
County Engineer, Chelan County

Erik Johansen
President
Washington State Association of County and Regional Planning Directors
Land Services Director, Stevens County

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SKAGIT | SKAMANIA | SNOHOMISH | SPOKANE | STEVENS | THURSTON | WAHKIAKUM | WALLA WALLA | WHATCOM | WHITMAN | YAKIMA

From:	Fox, Peggy
To:	HPA Rules (DFW)
Subject:	Comments on HPA Rule Making (Incorporating elements of 2SHB 1579 into HPA rules)
Date:	Friday, January 17, 2020 8:20:47 AM
Attachments:	HPARuleComments20200115.pdf

Peggy Fox, Admin. Assistant
Environmental Services
360-705-7482
foxp@wsdot.wa.gov

Washington State Department of Transportation

Transportation Building
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P.O. Box 47300
Olympia, WA 98504-7300
360-705-7000
TTY: 1-800-833-6388
www.wsdot.wa.gov

January 17, 2020

Randi Thurston
Attn: HPA Rule Making
PO Box 43234
Olympia, WA 98504-3234

RE: Comments on HPA Rule Making (Incorporating elements of 2SHB 1579 into HPA rules)

Dear Ms. Thurston:

Thank you for the opportunity to review the proposed amendments to the state hydraulic code rules. The Washington State Department of Transportation (WSDOT) appreciates the opportunity to provide comments on the proposed rules. We offer the following comments:

WAC 220-660-050 – Enforcement issues affecting statewide WSDOT HPA applications (pg. 11)

- (19)(a) (pg. 11) The term "project proponent" in this new rule has the same definition as in RCW 77.55.410." Does the "person" definition in WAC 220-660-030 apply to the "person" reference within the "project proponent" definition? We would like clarification that state agency applicants are included within the "project proponent" definition. If the project proponent does not include state agencies, we recommend adding "or government agencies" after project proponent to multiple locations throughout the proposed rule (WAC 220-660-050 and WAC 220-660-480).

- As the proposed language is written in Section 19 (as well in other sections throughout the rules), we are concerned about actions from by a WSDOT contractor negatively impacting other WSDOT HPA applications statewide. If a contractor were responsible for a significant HPA violation, would the contractor's actions and record impact WSDOT's future permit applications for HPAs?

WAC 220-660-370 – Saltwater bank protection qualifications / report requirements (pg. 12 - 15)

- (2) (pg. 14) WSDOT appreciates and supports the change from "bulkhead" to "bank protection structure" because it is a clearer description.

- (3) (pg. 14) We recommend the rule provide more clarity on the scope and scale of bank protection projects that require professional experts. WSDOT headquarters (HQ) designers of saltwater bank protection projects have professional licenses, but region designers may not always be licensed geologists or geomorphologists. However, these professionals are qualified to design adequate features. Would WDFW allow saltwater bank protection designs for projects from non-licensed geologists or geomorphologists?

- (4)(d) (pg. 14) The proposed requirements would be appropriate for new projects but maintenance of existing projects should be exempt. We recommend adding this clarification to the proposed rule.

WAC 220-660-370 – Saltwater bank protection benchmarks and monitoring (pg. 15)

(5) (pg. 15) To date, HPA provisions for WSDOT saltwater bank protection activities have not required 10 years of monitoring. Do these benchmark requirements apply to new construction only and does it apply to maintenance? We recommend the rule provide more leeway on the benchmark requirements depending on the scale and location of the project, since it requires the use of survey crews. We also suggest the rule clarify the frequency of measuring the benchmarks.

WAC 220-660-460 – Informal appeals (pg. 16-17)

(3)(a) (pg. 16) "any person with legal standing may request an informal appeal of…issuance, denial," etc. Section 9 (pg. 17) discusses that the department has 60 days from the date of request to make a decision (unless the appeal is in the informal conference process). During this process, will informally appealed permit issuance be withheld or suspended? In addition, Section 9 states that the department has 60 days to make a decision, but it is unclear by when the department must notify the appellant in writing of the decision. We suggest clarifying *when* WDFW will send a response in writing.

WAC 220-660-470 – Formal appeals (pg. 18)

(3)(c) (pg. 18) "issuance of a notice of civil penalty may be formally appealed by the person incurring the penalty." Per our comment regarding WAC 220-660-050 (19)(a), if the inclusion of state agencies as "project proponents" and "person" is not clarified elsewhere, we recommend adding "or government agencies" after "person" here.

WAC 220-660-480 – Complying with HPA provisions (pg. 19 – 28)

- General (pg. 19) – We would like to see some clarity on what action would trigger each specific compliance action. For example: Is substantive impact to the resource a trigger for a stop work order or will that be notice to comply?

- Technical Assistance Visit (2) (pg. 21) – Please define what is meant by minor harm to fish in (c)(ii).

- Compliance Inspection (3) (pg. 21) – Rule revision states clearly that a notice of correction does not need to precede a civil penalty if the project proponent has previously been subject to an enforcement action or similar notices for a specific violation. As the proposed language is written, we are concerned about actions from one WSDOT HPA activity negatively impacting other WSDOT projects statewide. Under this rule, if a western WA WSDOT project received violations or warnings of violations, would this be grounds for

immediate issuance of a civil penalty without notice of correction for an eastern WA WSDOT project?

- Stop Work Order (5) (pg. 24)
  - Please define "significant harm to fish" in (a)(1).
  - How is an immediate stop work order issued in the field if designated staff to authorize the order are not in the field? How is the authority to issue a stop work order and the specific directives relayed to the project proponent and presented in the field?
- Notice to Comply (6) (pg. 24 - 25) -- Who issues the notice to comply? Does the Habitat Biologist issue the notice, or does their supervisor need to issue the notice? The rule designates Signature Authority for Stop Work (5)(e) and Civil Penalties (7)(c), but does not designate authority for Notice to Comply (6). We suggest designating the WDFW authority for Notices to Comply for consistency and clarity.

If you have any questions about our comments, please contact me at (360) 705-7480.

Sincerely,

Megan White, P.E. Director
Environmental Services Office

Appendix D – Written Comments Received from March 5, 2020 through April 10, 2020

From: Robb Krehbiel
To: HPA Rules (DFW)
Cc: Commission (DFW)
Subject: Comments in Support of Proposed Hydraulic Code Rules to Incorporate Elements of 2SHB 1579 into HPA rules
Date: Thursday, April 09, 2020 3:06:29 PM
Attachments: 20200409_OSA to WDFW_HPA Rulemaking.pdf

Dear Ms. Thurston,

Please accept that attached comments on behalf of the Orca Salmon Alliance and our member organizations expressing our support for the proposed Hydraulic Code Rules. If you have any questions or difficulties accessing our document, please let me know.

Best,

Robb

Robb Krehbiel
Northwest Representative

DEFENDERS OF WILDLIFE
1402 3rd Ave, Ste. 930, Seattle, WA 98101
TEL: 206.577.2007
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ORCA
SALMON
ALLIANCE

April 9th, 2020

TO:
Randi Thurston
Habitat Program Protection Division Manager
Washington Department of Fish and Wildlife
PO Box 43152
Olympia, WA 98501

CC:
Washington Fish and Wildlife Commission
Natural Resource Building
1111 Washington St. SE
Olympia, WA 98501

Comments submitted electronically

RE: Comments in Support of Proposed Hydraulic Code Rules to Incorporate Elements of 2SHB 1579 into HPA rules

Dear Ms. Thurston,

Thank you for the opportunity to provide comments to the Washington Department of Fish and Wildlife (WDFW) in support of the proposed Hydraulic Code rules that would incorporate elements of 2SHB 1579 in the Hydraulic Project Approval (HPA) rules. The Orca Salmon Alliance (OSA), a coalition of seventeen local, state, and national organizations, supports the proposed rules and views them as essential to protect and restore nearshore habitat, which is critical for Chinook salmon, the preferred prey of endangered Southern Resident orcas.

During the 2019 legislative session, OSA and our member organizations advocated for the passage of 2SHB 1579, which created civil enforcement authority for WDFW and repealed RCW 77.55.141 regarding marine beachfront protective bulkheads or rock walls. These changes were proposed by Governor Inslee's Orca Task Force, which included members of OSA, to protect essential nearshore habitat and increase salmon availability for endangered Southern Resident orcas. The legislation and the proposed rules are critical to salmon recovery, particularly in the Salish Sea region. Since the passage of 2SHB 1579 in April of 2019, three more orcas died, and another is presumed dead, leaving just 72 Southern Resident orcas left in the wild. Protecting shoreline habitat through a consistent and firm application of the Hydraulic Code is an important piece of the state's overall efforts to recover salmon and Southern Resident orcas.

The single greatest challenge Southern Resident orcas face is finding enough Chinook salmon to eat. Over 80% of their diet in the summer months is comprised of Chinook salmon, and many chinook populations are listed as endangered or threatened. Salmon rely on habitat in marine, nearshore, and freshwater environments. Nearshore habitat supports healthy estuaries and eelgrass beds where juvenile salmon can find sufficient protection and prey (such as forage fish) as they mature into ocean-going adults. However, this habitat is becoming increasingly scarce, particularly in Puget Sound and the broader Salish Sea. Over 70 percent of historical salt marshes and wetlands in Puget

Sound have disappeared. Urban estuaries and marshes have almost completely disappeared.[1] A third (over 800 miles) of Puget Sound's shoreline has been modified with shoreline armoring and other structures.[2] Development along shorelines prevents natural ecological processes that create and support healthy nearshore habitat. Shoreline armoring, bulkheads, and docks along the shoreline all degrade the environment and make it harder for salmon to find the resources they need to survive.

OSA supports the proposed rules and urges the commission to vote in favor of them. These rules would implement key elements of 2SHB 1579, such as removing exemptions for single-family-residence properties, expanding WDFW civil enforcement authority, and expanding protection for shoreline habitat. As written, the rules emphasize deterring development and encouraging voluntary compliance with landowners before leveling fines against offenders. OSA supports this approach when tempered by an effective regulatory backstop and encourages the department to expand its outreach efforts and proactively reach out to landowners with hardened shorelines before enforcing these new rules. The proposed rules would not apply to existing structures, but through proactive outreach, department staff can offer incentives and technical assistance for landowners interested in voluntarily softening their shorelines.

Enacting these rules will significantly improve WDFW's ability to protect and restore important shoreline and nearshore Chinook salmon habitat. Over the long term, the investments made today can support healthy, abundant, and harvestable Chinook salmon runs for both people and orcas. It is important that the state commits to protecting our shorelines now if Southern Resident orcas are to see these benefits over time.

On behalf of our members, we strongly urge the adoption of the proposed Hydraulic Permit Rules.

Sincerely,

The Member Groups of the Orca Salmon Alliance
- The Center for Biological Diversity
- Defenders of Wildlife
- Earth Justice
- Endangered Species Coalition
- Friends of the San Juans
- Natural Resources Defense Council
- Oceana
- Orca Network
- Puget Soundkeeper
- Save Our Wild Salmon
- Seattle Aquarium
- Toxic-Free Future
- Washington Environmental Council
- Whale and Dolphin Conservation
- Whale Scout

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[1] U.S. Geological Survey. May 2006. Coastal Habitats in Puget Sound. Available at: https://pubs.usgs.gov/fs/2006/3081/pdf/fs20063081.pdf

[2] Encyclopedia of Puget Sound. Jeff Rice. 2018. Shoreline armoring implementation strategy finalized. Available at: https://www.pugetsoundinstitute.org/2018/04/shoreline-armoring-implementation-strategy-finalized/

From:	Commission (DFW)
To:	Thurston, Randi L (DFW); Chapman, Pat F (DFW)
Subject:	FW: comments 2SHB 1579 april 10 2020 hearing
Date:	Wednesday, April 08, 2020 7:43:43 AM
Attachments:	FSJ_WDFW_HB 1579 support letter_4_7_2020.pdf

From: tina@sanjuans.org <tina@sanjuans.org>
Sent: Tuesday, April 7, 2020 3:45 PM
To: Commission (DFW) <COMMISSION@dfw.wa.gov>
Cc: lovel@sanjuans.org
Subject: comments 2SHB 1579 april 10 2020 hearing

Dear Commissioners,

Attached please find a public comment and support letter for 2SHB 1579 and improved restoration and protection of shoreline habitat.

Please let me know if you have any issues opening the document or any questions.

Thank you for your consideration.

I hope you are all well in these unprecedented times.

Regards,

tina

Tina Whitman, Science Director
Friends of the San Juans
P.O. Box 1344 Friday Harbor, WA 98250
tina@sanjuans.org sanjuans.org
Direct: 360-298-7616 Cell: 360-840-3824

Friends *of the* **San Juans**
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April 7, 2020

WA State Fish and Wildlife Commission
WDFW Wildlife Program
PO Box 43200 Olympia, WA 98504
Fax: 360-902-2162

Sent via email: commission@dfw.wa.gov

RE: Support for amendments to Hydraulic Code Rules to implement 2SHB 1579

Dear Commissioners,

Friends of the San Juans is writing to express our strong support for 2SHB 1579 and the steps it proposes to improve the protection of nearshore habitat. We support the amendments to the Hydraulic Code Rules that are needed to implement elements in sections 4 through 11 of 2SHB 1579 to add a mechanism for preapplication determination, implement enhanced civil compliance tools, remove references to repealed statutes, and clarify administrative actions that are subject to informal and formal appeal.

These changes are long overdue and strongly supported by the science and public opinion. Implementation of the regulatory changes proposed in 2SHB 1579 directly support the recovery of Chinook salmon, an imperative task for both people and nature in our region.

The improved protection of nearshore marine habitats is an essential component of any efforts to recover Chinook salmon and the Southern Resident orca. In our community, the San Juan Islands, 20 of 22 stocks of Puget Sound Chinook as well as numerous Vancouver Island and Fraser River Watershed stocks use our 400+ miles of marine shoreline as critical juvenile rearing and feeding habitat.

Our shorelines are also significantly threatened by the very development activities addressed in the Hydraulic Code Rules; 90% of waterfront tax parcels in San Juan County are in private, residential ownership. Existing regulatory frameworks are already failing to prevent the ongoing incremental and cumulative impacts to shoreline function and demand for new shoreline modifications is only expected to increase as human populations and climate change impacts grow.

Local communities, Washington State and the citizens of the United States are spending hundreds

protecting and restoring the San Juan Islands and the Salish Sea for people and nature

of millions of dollars on habitat restoration in our region, often related to removal of unnecessary shoreline armoring. The Puget Sound Chinook salmon recovery plan is based on the flawed assumption that protection efforts will hold the line and allow restoration actions to provide net gain. The fact that the WDFW has been hampered in its ability to disallow unnecessary armoring means that one arm of government is supporting armor removal while another is continuing to allow new and expanded development without restraint. This is not how we achieve no net loss, the current requirement and is certainly not how we will achieve net gain, which is what will be required to recover Chinook salmon and the southern resident orca.

In addition, the current inability of WDFW to deny unnecessary or harmful projects or implement meaningful enforcement leaves local governments, many with limited technical and financial resources, holding the line for habitat protection. This lack of state leadership results in limited, inconsistent and often ineffective shoreline protection efforts. Implementation of 2SHB 1579 can help support rural communities in their efforts to reduce unnecessary armoring and achieve habitat restoration where unauthorized armoring occurs.

Over the past decade, scientific understanding of the negative impacts of shoreline armoring in our region has increased greatly. Existing policies were developed long before the numerous negative impacts of shoreline armoring and the critical status of Chinook salmon and the southern resident orca were fully understood. Significant advances have been made in both our understanding of the negative impacts to shoreline processes, habitat and species essential to marine food webs as well as in our understanding of feasible alternatives to hard armoring. In addition, many public and non-profit programs are now available that provide technical and financial resources for private waterfront property owners, and private options for alternatives to hard bulkheads have also increased greatly. Many of these are even managed by WDFW, including the Marine Shoreline Design Guidelines and Shore Friendly.

In the San Juans, the environment IS our economy and healthy shorelines are the foundation. We encourage you to enact 2SHB 1579 into law and promote the restoration and protection of habitat critical to salmon recovery through coordinated and meaningful implementation of these new policies across the agency.

Thank you for your consideration,

Tina Whitman

Tina Whitman, Science Director

From: Colleen Weiler
To: HPA Rules (DFW)
Subject: support for Hydraulic Code Rule Making 220-660 WAC
Date: Tuesday, February 18, 2020 11:54:55 AM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
image006.png
image007.png
image008.png
OSA Hydraulic Code support letter.pdf

Dear Ms. Thurston,

Please see the attached letter, submitted from member groups of the Orca Salmon Alliance to the WA Fish and Wildlife Commission, supporting the rule-making process to revise the Hydraulic Code as directed by 2018 2SHB 1579 and the WA Orca Recovery Task Force. We wanted to share this support letter with you for your records. Please let me know if you have any questions.

Cheers,
-Colleen

Colleen Weiler
WDC Fellow, Rekos Fellowship for Orca Conservation

Telephone: +1 508 746 2522
Mobile: +1 810 813 1643
Skype: cmweiler

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WDC - Protecting Whales and Dolphins for over 30 years

Whale and Dolphin Conservation ("WDC"), Inc. is an IRS recognized 501(c)3 non-profit organization. Your contributions are tax deductible to the fullest extent of the law.
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Washington Fish and Wildlife Commission
Olympia, WA 98501
Sent via online contact portal

ORCA SALMON ALLIANCE

cc: Randi Thurston, Habitat Program Protection Division Manager, Washington Department of Fish and Wildlife

February 18, 2020

Dear Chair Carpenter, Vice Chair Baker, and Commissioners:

The undersigned member organizations of the Orca Salmon Alliance (OSA) are writing to express our support for the Washington Department of Fish and Wildlife (WDFW) proposed Hydraulic Code rulemaking to implement 2SHB 1579. This bill passed in 2019 as part of the "Orca Recovery" package of bills to address the needs of the endangered Southern Resident orca community, and we urge the Fish and Wildlife Commission (Commission) to finalize the rule. OSA is coalition of 16 local, regional, and national organizations working to save the Southern Resident orcas by recovering the salmon they depend on.

2SHB 1579 was based on recommendations from the Southern Resident Orca Recovery Task Force (Orca Task Force), created in March 2018 by an Executive Order from Governor Jay Inslee in response to the continued decline of the Pacific Northwest's unique and iconic Southern Resident orca population. The Orca Task Force recognized that a lack of adequate prey is the primary limiting factor for the Southern Resident orcas, and that rebuilding salmon populations requires actions ranging from increasing investment in habitat to strengthening existing regulations such as the Hydraulic Code.

Through the duration of the Orca Task Force, OSA supported the recommendation to strengthen the Hydraulic Code and continued to advocate for the changes by supporting 2SHB 1579 in the 2019 legislative session. We urge the Commission to expedite the finalization and implementation of the subsequent proposed rules. The amendments and changes are vital for protecting and restoring shoreline habitat important for juvenile salmon and forage fish, the base of the food web in the Washington marine ecosystem.

Due to years of development and insufficient oversight, ecosystems throughout Washington have become too damaged to support forage fish, salmon, and Southern Resident orcas. Juvenile salmon need healthy nearshore habitat such as estuaries and eelgrass beds as they mature into ocean-going adults. However, nearshore habitat is becoming increasingly scarce – over 70% of historical salt marshes in Puget Sound have disappeared, and one third (over 800 miles) of Puget Sound's shoreline has been modified by armoring and other structures. This development prevents the natural ecological processes that create and support healthy nearshore habitat for forage fish and salmon. Strengthening the rules that protect habitat and improving WDFW's ability to enforce those rules is an important step to maintaining existing habitat and restoring what has been lost.

Although the Orca Task Force developed a comprehensive suite of actions to reduce and mitigate existing threats to the Southern Resident orcas, and some of those were translated into policies in the 2019 state legislative session, the small orca population has continued to decline. With the recent disappearance of L41 (Mega), announced by the Center for Whale Research on January 28, there are likely just 72 Southern Resident orcas remaining in the wild – perilously close to their lowest abundance on record. However, two new calves recently born into the population who appear to be thriving offer hope that they can recover, if the orcas have what they need to survive.

OSA remains committed to Southern Resident orca recovery and to advancing the recommendations of the Orca Task Force. We strongly support the proposed changes, and we urge the Commission to finalize and implement them as soon as possible to start the work necessary to ensure the newest Southern Resident orcas have abundant salmon and a healthy marine ecosystem to grow up in.

Thank you for the opportunity to support this important rule.

Regards,

The member groups of the Orca Salmon Alliance:

Colleen Weiler
Jessica Rekos Fellow
Whale and Dolphin Conservation

Whitney Neugebauer
Director
Whale Scout

Robb Krehbiel
Northwest Representative
Defenders of Wildlife

Lovel Pratt
Marine Protection Program Director
Friends of the San Juans

Alyssa Barton
Policy Director
Puget Soundkeeper Alliance

Dr. Erin Meyer
Director of Conservation Programs and Partnerships
Seattle Aquarium

Joseph Bogaard
Executive Director
Save our wild Salmon

Rein Attemann
Puget Sound Campaigns Manager
Washington Environmental Council

Howard Garrett
Orca Network President
Orca Network

Deborah A. Giles, PhD
Science and Research Director
Wild Orca

From:	Parker, Ted (Leo)
To:	HPA Rules (DFW)
Cc:	Seitz, Natalie; Parker, James
Subject:	Comments on rule making WAC 220-660-050, 370, 460, 470 and 480
Date:	Friday, April 10, 2020 7:06:58 AM
Attachments:	20200409c_HPA_2SHB 1579_Rule Making Comments_DRAFT.DOCX

Please accept and consider these comments.

Thanks

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L. Ted Parker-Aquatic Biologist
Senior Environmental Coordinator
Snohomish County-Roads Maintenance
19620 67th Avenue NE
Arlington WA 98223

Phone
Office 425-388-7524
Cell 425-308-8332

Thank you for the opportunity to review the draft amendments to Washington Administrative Code 220-660- 050, 370, 460, 470 and 480. We would appreciate your consideration of the following comments:

Location	Comment
WAC 220-660-050(13)(d)	The current draft proposes to insert "or other work" after construction in order to better conform to the definition of hydraulic project -030 (77). Would you please consider amending the text as follows: "...department before a hydraulic project ((~~construction or other work~~)) starts..."? This revision would best conform to the definition of hydraulic project and avoid potential confusion that may result in notification for pre-construction survey work.
WAC 220-660-480(5)	House Bill 2SHB 1579 Section 6(2)(b) requires "... any project proponent stop all work connected with the violation until corrective action is taken." The department currently issues general and multi-site HPAs [220-660-050(b)(3)] which may result in concurrent work being performed that is not in violation. Would you please consider changing the first sentence of WAC 220-660-480(5)(c) as follows: "Scope of a stop work order: A stop work order may require that a person stop all work connected with the ((~~project~~)) violation until corrective action is taken..."? This revision would best conform to 2SHB 1579 Section 6(2)(b).
WAC 220-660-480(5)	Would you please clarify that section WAC 220-660-480(5)(c) applies to stop work orders issued under WAC 220-660-480(5)(f)? If a violation were to occur installation of immediate best management practices (BMPs) may help to prevent further adverse impacts to fish life caused by the violation.
WAC 220-660-480(8)(c)(ii)(A)	House Bill 2SHB 1579 Section 8(6) identifies that the penalty schedule must be developed in consideration of "(a) previous violation history." WAC 220-660-480(8)(c)(ii)(A) identifies that the department will consider "the frequency and similarity of any previous violations within five years preceding the violation leading to the issuance of the penalty." Some project proponents currently undertake a significant number of hydraulic projects that directly benefit fish life. Would the department consider reducing the review period to 3 years preceding the violation leading to the issuance of the penalty? This revision would meet the intent of House Bill 2SHB 1579 Section 8(6) to consider the project proponents violation history, while also recognizing individual violations may represent a low frequency for some project proponents.
WAC 220-660-480(8)(c)(ii)(C)	House Bill 2SHB 1579 Section 8(6) identifies that the penalty schedule must be developed in consideration of "(c) whether the violation of this chapter or of its rules was intentional." Technical assistance visits are identified as a method to for the department to advise and consult on permit applications (WAC 220-660-480 Introduction). Public agency project proponents often undertake

DRAFT

	site visits with the department and stakeholders far in advance of project construction. Non-compliance may result from multiple factors unrelated to information exchanged during the site visit, including but not limited to site conditions at the time of construction that are *unknown* at the time of the site visit. The acceptance of technical assistance should not be viewed by the department as proof of an "intentional" violation; would you please consider striking "consultation, a technical or" from the civil penalty schedule WAC 220-660-480(8)(c)(ii)(C)? This revision would best conform to 2SHB 1579 Section 8(6) by restricting the consideration to penalties to intentional violations.

DRAFT

From:	Melia Paguirigan
To:	HPA Rules (DFW)
Subject:	HPA Rulemaking Comment Letter
Date:	Thursday, April 09, 2020 8:22:28 AM
Attachments:	HPA Supplemental CR-102 Comment Letter Final.pdf

Hello,

Please find the attached document as formal comment from Washington Environmental Council to the Washington Department of Fish and Wildlife in regards to the current rulemaking proposal for implementing 2SHB 1579.

If you have any questions, feel welcome to reach out to me directly using the contact info below.

Thank you,
Melia Paguirigan

Melia Paguirigan • Water & Shorelines Policy Manager
206.631.2619 • melia@wecprotects.org
Pronouns: she/her

Washington Environmental Council • wecprotects.org
1402 Third Avenue | Suite 1400 | Seattle, WA 98101

WASHINGTON ENVIRONMENTAL COUNCIL

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April 9, 2020

Randi Thurston
Washington Department of Fish and Wildlife
PO Box 43200
Olympia, WA 98504-3200

RE: New HPA rulemaking implementing 2SHB 1579 Civil Compliance Enhancements

Ms. Thurston,

Washington Environmental Council (WEC) appreciates the Washington Department of Fish and Wildlife's (WDFW) responses to comments provided on January 21, 2020. We are grateful for the opportunity to comment on amendments in the supplemental CR-102 form for WDFW's rulemaking to implement the Governor's Orca Task Force recommendations through 2SHB 1579. As advocates for Washington's coastal and aquatic ecosystems, we believe strengthening Hydraulic Project Approval (HPA) rules will better protect ecologically important coastal habitats that our beloved salmon and orca depend on. That is why WEC supports WDFW's enhanced civil protection authority and in general, the clarity provided to the penalty schedule. We urge WDFW to move forward with adoption of the proposed rules and to carry out the legislative intent to protect fish life, orcas and the habitat they depend on.

WEC is a 501 (c)(3) organization founded in 1967. Our mission is to protect, restore and sustain Washington's environment for all, and we are committed to fish and habitat protections that are beneficial for Puget Sound and for all Washington State waters. We understand that construction and development along marine shorelines impact ecologically important habitat that fish, orcas and communities depend on. We believe the HPA permitting process plays an important role in protection of these vital nearshore areas and want to ensure WDFW has the tools they need to carry out this important work. Therefore, WEC supports all minor changes to WAC Sections:

- 220-660- 050(9)(c)(iii)(D)
- 220-660-370
- 220-660- 370(3)(d)
- 220-660- 370(5)(a)
- 220-660-480
- 220-660-480
- 220-660- 480(6)(e)
- 220-660- 480(7)(a)
- 220-660-480 (8)(d)(iii)

In addition, WEC also supports amendments to the penalty schedule in WAC Section 220-660-480(8)(c), which sets a base penalty and provides clarity around how full penalty amounts will be determined. In general, we hope that this added clarity and transparency will help the public understand the implications to habitat and will

Protecting, restoring, and sustaining Washington's environment for all.

WASHINGTON ENVIRONMENTAL COUNCIL

wecprotects.org
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serve as a sufficient deterrent of violations. The legislation intended that these amendments protect habitat and fish life. Therefore, we ask WDFW evaluate the effectiveness of the civil penalty schedule and ensure that violators are held accountable by assessing the program every two years. This will provide WDFW with baseline information with which to adaptively manage the program implementation to achieve beneficial outcomes.

In closing, we would like to thank WDFW for your strong efforts to develop rules that protect coastal and marine habitat that orca survival and salmon abundance depends on. We look forward to ongoing participation in WDFW work to protect ecologically important lands and the marine life and communities that rely on them.

Thank you,

Melia Paguirigan

Water & Shorelines Policy Manager

Washington Environmental Council

Protecting, restoring, and sustaining Washington's environment for all.

From:	Paul Jewell
To:	HPA Rules (DFW)
Cc:	McAleenan, Mellani; Johnson, Eric; Jane Wall
Subject:	Comment Letter from the Washington State Association of Counties on Proposed Revision to chapter 220-660 WAC
Date:	Friday, April 10, 2020 3:53:09 PM
Attachments:	Comment Letter to WDFW on Hydraulic Code Amendments.docx

Dear Randi,

Please see our comment letter on the WDFW proposed revisions to Hydraulic Code Rules in chapter 220-660 WAC.

Sincerely,

--
Paul Jewell | Policy Director – Water, Land Use, Environment & Solid Waste
Washington State Association of Counties | wsac.org
pjewell@wsac.org | 360.489.3024

This email may be considered subject to the Public Records Act and as such may be disclosed by WSAC to a third-party requestor.

WSAC WASHINGTON STATE ASSOCIATION of COUNTIES

206 Tenth Ave SE Olympia, WA 98501
(360) 753-1886 www.wsac.org

January 17, 2020

Washington Department of Fish and Wildlife
Randi Thurston, Habitat Program Protection Manager
1111 Washington Street SE
Olympia, WA 98501

Dear Randi,

The intent of this letter is to provide comments on the Washington Department of Fish and Wildlife (WDFW) proposed revisions to Hydraulic Code Rules in chapter 220-660 WAC.

The Washington State Association of Counties (WSAC) is a private, non-profit organization serving as the voice of Washington's counties. Our members include elected County Commissioners, Councilmembers, Councilors, and Executives from all 39 counties.

WSAC also represents the interests of several affiliate organizations, including the Washington State Association of County Engineers (WSACE) and the Washington State Association of County and Regional Planning Directors (WSACRPD). WSACE members are the county engineers that oversee construction and maintenance of the vast majority of our state's transportation infrastructure. WSACRPD's members include professionals who lead and operate the county and regional planning and permitting agencies across the state.

Please consider this letter as the official comments of WSAC, WSACE and WSACRPD.

First, we appreciate the amendments to sections 050, 370 and 470. We agree the amendments simplify and clarify to improve readability and understanding. Unfortunately, we do have some concerns and objections with amendments in section 480. They are as follows:

- Our first concern is with the amendments that create the new term "correction request". It is our understanding that "correction request" is intended to replace the terms "notice of correction" and "notice of violation". It is further stated in WAC 220-660-480 (1) (b) that "correction request" means a notice of violation or a notice of correction as defined in chapter 43.05 RCW.

  In a review of chapter 43.05 RCW a specific, clear definition of either "notice of correction" or "notice of violation" cannot be found, but rather a loose definition in several locations (RCW 43.05.060, 43.05.100,43.05.160 for "notice of correction" and 43.05.030 for "notice of violation") that describe how an agency shall inform a facility when the agency observes a violation of law or agency rule. It is important to note that RCW 43.05.100 specifically includes WDFW regarding notices of correction.

  One thing that is clear in current statute, however, is that there is a distinct difference between a "notice of correction" and a "notice of violation". A "notice of correction", according to RCW

43.05.060 and 43.05.100, cannot be issued as part of technical assistance visit. It is also specifically "not a formal enforcement action, is not subject to appeal...". A "notice of violation" however, is the proper way to inform a facility when a violation of law or agency rules are identified during a technical visit. It is unclear as to whether a "notice of violation" is subject to appeal, but it appears it may be as, unlike "notice of correction", it is not specifically stated otherwise. However, the proposed amendment to WAC 220-660-480 (4) (a) further defines "correction request" and specifically states it is not subject to appeal.

We are concerned that the new term "correction request" will create confusion and ambiguity in rule understanding and enforcement. The terms "correction request" proposes to replace, "notice of correction" and "notice of violation", are substantively different as described in various sections of RCW 43.05. Combining the two terms into one creates several questions including when a "correction request" can/should be issued – for instance only outside of technical assistance visit or during/after one – and whether it is an appealable action/decision.

The amendments adding "correction request", defining it as both "notice of correction" and "notice of violation" in RCW 43.05, and then further defining it as unappealable leaves too much to interpretation and may contradict state law. If these rule updates are needed, as stated in your CR-102 "to implement Laws of 2019, ch. 290 (2SHB 1579)", then why not simply utilize the same terms as used in the bill and existing statute, rather than developing the term "correction request" and creating uncertainty in its meaning?

- Our second concern is with the proposed amendments to WAC 220-660-480 (6) (b). The language in this subsection is very broad and doesn't occur anywhere in RCW 43.05. Further, the notice to comply as described in 2SHB 1579 (2019) Section 7 (1) (a) does not include such an expanded "scope of notice to comply" as stated here which allows "additional action to prevent, correct, or compensate for adverse impacts to fish life caused by the violation."

  Quite frankly, we question whether the rule can or should include this additional language. That aside, we also believe that language as broad as this should, at the least, also include the approval and signature of agency leadership like the proposals for stop work orders and civil penalties.

  During our testimony on 2SHB 1579, we stated more than once that our members are continuously frustrated with the varying interpretation and implementation of the HPA requirements and the State Hydraulic Code by local and regional agency staff. Our members continue to report varying opinions in agency legal requirements from region to region, county to county, and sometimes even among agency field staff. Some county engineers even expressed that working with agency field staff can often feel like a negotiation rather than a well-defined, well-understood and predictable process.

  Language like what is proposed for amendment in this section will only exacerbate those experiences and concerns.

- Finally, we have objections to the proposed amendments in WAC 220-660-480 (8).

  First, WAC 220-660-480 (8) (a) (i) proposes to allow the levy of a civil penalty if "the project proponent fails to complete actions required to be completed in a correction request, ..." We

do not believe that civil penalties should be issued with the basis of a correction request. As stated earlier, it is unclear when and how a correction request can/should even be issued. However, if it is issued as part of, or after, a technical assistance visit, civil penalties should not be issued unless the violations meet the circumstances defined in RCW 43.05.050. As you know and as defined in RCW 43.05, a technical assistance visit is requested or is voluntarily accepted by the facility for business. It is not something that is a required inspection or compliance visit by the agency.

Section 5 (1) of 2SHB 1579 (2019) clearly states that the department "shall first attempt to achieve voluntary compliance." By issuing a "correction request" or whatever notice is ultimately decided upon as a first action in most cases of violations which don't meet more urgent action, the agency will be complying with that portion of the bill. However, we believe that violations which qualify for a "correction request" should first be elevated to a notice to comply before civil penalties are levied. We believe that such a requirement is progressive in nature and meets the overall spirit and intent of voluntary compliance.

Our second objection to the proposed amendments in this section are regarding what is missing, rather than what is included. The title of this proposed section is "Civil Penalty Schedule" yet no schedule of penalties is included in the proposed amendments.

While we appreciate inclusion here of an itemized list of considerations and circumstances which may be considered when the department decides if and what civil penalty amount to levy and whether to consider civil penalty adjustments, we also expected a specific list (i.e. schedule) of possible violations and their corresponding penalty amounts.

Section 8 (6) of 2SHB 1579 (2019) was very specific in stating "the department shall adopt by rule a penalty schedule to be effective January 1, 2020." What is proposed in WAC 220-660-480 (8) is by no means a penalty schedule. There are several excellent examples of penalty schedules for WDFW to refer to, including those governing Fish and Wildlife Enforcement (chapter 77.15 RCW).

Without a specific penalty schedule, agency staff is afforded too much discretion in assigning civil penalty amounts to a violation. Penalties, as proposed in these amendments, may be assessed from $0 to $10,000 per violation. How will the public be protected from arbitrary and capricious assessments without written, verifiable guidance that a proper penalty schedule will provide?

We believe that 2SHB 1579 was clear and specific in directing the department to adopt a penalty schedule. What is being proposed here is a far cry from meeting that directive and should be expanded upon to include a specific list of violations and the penalties associated with each one. Nothing less would be acceptable to our members and the citizens of Washington State.

Thank you for the opportunity to provide these comments. We trust you will find them helpful as you continue to develop these amendments and move forward in the rule-making process.

If you have any questions or if we can provide further information, please let us know. We would also appreciate being notified of any changes to the proposed amendments, any further opportunities to provide comment and any final action being taken.

Respectfully submitted,

Robert Gelder
President
Washington State Association of Counties
Kitsap County Commissioner

Eric Pierson, P.E.
President
Washington State Association of County Engineers
County Engineer, Chelan County

Erik Johansen
President
Washington State Association of County and Regional Planning Directors
Land Services Director, Stevens County

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