



Washington  
Department of  
**FISH and  
WILDLIFE**

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## **Hydraulic Code Rules Chapter 220-660 WAC**

### **Incorporating Elements of ESHB 1261 into HPA Rules**

WAC 220-660-030 Definitions

WAC 220-660-050 Procedures

WAC 220-660-300 Mineral Prospecting

WAC 220-660-305 Suction Dredging [Renamed]

### **Regulatory Analysis**

Incorporating:

**Cost-Benefit Analysis**

**Least Burdensome Alternatives Analysis**

**Administrative Procedure Act Determinations**

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

Version 3 Draft

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***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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## SECTION 1: INTRODUCTION

The state Legislature gave the Washington Department of Fish and Wildlife (department) the responsibility to preserve, protect, and perpetuate all fish and shellfish resources of the state. To help achieve this mandate, the Legislature passed a state law in 1943 called “Protection of Fish Life.” Now titled “Construction Projects in State Waters” and codified as Chapter 77.55 Revised Code of Washington (RCW), the entire text of the statute can be found at:

<http://app.leg.wa.gov/RCW/default.aspx?cite=77.55> .

Under the authority of Chapter 77.55 RCW, the department issues a construction permit called a Hydraulic Project Approval (HPA). The sole purpose of the HPA is to protect fish life from construction and other work that uses, diverts, obstructs, or changes the natural flow or bed of state waters. HPAs are site-specific, meaning that provisions are tailored to the site conditions and fish species that might be affected by each project. The HPA contains provisions that a permittee must follow in order to mitigate<sup>1</sup> impacts to fish life caused by the project.

The department adopts rules to implement Chapter 77.55 RCW under Chapter 220-660 Washington Administrative Code (WAC) - *Hydraulic Code Rules*. This WAC Chapter establishes regulations for administration of the HPA program. The Hydraulic Code Rules set forth definitions, administrative procedures for obtaining an HPA, steps for HPA appeals and civil compliance, and criteria generally used by the department to review and condition hydraulic projects to protect fish life.

This report presents Washington Department of Fish and Wildlife (department) analyses and determinations pursuant to Chapter 34.05 RCW - Administrative Procedure Act (APA), and Chapter 19.85 RCW - Regulatory Fairness Act (RFA), for proposed amendments to Hydraulic Code Rules in Chapter 220-660 WAC. This document is organized as follows:

SECTION 1: Introduction

SECTION 2: Describe the proposed rule and its history

SECTION 3: Significant Legislative Rule Analysis Required

SECTION 4: Goals and Objectives of the Statute that the Rule Implements

SECTION 5: How the Rule Meets the Objectives of the Statute

SECTION 6: Involving stakeholders in rule development

SECTION 7: Cost-Benefit Analysis

SECTION 8: Least Burdensome Alternative

SECTION 9: Remaining APA Determinations

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<sup>1</sup> “Mitigation” is defined in WAC 220-660-030(100) to mean sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts to fish life or habitat that supports fish life.

Documents relating to this rule making activity are available on the department's HPA rule making web page at <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking>.

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## **SECTION 2: Describe the proposed rule and its history**

Rule amendments are proposed as necessary to implement elements of Engrossed Substitute House Bill 1261 (ESHB 1261)<sup>2</sup> - a bill passed by the legislature during the 2020 legislative session. Bill sections 1 and 2 amended Chapter 90.48 RCW. Section 2 prohibits motorized or gravity siphon aquatic mining or discharge of effluent from such an activity to any waters of the state that have been designated under the Endangered Species Act (ESA) as critical habitat, or that would impact critical habitat for salmon, steelhead, or bull trout. This prohibition includes fresh waters with the designated uses of salmonid spawning, rearing, and migration.

Sections 3 and 4 of ESHB 1261 also amended Chapter 77.55 RCW. Section 3 amended the definition of "small scale prospecting and mining" and added a new definition for "motorized or gravity siphon aquatic mining". Section 4 added a new requirement for a complete a Hydraulic Project Approval (HPA) application. This requirement states "In the event that any person or government agency desires to undertake mineral prospecting or mining using motorized or gravity siphon equipment or desires to discharge effluent from such an activity to waters of the state, the person or government agency must also provide proof of compliance with the requirements of the federal clean water act issued by the department of ecology."

### **2.1 Specific Objectives for this Rule Making**

In order to implement elements in sections 3 and 4 of ESHB 1261, the department's objectives in this rule making include the following:

- ✓ Add definitions for "gravity siphon aquatic mining" and "motorized or gravity siphon equipment";
- ✓ Specify that a standard hydraulic project approval (HPA) permit is required to conduct mineral prospecting involving motorized or gravity siphon equipment and require proof of compliance with the federal Clean Water Act for this activity as part of a complete application for a standard HPA;
- ✓ Specify that the department may reject an application for motorized or gravity siphon aquatic mining if the proposed project location or locations occur where they are prohibited under RCW 90.48.615; and
- ✓ Remove authorization for motorized aquatic mining activities from the Gold and Fish pamphlet rules

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<sup>2</sup> Laws of 2020, Chapter 10; Codified in RCWs 77.55.011 and 77.55.021

In addition, the proposal specifies that all activities under WAC 200-660-305 (Mineral prospecting involving motorized or gravity siphon equipment) must employ aquatic invasive species prevention.

## 2.2 Describe the proposed rule

Table 1 presents the proposed SSB 1261 Rule Change Proposals (Proposals). The table presents changes listed in sequential order by change number and WAC subsection number.

**Table 1 WDFW 2020 ESHB 1261 Rule Change Proposals presented by section and subsection number**

Change #	WAC Subsection	Description
<b>WAC 220-660-030 Definitions</b>		
1	220-660-030(29)	Removes “or water pressure” from the definition of crevicing. The use of pressurized water would be a discharge.
2	220-660-030(55)	Amends the definition of “Fish guard” by changing “pumping” to “removing” and removing “pump” before the word intake. This change accounts for gravity or siphon intakes that don’t use a pump but still need a fish guard.
3	220-660-030(68)	Adds a new definition for “Gravity siphon aquatic mining”.
4	220-660-030(72)(a)	Amends the “Hand-held mineral prospecting tools” definition to include only non-motorized hand-held tools.
5	220-660-030(78)(a)(i)	Clarification made by removing the phrase “and other minor hydraulic project activities for”.
6	220-660-030(105)	Adds a new definition for “Motorized or gravity siphon equipment”.
7	220-660-030(149)	Removes the definition of “Vac-pac” because the term is no longer used.
<b>WAC 220-660-050 Procedures – Hydraulic project approvals</b>		
8	220-660-050(9)(c)(iii)(H)	Specifies proof of compliance with the federal Clean Water Act must be included in a standard HPA application for mineral prospecting involving motorized or gravity siphon equipment.
9	220-660-050(9)(c)(iii)(I)	This existing language was moved from 220-660-305(3)(b).
10	220-660-050(9)(c)(iv)(A)	Clarifies how to apply for a motorized or gravity siphon aquatic mining HPA.
11	220-660-050(9)(c)(iv)(D)	Clarifies normal business hours.
12	220-660-050(10)(d)	Specifies the department may reject a standard application for mineral prospecting involving motorized or gravity siphon equipment if the proposed project location or locations occur in an area that is prohibited under RCW 90.48.615.

Change #	WAC Subsection	Description
<b>WAC 220-660-300 Mineral prospecting</b>		
13	220-660-300(1)	Specifies which equipment the section applies to and does not apply to.
14	220-660-300(4)(b)	Specifies when mineral prospecting without timing restrictions, that only hand-held mineral prospecting tools, pans, sluices, non-motorized concentrators, mini rocker boxes and non-motorized mini high bankers may be used. Spiral wheels are removed from the list of authorized equipment because the discharge cannot be fully contained within the equipment.
15	220-660-300(4)(c)	Specifies that a person may use one “non-motorized” hand-operated winch.
16	220-660-300(4)(g)(i)	Spiral wheels are removed from the list of authorized equipment because the discharge cannot be fully contained within the equipment.
17	220-660-300(4)(g)(viii)	Specifies “nonmotorized” mini high-bankers. Specifies that water may only be supplied to mini high-bankers or concentrators from natural stream flow or hand-held containers, not by a gravity siphon.
18	220-660-300(4)(g)(ix)	Removes the screening requirement because motorized pumps are no longer authorized in WAC 220-660-300.
19	220-660-300(4)(g)(xii)	Removes fuel rules because motorized equipment is no longer authorized in WAC 220-660-300.
20	220-660-300(5)(a)	Removes the phrase “and with the mineral prospecting equipment limitations” for clarification.
21	220-660-300(5)(b)	Specifies when mineral prospecting with timing restrictions, that only “non-motorized” hand-held mineral prospecting tools and pans, sluices, “non-motorized” concentrators, rocker boxes and “non-motorized” high bankers may be used. Spiral wheels are removed from the list of authorized equipment because the discharge cannot be fully contained within the equipment. Other motorized equipment is removed.
22	220-660-300(5)(d)	Removes reference to motorized equipment because it is no longer authorized in WAC 220-660-300. Specifies a person may use one “non-motorized” hand-operated winch.
23	220-660-300(5)(e)(i)	Removes spiral wheels from the list of authorized equipment and specifies “nonmotorized” mini high-bankers.
24	220-660-300(5)(e)(ii)	Removes reference to motorized equipment because it is no longer authorized in WAC 220-660-300. Specifies equipment separation from others operating “mineral prospecting equipment”.

Change #	WAC Subsection	Description
25	220-660-300(5)(e)(iii)	Removes reference to motorized equipment because it is no longer authorized in WAC 220-660-300. Specifies equipment separation from others operating “mineral prospecting equipment”.
26	220-660-300(5)(g)	Removes the screening requirement because motorized pumps are no longer authorized in WAC 220-660-300.
27	220-660-300(5)(h)	Removes fuel rules because motorized equipment is no longer authorized in WAC 220-660-300.
28	220-660-300(5)(p)	Removes spiral wheels from the list of authorized equipment and specifies “nonmotorized” mini high-bankers and “non-motorized” concentrators. Removes reference to motorized equipment.
29	220-660-300(5)(q)	Removes spiral wheels from the list of authorized equipment and specifies “nonmotorized” mini high-bankers and “non-motorized” concentrators. Removes reference to motorized equipment.
30	220-660-300(5)(u)	Removes authorization for crevicing or redistributing dredge tailing because this activity uses motorized equipment that discharges to surface and ground water.
31	220-660-300(5)(v)	Removes authorization for crevicing in the wetted perimeter, frequent scour zone or landward of the frequent scour zone because this activity discharges to surface and ground water.
30	220-660-300(6)(d)	Specifies “non-motorized” hand-held mineral prospecting tools and “non-motorized” mineral prospecting equipment. Removes spiral wheels from the list of authorized equipment because this is motorized equipment that discharges to surface and ground water. Removes authorizations for motorized equipment.
31	220-660-300(6)(f)	Specifies that water may only be supplied to a high-bankers or concentrator from natural stream flow or hand-held containers, not by a gravity siphon.
32	220-660-300(6)(g)	Specifies a person may use one “non-motorized” hand-operated winch.
33	220-660-300(6)(h)	Removes the screening requirement because motorized pumps are no longer authorized in WAC 220-660-300.
34	220-660-300(6)(i)	Removes fuel rules because motorized equipment is no longer authorized in WAC 220-660-300.
35	220-660-300(6)(p)	Removes authorization for crevicing or redistributing dredge tailing because this activity uses motorized equipment that discharges to surface and ground water.



Change #	WAC Subsection	Description
<b>WAC 220-660-305 Suction dredging (Renamed Mineral prospecting involving motorized or gravity siphon equipment)</b>		
36	220-660-305	Change section title from “Suction dredging” to “Mineral prospecting involving motorized or gravity siphon equipment”.
37	220-660-305(1)	Broadens the description to include mineral prospecting involving motorized and gravity siphon equipment.
38	220-660-305(2)	Broaden general fish life concerns to include those common to mineral prospecting involving motorized and gravity siphon equipment.
39	220-660-305(3)(a)	Change “suction dredging activity” to “mineral prospecting involving motorized and gravity siphon equipment”.
40	220-660-305(3)(b)	This language is moved to 220-660-050(9)(c)(iii)(l) and replaced with “The department will determine the authorized work time for mineral prospecting activities involving motorized or gravity siphon equipment per section 110 in this chapter”.
41	220-660-305(4)(a)	Change “suction dredge” to “motorized or gravity siphon” equipment.
42	220-660-305(4)(b)	Change “suction dredge” to “motorized or gravity siphon” equipment.
43	220-660-305(5)	Change “Suction dredging” to “mineral prospecting involving motorized or gravity siphon equipment”. Eliminate “in fresh waters” because this subsection would also apply to salt waters of the state.
44	220-660-305(5)(a)	Change “suction dredge” to “operate motorized or gravity siphon equipment”. Eliminate “fresh” because this subsection would also apply to salt waters of the state.
45	220-660-305(5)(b)	“Suction dredging” is changed to “mining using motorized or gravity siphon equipment”. The list of equipment is expanded to include pans, spiral wheels, concentrators and high-bankers, gravity siphons, suction dredges, power sluice/suction dredge combinations, high-bankers and power sluices.

Change #	WAC Subsection	Description
46	220-660-305(5)(c)	Species motorized or gravity siphon aquatic mining equipment listed in the previous provision may be used ONLY in waters in Adams, Benton, Clallam, Franklin, Grant, Grays Harbor, Lincoln, Spokane, Whitman, and Yakima counties that are NOT designated under the Endangered Species Act as critical habitat for salmon, steelhead, or bull trout or have a freshwater designated use of salmonid spawning, rearing, and migration. The language regarding the authorized nozzle diameters is moved to 305(5)(d).
47	220-660-305(5)(d)	The language regarding the authorized nozzle diameters is moved from 305(5)(c) and reference to subsection 5 is added.
48	220-660-305(5)(f)	Specifies a person may use one “non-motorized” hand-operated winch.
49	220-220-305(5)(g)	This subsection is broadened to include equipment separation requirements for high-bankers, other motorized and gravity siphon aquatic mining equipment.
50	220-660-305(5)(h)	Changes “pumping” to “removing” and removes “pump” to clarify a fish guard is also required on gravity or siphon intakes that don’t use a pump.
51	220-660-305(5)(o)	Specifies a person may work in only one excavation site at a time. However, they may use a second excavation site as a settling pond. Multiple individuals may work within a single excavation site.
52	220-660-305(5)(q)	Specifies a person may not excavate, collect, or remove aggregate from an unstable slope or any slope that delivers, or has the potential to deliver, sediment to the wetted perimeter or frequent scour zone.
53	220-660-305(5)(r)	Clarifies that a person can use natural or artificial materials to partially divert a body of water provided the diversion is constructed by hand. Specifies that before abandoning the site, a person must remove artificial materials used in the construction of a diversion structure and restore the site to its approximate original condition.
54	220-660-305(5)(s)	Specifies the conditions under which a person can process aggregate collected from the frequent scour zone.
55	220-660-305(5)(t)	Specifies the conditions under which a person can process aggregate collected from upland areas landward of the frequent scour zone.

Change #	WAC Subsection	Description
56	220-660-305(5)(v)	Authorizes crevicing in the wetted perimeter, in the frequent scour zone, or landward of the frequent scour zone. The hose connecting fittings of pressurized water tools used for crevicing must not have an inside diameter larger than ¾-inch. If a person crevices landward of the frequent scour zone, a person may not discharge sediment or wastewater to the wetted perimeter or the frequent scour zone.
57	220-660-305(6)	Change “Suction dredging on ocean beaches” to “Mineral prospecting involving motorized or gravity siphon equipment”.
58	220-660-305(6)(a)	Changes “suction dredge” to “operate”.
59	220-660-305(6)(b)	Changes “suction dredging” to “operating motorized or gravity siphon equipment”. Removes list of authorized equipment and instead refers to subsection 5(b) to reduce repeated language.
60	220-660-305(6)(c)	Specifies motorized types of mineral prospecting equipment listed in the previous provision may be used ONLY in waters in Grays Harbor, and Pacific counties that are NOT designated under the Endangered Species Act as critical habitat for salmon, steelhead, or bull trout or have a freshwater designated use of salmonid spawning, rearing, and migration.
61	220-660-305(6)(d)	Specifies a person may use one “non-motorized” hand-operated winch.
62	220-660-305(6)(e)	Removes reference to RCW 77.57.010 and 77.57.070. Changes “pumping” to “removing” and removes “pump” to clarify a fish guard is also required on gravity or siphon intakes that don’t use a pump.
63	220-660-305(6)(g)	Removes language that doesn’t apply to ocean beaches.
64	220-660-305(6)(i)	Removes language that doesn’t apply to ocean beaches.
65	220-660-304(6)(j)	Removes language that doesn’t apply to ocean beaches.
66	220-660-305(7)	The Authorized Work Times are removed and replaced by 220-660-305(3)(b).
67	220-660-305(8)	The suction dredge activity reporting requirement is removed.

### 2.3 History of this Rule Making Action

May 29, 2020                    WDFW commenced rule making by filing a CR-101  
June 11, 2020                    ESHB 1261 became effective  
Dec. 2, 2020                    WDFW filed CR-102 for rule making implementing ESHB 1216

Dec. 16, 2020	WDFW received a Determination of Nonsignificance under the State Environmental Policy Act for the rule making
Dec. 16, 2020	Public comment period begins
Jan. 29, 2021	Public hearing
Jan. 30, 2021	Public comment period ends

Refer to Section 6 relating to stakeholder outreach, which provides a timeline of outreach milestones related to this rule making activity.

### 2.3.1 History of regulating mineral prospecting

Before 1980, mineral prospecting required standard HPA permits. In 1980, Washington Departments of Fisheries and Game, which jointly administered the hydraulic code, distributed a “pamphlet” containing regulations for mineral prospecting that specified classification of streams, timing, dredge nozzle size, and sluice box size. At that time, only panning and sluicing could be conducted using the pamphlet; other activities listed in the pamphlet required standard HPAs. The agencies frequently modified and re-issued pamphlets (the agencies merged to form Department of Fish and Wildlife in 1993).

In 1997, the Washington state Legislature passed *Substitute House Bill 1565* requiring WDFW to regulate some types of mineral prospecting through the pamphlet without issuing standard HPAs. WDFW conducted rulemaking in 1998 and involved mineral prospectors and other interested parties in the development of those rules. Those rules were adopted in 1999, and the new pamphlet was issued. Another stakeholder process and rule update occurred in November 2008, resulting in another pamphlet edition in 2009.

WDFW has continued to update its prospecting rules and the Gold and Fish Pamphlet. In 2015, the entire body of hydraulic code rules was overhauled and moved into a new WAC section (chapter 220-660 WAC). Four mineral prospecting rules were consolidated into one section (WAC 220-660-300) without substantive changes, and authorized work times (work windows) were amended in some areas, requiring a pamphlet update in July 2015. In 2018, mineral prospecting rules were amended to reflect work window changes in additional water bodies, and a revised pamphlet was issued in June 2018. In 2019, the rules were amended again to remove motorized and gravity siphon suction dredging as an authorized activity in pamphlet and instead require a standard HPA for these mining methods. Other motorized prospecting activities do not require a standard HPA permit so long as the prospector follows the requirements in the pamphlet. Alternatively, when a miner wants to vary any of the Pamphlet requirements, such as equipment limits or work window timing, that person must apply for a standard HPA permit.

### 2.3.2 Crosswalk of ESHB 1261 with statute and rules

The following information provides a crosswalk from the bill as enacted (Laws of 2020, c. 290) to statute to rule (Table 2).

**Table 2: Crosswalk from ESHB 1261 section to the statute to proposed rule section and subsection**

Topic	ESHB 1261	Statute	Proposed Rule	Rule Topic
Definitions	Section 3	RCW 77.55.011	WAC 220-660-030	Definitions
Proof of compliance with Clean Water Act	Section 4	RCW 77.55.021(2)(e)	WAC 220-660-050(9)(c)(iii)(H)	Complete application package for an HPA

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### **SECTION 3: Significant Legislative Rule Analysis Required**

*RCW 34.05.328(5)(a) states, “Except as provided in (b) of this subsection, this section applies to: (i) ... the legislative rules of the department of fish and wildlife implementing chapter 77.55 RCW;...”*

Hydraulic code rules in chapter 220-660 WAC are significant legislative rules as specified in RCW 34.05.328(5)(a)(i). Analyses pursuant to RCW 34.05.328 are provided for this rule proposal.

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### **SECTION 4: Goals and Objectives of the Statute that the Rule Implements**

*RCW 34.05.328 (1)(a) states, “Clearly state in detail the general goals and specific objectives of the statute that the rule implements;”*

#### **4.1 Chapter 77.55 RCW - the Hydraulic Code - Goals and Objectives**

The state Legislature gave WDFW the responsibility to preserve, protect, and perpetuate all fish and shellfish resources of the state, and to

*“...authorize the taking of wildlife, food fish, game fish, and shellfish only at times or places, or in manners or quantities, as in the judgment of the commission does not impair the supply of these resources.” RCW 77.04.012*

The Legislature also granted the Commission very broad authority to adopt rules to protect fish life for a wide variety of activities in Washington waters:

*The commission may adopt, amend, or repeal rules: specifying the times when the taking of wildlife, fish, or shellfish is lawful or unlawful; specifying the areas and waters in which the taking and possession of wildlife, fish, or shellfish is lawful or unlawful; specifying and defining the gear, appliances, or other equipment and methods that may be used to take wildlife, fish, or shellfish, and specifying the times, places, and manner in which the equipment may be used or possessed. RCW 77.12.047.*

To help achieve the agency’s mandate, the Legislature passed a state law in 1943 called *Protection of Fish Life*, now recorded as [Chapter 77.55 RCW - Construction projects in state waters](#). The entire text of the statute can be found at: <http://app.leg.wa.gov/RCW/default.aspx?cite=77.55> .

[RCW 77.55.011](#)(11) defines a “hydraulic project” as

*“the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwater of the state.”*

[RCW 77.55.021](#)(1) states

*“...In the event that any person<sup>3</sup> or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval from the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.”*

The Legislature limited WDFW's regulatory authority: WDFW cannot unreasonably withhold or unreasonably condition the HPA [[RCW 77.55.021](#)(7)(a)], nor can WDFW impose conditions that optimize fish life:

*“Conditions imposed upon a permit must be reasonably related to the project. The permit conditions must ensure that the project provides proper protection for fish life, but the department may not impose conditions that attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project.”* [RCW 77.55.231](#)(1)

The Hydraulic Code is intended to ensure that hydraulic projects adequately protect fish life.

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## **SECTION 5: How the Rule Meets the Objectives of the Statute**

***RCW 34.05.328 (1)(b) Determine that the rule is needed to achieve the general goals and specific objectives stated under (a) of this subsection*** [i.e. for the statute that the rule implements], ***and analyze alternatives to rule making and the consequences of not adopting the rule;***

### **5.1 Why is the Proposed Rule Needed?**

**Rule amendments are proposed as necessary to implement elements of ESHB 1261.**

Bill section 2 amended Chapter 90.48 RCW. Section 2 prohibits motorized or gravity siphon aquatic mining or discharge of effluent from such an activity to any waters of the state that have been designated under the Endangered Species Act (ESA) as critical habitat, or that would impact critical habitat for salmon, steelhead, or bull trout. This prohibition includes fresh waters with the designated uses of salmonid spawning, rearing, and migration.

Sections 3 and 4 of ESHB 1261 also amended Chapter 77.55 RCW. Section 3 amended the definition of “small scale prospecting and mining” and added a new definition for “motorized or gravity siphon aquatic mining”. Section 4 added a new requirement for a complete a Hydraulic Project Approval (HPA) application.

WDFW proposes changes to WAC 220-660 to align it with changes to RCW. Some of the changes, such as incorporating definitions and the requirement for proof of compliance with the Clean

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<sup>3</sup> A “person” is defined in WAC 220-660-030(112) as meaning “an applicant, authorized agent, permittee, or contractor. The term person includes an individual, a public or private entity, or organization.” This term is used throughout this document to refer to individuals, organizations, and businesses.

Water Act, come directly from statute. Other changes, such as removing all motorized equipment authorizations from the Gold and Fish Pamphlet (WAC 220-660-300), are not directly spelled out in statute but are necessary to administer the rules in accordance with the statute. Section 220-660-305 is being expanded from covering only suction dredging to include all activities involving motorized or gravity siphon equipment.

The only portion of the proposal that is not directly related to implementation of ESHB 1261 is found in 220-660-305(4), aquatic invasive species prevention. As with the rest of section 305, that subsection gets expanded to include all motorized or gravity siphon equipment. The change keeps the regulation of motorized or gravity siphon equipment uniform, eliminating separate treatment of certain equipment within the category.

Transport of prospecting equipment poses the risk of aquatic invasive species (AIS) coming into the state. Motorized and gravity siphon equipment, like watercraft, could also spread aquatic invasive species in-state when they move their equipment from waterbody to waterbody. Although chapter 77.135 requires inspections and decontamination for aquatic invasive species, the Gold and Fish Pamphlet does not explicitly require inspections of equipment coming into the state, nor does the pamphlet include best practices to prevent the spread of aquatic invasive species in-state. Once non-native species become established in a new environment, where their natural enemies are missing, these invaders can spread rapidly. Aquatic invasive species can out-compete native species and disrupt efforts to recover naturally-reproducing salmon, steelhead, and trout stocks.

## **5.2 Alternatives to rule making?**

Following is a discussion of alternatives to rule making that we considered before filing a preproposal notice of inquiry.

### **5.2.1: Alternative 1: No action - do not adopt the new statutes into rule**

People wanting to know about the department's responsibilities and authorities can find that information in statute. Under this alternative, WDFW does not have a nexus in rule for requiring proof of compliance with the federal Clean Water Act for mineral prospecting or mining activities that use motorized or gravity siphon equipment or that discharges effluent from such activities to waters of the state.

- The existing rules for suction dredging do require a written application, but do not require proof of compliance in the supporting materials.
- No application is presently required for mineral prospecting involving motorized or gravity siphon equipment that is allowed under the Gold and Fish pamphlet. Therefore, there is no opportunity for individuals to provide proof of compliance.

Without the changes, the rules would conflict with the requirements in statute. Because the legislature specifically requires persons to provide proof of compliance as part of the HPA application process, the "no action" alternative is not a viable alternative.

### **5.2.2: Alternative 2: Adopt the new statute into rule but do not expand the aquatic invasive species prevention standard**

The aquatic invasive species prevention requirement was applied to suction dredging activities under section WAC 220-660-305(4) in 2019. Alternative 2 would leave the requirement unchanged. Some motorized or gravity siphon aquatic equipment would not be given the same treatment as suction dredging equipment under WAC 220-660-305. This would create a double standard in rule for equipment that is otherwise regulated identically. Regardless of type, any equipment that is used in a contaminated water body poses a risk of spreading aquatic invasive species if it is moved from one water body to another.

### **5.3 Consequences of not adopting the rule**

Declining to adopt rules would be inconsistent with statute with respect to proof of compliance with the federal Clean Water Act. Activities conducted under the Gold and Fish Pamphlet would continue without the statutorily required proof of compliance.

With the existing procedure rules (WAC 220-660-050) and suction dredging rules, WDFW could require the proof of compliance for standard HPA applications based on statute. People wanting to know about the department's new requirement would need to find that information in statute, creating an additional process for them to find information. The department's constituents would not have as much notice or opportunity to learn about the new requirement as is afforded via APA rule making procedures.

The aquatic invasive species prevention requirement would be applied unevenly to motorized or gravity siphon equipment. Prospectors entering Washington from out of state would face confusion about whether inspections are needed when they enter Washington. People moving between water bodies without taking AIS precautions take the risk of introduction of aquatic invasive species into waters, increasing risk to native fish species.

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## **SECTION 6 Involving stakeholders in rule development**

Because requiring applications is integral to the objectives for rule making, WDFW took advantage of opportunities to communicate the objectives of rule making to those affected, and to obtain information from affected persons about how the rules would impact them. Those events are summarized in Table 3.

WDFW also maintains a web page<sup>4</sup> with information on rule making and a way for people to track rule making progress. An email address<sup>5</sup> is available for people to submit preproposal comments and formal public comments.

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<sup>4</sup> <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking>

<sup>5</sup> [HPARules@dfw.wa.gov](mailto:HPARules@dfw.wa.gov)



**Table 3 Stakeholder contact events**

<b>Date(s)</b>	<b>Person(s)</b>	<b>Activity</b>
4/28/20	Fish and Wildlife Commission Habitat Committee	Habitat Program staff introduced rulemaking to be done in response to ESHB 1261
5/6/20	U.S. Forest Service and Hydraulic Code Implementation Citizens Advisory Group (HCICAG)	Emailed draft communication plan
5/26/20	Director	Habitat Program Director briefed the WDFW Director
6/11/20	News Release	Announcing that ESHB 1261 took effect June 11, 2020
6/18/20	Tribes	Tribal Affairs sent an email notification of rulemaking initiation, objectives, and copy of CR-101
6/19/20	Stakeholders and Agencies	Habitat Program sent an email notification of rulemaking initiation, objectives, and copy of CR-101
6/25/20	Stakeholders and Agencies	Habitat Program sent an email regarding changes to and publication of a new Gold and Fish Pamphlet
7/31/2020	Stakeholders, Agencies and prospecting HPA holders	Habitat Program sent an email providing background on the rulemaking and an invitation to participate in a survey for the SBEIS
9/28/2020 10/14/2020 10/22/2020	Prospecting businesses (names kept confidential)	Habitat Program sent emails and phone calls to collect data for the SBEIS and Regulatory Analysis (RA)
11/10/2020	HCICAG	Habitat Program distributed draft rule proposal for review
11/30/2020	HCICAG	Draft SBEIS distributed for review
12/11/2020	Tribes	Tribal Affairs sent an email including information, the rule proposal, SBEIS for review
12/18/2020	Stakeholders, Agencies and prospecting HPA holders	Habitat Program distributed rule making information and notice of the comment periods for rule making and for SEPA
12/23/2020	All interested persons	Narrated Power Point slide show posted to the WDFW HPA Rule Making website providing information about this rule making effort

## **6.2 Surveying businesses identified with the metal ore mining industry**

When WDFW began to prepare the documents necessary to accompany rule change proposals, we considered how we might get information from miners and mining businesses about the economic impacts of the proposed rule.

WDFW developed a survey to determine the time and financial costs related to acquiring an HPA permit. The survey also attempted to identify mineral prospecting businesses, and some basic information about those businesses. We developed an extensive stakeholder list during our 2018 suction dredge rule making process. That list includes individual prospectors, clubs, businesses, nonprofit groups, government agencies, and other interested parties. We also compiled the names of those who have acquired the 174 suction dredging HPAs that have been issued in the past 5 years. Altogether, our current outreach list totals 472 names. We sent survey invitations by email to the entire outreach list on July 31, 2020. The survey was available online for three weeks. We received a total of eighty-one responses. Sixty respondents reported that they had applied for a mineral prospecting HPA in the past, while twenty reported that they had not. Those who had applied were asked about the time required and the cost to hire help for the application, as well as collecting information about any mineral prospecting businesses.

Four respondents indicated that they owned a mineral prospecting business. The business types were broken down as: three sole proprietorships and one corporation. One of these provided their business name, contact information, and Washington Universal Business Identifier (UBI). Another provided their UBI number. One provided only a North American Industry Classification System (NAICS) code (212221). The unnamed UBI number was entered into the Washington State Department of Revenue (DOR) Business Lookup Tool<sup>6</sup>. It did not turn up a valid business account. In total, we were able to obtain data from four businesses and positively identify one of them. That business volunteered to be contacted for further questions.

### **6.3 Business research**

In September 2020, WDFW did further research to identify businesses subject to the new HPA requirements. We conducted searches to find businesses with “prospecting”, “prospector”, “placer” or “gold mining” in the business name. Primary online tools were business data bases maintained by Department of Licensing, Department of Revenue, and Office of the Secretary of State<sup>7</sup>, and web searches using Google. We found forty-four businesses during the search and conducted deeper searches on eleven. The others were not primarily mineral prospecting businesses, as evidenced by names and NAICS numbers. Of the remaining eleven, four were closed according to the Department of Revenue business lookup tool. Two others were also quickly eliminated as one turned out to be a jeweler and the other a gold, silver and antiques dealer.

Three of the businesses were identified as owned by the same person. WDFW was able to contact that individual’s primary business by telephone. We received a response back that none of the three mining businesses were currently conducting any mining or mineral operations in Washington<sup>8</sup>. The last business could not be located online or physically. It appears to have

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<sup>6</sup> [https://secure.dor.wa.gov/gteunauth/\\_/#1](https://secure.dor.wa.gov/gteunauth/_/#1)

<sup>7</sup> Note that business information from Licensing, Revenue, and Secretary of State is now available using the Revenue “Business Lookup” tool instead of the separate searches conducted in 2017.

<sup>8</sup> Maryann Rhodes (voicemail). October 14, 2020. Personal Communications.

moved to an unknown location according to an address search of the Skagit County property search website<sup>9</sup>.

In addition to seeking out individual businesses, WDFW conducted industry-level research. For more about this research, refer to the 2020 Incorporating Elements of ESHB 1261 into HPA Rules Small Business Economic Impact Statement, available at: <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking>.

**6.4 Survey - Data results for effort and costs**

As described in section 6.2, WDFW sent out a survey to 472 contacts on our distribution list. The survey collected information about the time and cost to acquire an HPA for mineral prospecting activities. The questions were presented only to those who first responded that they had previously applied for an HPA. The values are understood to be data based on real experience rather than hypothetical estimates. The results are summarized in Table 4. The median time spent was three hours, with a maximum of sixty hours. The relatively low numbers may be explained in part by the fact that the majority (74%) used the simplified application form. The other 28% filled out either the Aquatic Protection Permitting System (APPS) online form or the Joint Aquatic Resources Permit Application (JARPA) form. The JARPA form is considerably longer than either the simplified form or the regular online form.

Seven individuals indicated that they had sought professional assistance. The cost for that assistance was reported as \$100 or less for all but one respondent. The median value was impacted by the fact that two respondents reported hiring assistance but then identified their cost as \$0. It was also impacted by an outlier data point of \$2,000. We use the median of responses (the middle value in the list of responses) for all the survey results because the data received contained outliers that would influence a standard mean or average (sum of responses divided by the number of responses).

The survey attempted to differentiate mineral prospecting businesses and their specific effort and costs. The median time reported by businesses to apply for HPAs was 1 hour, with 4 hours being the highest reported time effort. No businesses reported hiring professional assistance.

**Table 4 Overall survey responses for time and financial cost to apply for an HPA**

	<b>Median hours spent applying for an HPA</b>	<b>Response range for hours spent applying for an HPA</b>	<b>Median cost for application assistance</b>	<b>Response range for cost for application assistance</b>
All responses (52)	3	0.5 to 60	\$100	\$0 to \$2,000
Business responses (4)	1	0.5 to 4	none	none

<sup>9</sup> <https://www.skagitcounty.net/Search/Property/> accessed 10/9/2020.

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## **SECTION 7: Cost-Benefit Analysis**

*RCW 34.05.328 (1)(d) provides, “Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented;”*

### **7.1 Which rules require analysis?**

220-660-030 (Definitions): revises three definitions for clarity and adds new definitions for “gravity siphon aquatic mining” and “motorized or gravity siphon equipment” as reflected in the new statutory definitions for those terms. Changes in this section correct or clarify language without changing the effect of that language and do not create compliance requirements. This section is not discussed further in this analysis.

220-660-050 (Procedures): requires that proof of compliance with the federal Clean Water Act must be included in a standard HPA application for mineral prospecting or mining using motorized or gravity siphon equipment. The proposal also specifies that the department may reject an incomplete application for mineral prospecting or mining using such equipment if the proposed project location or locations occur where they are prohibited under RCW 90.48.

Proof of compliance with the federal Clean Water Act is differentiated in this document from the act of compliance with the Clean Water Act. The costs of relevant prohibitions and permitting under the Clean Water Act are not incorporated into this analysis under RCW 19.85 or RCW 34.05.328 because such costs are indirect and result from new legal requirements that are outside the scope of WDFW’s rulemaking authority under RCW 77.55. Proof of compliance with the Clean Water Act is a new HPA application requirement that is specifically dictated by statute in RCW 77.55.021(2)(e) and is therefore not discussed in this analysis.

HPA applications for motorized or gravity siphon mineral prospecting and mining methods which are to occur in locations where an activity is prohibited under RCW 90.48.615(2) are impossible to complete statutorily under the proof-of-compliance requirement of RCW 77.5.021(2)(e). Department procedures for handling of these incomplete applications are internal government operations and not evaluated in this analysis.

220-660-300 (Mineral Prospecting): removes authorization for motorized or gravity siphon mineral prospecting activities from the Gold and Fish pamphlet rules. Those activities are moved to 220-660-305. Changes to this section do not create new compliance requirements and so it is not discussed further in this analysis.

220-660-305 (Suction Dredging): changes the name of this section to “Mineral prospecting involving motorized or gravity siphon equipment” and contains rules for prospecting using motorized or gravity siphon equipment. Specifically, it expands the existing requirements for suction dredging to include all prospecting with motorized or gravity siphon equipment. The reason for this requirement is to implement RCW 77.55.021(2)(e). The annual reporting

requirement for suction dredging is repealed. This WAC section is the subject of this SBEIS analysis.

**Table 5 RFA exemptions to the proposed rule changes**

Section	Change	RFA exempt?	Exemption citation
030 Definitions	Multiple changes to definitions, one addition, one deletion	Y	RCW 34.05.310(4)(d) Correct or clarify language
050 Procedures	Require proof of compliance with federal Clean Water Act in HPA applications	Y	RCW 34.05.310(4)(e) Dictated by statute
050 Procedures	Allow WDFW to reject incomplete applications for prohibited locations	Y	RCW 34.05.310(4)(b) Internal government operations

## 7.2 Key variables to determine costs

Here are some of the challenges WDFW faces when estimating costs and benefits attributable to these rule changes:

- WDFW does not know how many persons conduct mineral prospecting involving motorized or gravity siphon equipment in Washington:** Several considerations complicate the estimation of how many people will be affected by the rule proposal. See section 7.2.1 for more discussion of this matter.
- WDFW is unsure how many persons using motorized or gravity siphon equipment are already implementing measures to prevent the spread of aquatic invasive species.** WDFW conducted a survey of suction dredgers in January 2019 that included questions about decontamination of equipment<sup>10</sup>. Eighty-four percent of survey respondents indicated they took decontamination steps in 2018, which is prior to any such requirements in WAC 220-660. Suction dredging equipment is a subset of the equipment in the proposed rule. To avoid underestimation, we assume for this analysis that all persons using motorized or gravity siphon equipment will be implementing aquatic invasive species clean/drain/dry or decontamination procedures for the first time upon implementation of the proposed rules.

<sup>10</sup> Details about the survey can be found in the Small Business Economic Impact Statement for the Hydraulic Code Rules Chapter 220-660 WAC 2019 HPA Suction Dredge Rulemaking, available at <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking#Final-rule>.

### 7.2.1 How many people?

Mineral prospecting involving motorized or gravity siphon equipment presently takes place with three permitting options. All suction dredging requires a standard HPA. The remainder of motorized and gravity siphon equipment use is covered in the Gold and Fish pamphlet rules, or under standard HPAs for those wishing to vary from the Gold and Fish pamphlet rules. Permitting data provides some insight into past levels of activity. See Table 6 for details.

**Table 6 Mineral prospecting permit data**

Permit type	Number	Timeline	Comments
Standard permits for mineral prospecting	174 active permits	April 10, 2020	These are active permits issued for work outside the Gold and Fish pamphlet rules. The permits were issued between April 2015 and April 2020. Some of these permits include prospecting with motorized or gravity siphon equipment.
Predicted suction dredging permits	570	N/A	This is the predicted number of suction dredgers needing permits as estimated for the 2019 HPA Suction Dredge Rule Making Regulatory Analysis.
Actual suction dredging permits	112 permits issued	Nov. 2019-June 2020	The suction dredging standard permit requirement went into effect Nov. 1, 2019. ESHB 1261 became effective June 11, 2020, effectively halting new permit applications.
Standard permits for mineral prospecting on ocean beaches	252 permits issued	July 2014-July 2015	Standard permits for beach prospecting were no longer mandatory after the activity was added to the Gold and Fish pamphlet in July 2015.

Some considerations must be made when looking at past permit numbers. Those standard permits for mineral prospecting can be broken into two groups: suction dredging, and other prospecting not covered in the Gold and Fish pamphlet. Suction dredging permits are identifiable in the HPA database. These permits were issued beginning when new suction dredge rules took effect Nov. 1, 2019. Permitting took place for 7 months before the ESHB 1261 went into effect on June 11, 2020, enacting extensive prohibitions and requiring an additional water quality (NPDES) permit. WDFW has not received any complete applications for suction dredging since ESHB 1261 became effective. Additionally, the passing of ESHB 1261 in March may have had a cooling effect on suction dredge permit applications between March and June because of the impending

prohibitions. The short time period and influence of the new statutes make use of the suction dredging permit data problematic for projecting future numbers.

The other group (permits for prospecting not covered under the Gold and Fish pamphlet) includes a variety of equipment types. Those equipment types are often not specified on the permit application. Permits for motorized equipment cannot be distinguished from non-motorized, so this data does not capture the information we need.

Mineral prospecting conducted under the Gold and Fish pamphlet rules does not require any sort of application or notification to WDFW. No data exists on how many people use the Gold and Fish pamphlet.

Beach prospecting is one area where we may look to past permit numbers with some confidence. The most recent figure available is for July 2014 to July 2015. This is the year immediately prior to the addition of beach prospecting to the Gold and Fish pamphlet in July 2015, largely eliminating the need for standard permits. (The current rule proposal removes beach prospecting from the Gold and Fish pamphlet and reinstates standard permits.) Beach prospecting permits were typically issued to include the entire outer coast. Although the allowed area has been reduced under RCW 90.48, we will assume that the number of interested persons has not changed. If approximately 252 permits are issued annually, and a permit is good for 5 years, we can extrapolate out to a potential of 1,260 permits total. Given one permit per person<sup>11</sup>, that is 1,260 people.

The most important factor in estimating how many people are affected by the proposed rules is the fact that motorized and gravity siphon aquatic mining is now prohibited across much of the state, particularly in freshwater. The prohibition is found in statute and is outside this rulemaking process. This rule proposal will only affect activities in the remaining allowed areas. WDFW does not have a way to estimate how many people may seek to conduct this activity in the remaining freshwater areas. As of December 12, 2020, no standard mineral prospecting permits of any kind were active in those areas. Neither were we able to identify any active mining claims in those areas<sup>12</sup>. This suggests that those locations may not be considered as desirable for placer-type prospecting as other locations.

The bottom line is that WDFW has very little solid information on which to base effort estimates. We used one “solid” data element – the number of beach prospecting permits- and have added half again to accommodate for freshwater prospecting. The result - 1,260 plus 630 equals 1,890 – is likely to fall on the high side given the new location prohibitions in statute, but we would prefer to land high than to risk underestimating the costs of the proposal. The reader should be aware of this. **WDFW estimates 1,890 persons will need to comply with the proposed rules.**

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<sup>11</sup> Since beach prospecting permits typically have included the entire outer coast, there is no need for individuals to get multiple permits to cover multiple sites.

<sup>12</sup> [www.thediggings.com](http://www.thediggings.com). Accessed Dec. 15, 2020.

### **7.3 Costs to comply**

WDFW estimated the costs to comply with the proposed rules. We used the cost of hiring help for the HPA application process as reported in the survey. We also used responses for hours per permit and a cost per hour established by WDFW. Those two values were combined to estimate a cost per permit. We used a similar “hours x cost per hour” approach to estimate the cost of aquatic invasive species prevention.

Because there are no industry records of annual payroll to help us estimate costs per hour for the suction dredging and motorized prospecting industry, WDFW referenced mining labor data provided by the Bureau of Labor Statistics<sup>13</sup>. We chose the worker type we think mostly closely matches the work of a suction dredger - Continuous Mining Machine Operator - which earned an average hourly wage of \$28.68 for metal ore mining in 2019. We are using this figure to estimate hourly costs per individual for the time taken to comply with the proposals.

We anticipate the cost of equipment and supplies to be minimal. WDFW’s HPA applications can be completed online using a home computer with an internet connection. Computers and internet connectivity are available for free to the public at most libraries.

### **7.4 Multiple permits**

Most HPAs are issued for a 5-year period pursuant to WAC 220-660-050(14)(a). Pursuant to WAC 220-660-050(b)(ii)(A), a standard multi-site HPA can authorize work at multiple project sites if: (I) All project sites are within the same water resource inventory area (WRIA) or tidal reference area; (II) The primary hydraulic project is the same at each site so there is little variability in HPA provisions across all sites; and (III) Work will be conducted at no more than five project sites to ensure department staff has sufficient time to conduct site reviews.

Analysis of existing mineral prospecting HPAs found that three individuals held two permits each in the past five years out of 172 total permit holders. Two of those people had multiple sites, necessitating two permits. The third was eligible for a single multi-site permit rather than two single-site permits. Given the existing rate of 1.1% (or 2 of 172) of permittees needing multiple permits, we have conducted our cost-to-comply analysis based on the more common condition of one permit per applicant.

### **7.5 Calculated costs to comply**

#### **7.5.1 Costs to comply with the standard HPA rule**

Each person wishing to lawfully conduct activities covered in WAC 220-660-305 in Washington State will be required to obtain a standard HPA. A person is not required to apply for an HPA;

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<sup>13</sup> Bureau of Labor Statistics. Industries at a Glance Statistics for Metals Ore Mining NAICS 2122. Occupation: Continuous Mining Machine Operator (a worker who extracts raw materials from the ground for commercial and other uses by operating self-propelled mining machines that rip coal, metal and nonmetal ores, rock, stone, or sand from the mine face and load it onto conveyors or into shuttle cars in a continuous operation.) Downloaded September 14, 2020 from [https://www.bls.gov/oes/current/naics4\\_212200.htm#47-0000](https://www.bls.gov/oes/current/naics4_212200.htm#47-0000). Note that the machine referenced for this occupation is nothing like the motorized equipment used in Washington, but it was the closest occupation we could find for the U.S. metal ore mining industry as a whole.



however, an HPA is required if a person wishes to conduct the activity. WDFW assumes that each of those HPAs would be issued for a 5-year period as allowed under WAC 220-660-050(14)(a).

There is no application fee, so there is no cost to apply for an HPA other than the labor costs estimated below. WDFW's HPA applications can be completed online using a home computer with an internet connection. Computers and internet connectivity are available for free to the public at most libraries.

Alternatively, a person can download, print (3 pages @ \$.49 per page at Office Depot online), and fill out an application on paper using a \$2 pen, and mail it to WDFW using a \$.10 envelope and \$.55 stamp (total of \$4.12 for supplies and mailing). These costs are not necessary to comply with the proposal.

Professional services are not expected to be needed to aid a person to apply for an HPA. A person needing help with the application can get help from WDFW's HPA Regulatory Services staff during normal business hours.

If a person takes 3 hours (median survey response) to complete an HPA application, that costs \$86.04 in labor based on our estimated cost per hour. If professional assistance is required, then \$100 is added to the cost for a total of \$186.04. If each HPA is valid for 5 years, and each person needs only one HPA, then the annual cost per person to complete the application process is \$186.04 divided by 5, or \$37.21 per year.

Businesses reported taking one hour (median survey response) to complete an HPA application for a labor cost of \$28.68. No business reported hiring professional assistance, but if \$100 from the general survey responses is applied, then a business may spend a total of \$128.68. Over 5 years, the cost comes to \$25.74 per year.

In summary, we have estimated that the range of costs for an individual or small business to comply is from \$128.68 to \$186.04. Over the 5-year permit period, the range is \$25.74 to \$37.21 per year.

### **7.5.2 Costs to comply with the Aquatic Invasive Species Prevention rule**

The expansion of WAC 220-660-305, from suction dredging to all motorized and gravity siphon equipment, includes the aquatic invasive species prevention rules in WAC 220-660-305(4). The subsection specifies that all motorized and gravity siphon equipment that has been used in waters outside of Washington State must be inspected for the presence of aquatic invasive species. Further, all motorized and gravity siphon equipment used in any water of the state must be decontaminated according to department specification prior to use in a different water of the state.

"Clean-Drain-Dry" decontamination steps published on the WDFW web site can be undertaken by the average person using supplies commonly available: hot water, brushes, and household cleaning liquid<sup>14</sup>. WDFW conducted a survey of suction dredgers in January 2019 that included

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<sup>14</sup> <https://wdfw.wa.gov/ais/youcanhelp.html>

questions about decontamination of equipment<sup>15</sup>. They reported that cleaning and drying out their equipment is a regular activity associated with dredging because they want to ensure that all the gold collected by the equipment is recovered. Eighty-four percent of survey respondents indicated they took decontamination steps in 2018.

The proposed rules also require persons bringing motorized and gravity siphon equipment into Washington from out-of-state to have their equipment inspected for the presence of aquatic invasive species prior to using that equipment to suction dredge in Washington. Inspections for the presence of aquatic invasive species are available at major highway entry points into the state, so persons bringing equipment into Washington can arrange their entry so they are inspected as they cross the state line. Certificates of inspection are available on request at the time the inspection is completed. Inspections and certificates are provided at no cost.

If a person takes 2 hours and 30 minutes (median survey response) to comply with the proposed aquatic invasive species decontamination rule for suction dredging equipment, that costs \$71.70 in labor. Suction dredging equipment is generally larger and more complex to clean than the equipment being added under this rule making. WDFW estimates that the time required to decontaminate the simpler and smaller equipment would be somewhat less. We are using the larger value in lieu of a more specific estimate for the smaller equipment to accommodate for any uncertainty in our estimate.

### **7.5.3 Summary of Costs to Comply**

The up-front cost to acquire a permit is estimated from \$128.68 to \$186.04. The cost to comply with the aquatic invasive species rule is estimated at \$71.70 annually. The total cost to comply in the first year of a permit is the highest, and is estimated from \$200.38 to \$257.74. Total costs to comply per person per year over a 5-year permit range from \$97.44 to \$108.91.

## **7.6 Lost sales or revenues and lost jobs**

Data regarding industry revenue was unavailable. For more about our research, refer to the 2020 Incorporating Elements of ESHB 1261 into HPA Rules Small Business Economic Impact Statement, available at: <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking>. WDFW conducted a phone interview with one business that was identified in the online survey. That business reported permitting complications that caused a one-month work delay at one site. The estimated value of that delay was \$2,000. The business interviewed indicated that they had no employees and that no jobs would be created or lost because of the proposed rules. Additional data on employment was also unavailable. The Washington Employment Security Department Employer Database tool<sup>16</sup> returned no results on companies that hire employees. The US Census Bureau 2017 Economic Census contained only masked data for annual sales, revenue and payroll. The number of employees was given as 250-499, which is also a masked value.

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<sup>15</sup> Details about the survey can be found in the Small Business Economic Impact Statement for the Hydraulic Code Rules Chapter 220-660 WAC 2019 HPA Suction Dredge Rulemaking, available at <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking#Final-rule>.

<sup>16</sup> <https://esd.wa.gov/find-an-employer#/>

Based on insufficient data, WDFW was unable to estimate the number of jobs created or lost, or changes to sales and revenue, as a result of compliance with the proposed rule.

## **7.7 Other potential costs**

### **7.7.1 Costs for record storage**

Keeping records of a person's HPA applications and HPA permits could be very low cost depending upon the method used to keep the records. A typical application document is three pages long, and a typical HPA for five locations is seven pages long. A person storing 1 application, 1 HPA document, and a reporting document per year for a 5-year permit would be storing or printing up to 15 pages. A file folder can be purchased for \$.39 and copying/printing is \$.49 per page at Office Depot online. Paper copies and file storage would cost \$7.74 for five years or \$1.55 per year. Storing these documents on an electronic device such as a computer or cell phone is virtually free. Storing on a cell phone is a particularly attractive option because electronic versions of an HPA are allowed on the work site.

### **7.7.2 Other potential costs**

Other potential costs of implementing the proposed rules include loss of mining time because of the delay in receiving an HPA permit. Miners have previously expressed the concern that WDFW will not have the staff capacity to handle the processing of so many new applications and will therefore exceed the 45-day HPA processing period for many applicants. Although this is an acknowledged potential cost, we can't know if permitting delays will be a problem until applications begin to be submitted. Therefore, we did not attempt to quantify this cost.

## **7.8 Benefits of Proposals**

The primary benefit of the proposal is that the Hydraulic Code rules will be made consistent with RCW 77.55. WDFW will have updated rules for carrying out its authority under RCW 77.55. The regulated community will benefit from having a complete set of rules without confusion about additional requirements that can only be found in statute.

Expanding the aquatic invasive species prevention requirement will help further reduce the risk of spreading aquatic invasive species to and within Washington. Fewer people would be moving between water bodies without taking preventative measures. These rules are important to the protection of fish life because they raise awareness of the potential for equipment to transmit aquatic invasive species. The benefits of awareness and compliance with aquatic invasive species protections are significant at the individual level because it only takes one carrier to infest a water body. Costs of aquatic invasive species infestations on fish life and fish habitat could be devastating. The benefits of avoiding this devastation are unquantifiable.

## **7.9 Reducing costs for those who must comply**

WDFW has taken steps to reduce costs to individuals and businesses:

- WDFW proposes to continue to use a simplified HPA application form, which is shorter than the Joint Aquatic Resource Permit Application form while still collecting all the

information necessary to evaluate an HPA application. Use of the simplified form is an important component in reducing application costs for individuals and businesses.

- The annual reporting requirements in WAC 220-660 305(8) will be eliminated.
- The proposal allows WDFW to reject applications for prohibited locations. These applications are otherwise unable to advance beyond incomplete status and would remain in a state of limbo indefinitely. The rejection process allows applicants to receive a timely decision about the status of their applications.

WDFW has been and will continue working with miners to identify and implement actions to lessen impacts to miners.

### 7.10 Recap of costs and benefits and determination

*RCW 34.05.328 (1)(d) states, “Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented”*

Costs to comply with the proposal are summarized on Table 7.

**Table 7 Estimated costs and benefits of the proposal**

Costs Summary (discussion section)	Per person per year (whole dollars)	All 1,890 applicants per year (whole dollars)
Standard HPA (7.5.1)	\$37	\$69,930
Aquatic Invasive Species Prevention (7.5.2)	\$72	\$136,080
Written application supply costs (7.5.1)	\$4	\$7,560
Recordkeeping (7.7.1)	\$2	\$3,780
Lost revenue	See discussion in section 7.6	
<b>Total Costs</b>	<b>\$115</b>	<b>\$217,350</b>
Rule	Benefits summary	
<i>Standard HPA required</i>	Necessary to implement the statutory requirement to provide proof of compliance with the Clean Water Act	
<i>Aquatic invasive species prevention</i>	Necessary to reduce risk of spreading aquatic invasive species into and around Washington	

**WDFW determines that the probable benefits of the proposed rules are greater than the probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented. This is because 1) bringing the rules into alignment with statute provides a clear pathway for persons to comply with statute, and 2) because the rule proposals are intended to avoid the devastation of aquatic invasive species infestations on fish life and fish habitat.**

## SECTION 8: Least Burdensome Alternative

*RCW 34.05.328 (1)(e) Determine, after considering alternative versions of the rule and the analysis required under (b) [Section 4 of this document], (c) [Notification in CR-102], and (d) [Section 6 of this document] of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection [i.e. for the statute being implemented];*

### 8.1 Introduction

In order to propose and adopt significant legislative rules, WDFW must evaluate alternative versions of the rule. Once this analysis is complete WDFW must determine that the rule proposed for adoption is the least burdensome version of the rule that will achieve the goals and objectives of the authorizing statute(s) as discussed in section 4. Alternatives to rule making are addressed in section 5.2 and consequences of not adopting the proposal are included in section 5.3.

### 8.2 Alternatives considered

Two alternatives to rule making are presented and discussed in Section 5.2 and summarized on Table 8.

The term “*least burdensome alternative*,” when used within this table and subsequently, means “*least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under Chapter 77.55 [RCW].*”

**Table 8 Least Burdensome analysis of alternative rule language**

Alternative/ Comment	Proposed Rule Change	WDFW Response	Least Burdensome Alternative
Alternative 1:	No action - do not adopt the new statutes into rule	<ul style="list-style-type: none"> <li>• Fails to adopt language needed to comply with statute change.</li> <li>• Conflicts with changes to Department of Ecology’s statute regulating motorized and gravity siphon aquatic mining.</li> </ul>	Proposed rule
Alternative 2:	Adopt the new statute into rule but do not expand the aquatic invasive species prevention standard	<ul style="list-style-type: none"> <li>• Fails to reduce the risk of introduction of aquatic invasive species on certain equipment.</li> <li>• Creates a double standard for equipment that is otherwise regulated identically.</li> </ul>	Proposed rule

### 8.3 Determination: Least Burdensome

After considering alternative versions of the rule in context with the goals and objectives of the authorizing statute, **WDFW determines that the proposed rule represents the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under chapter 77.55 RCW.**

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## SECTION 9: Remaining APA Determinations

The remaining narrative in this document addresses determinations pursuant to RCW 34.05.328(1)(f) through (1)(i) relating to state and federal laws, equal requirements for public and private applicants, and coordination with state, federal, tribal, and local entities.

### 9.1 Violation of other state or federal laws

***RCW 34.05.328 states, “(1)(f) Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.”***

There are no provisions in the Hydraulic Code Rules requiring those to whom they apply to take an action that violates requirements of another federal or state law.

We make this determination because the HPA permit does not compel persons to take an action.

Consistent with other state authorities, the Hydraulic Code Rules regulate the time, place, and manner in which an action can occur to adequately protect fish life. The HPA also does not convey permission to use public or private property to conduct the project. Applicants must seek permission to use property from the landowner. Authorization by WDFW to conduct any hydraulic project does not exempt anyone from the requirements of other regulatory agencies or landowners. Every HPA issued in Washington carries the notice that the permit

*“...[the HPA permit] pertains only to requirements of the Washington State Hydraulic Code, specifically Chapter 77.55 RCW. Additional authorization from other public agencies may be necessary for this project. The person(s) to whom this Hydraulic Project Approval is issued is responsible for applying for and obtaining any additional authorization from other public agencies (local, state and/or federal) that may be necessary for this project.”*

Hydraulic Code rules do not supersede existing federal and state requirements.

**WDFW has determined that the proposed rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.**

### 9.2 Equal Requirements for Public and Private

***RCW 34.05.328 (1)(g) states, “Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law.”***

The hydraulic code rules generally apply equally to all HPA applicants whether public or private. Public entities are unlikely to engage in mineral prospecting, but if they did, requirements would

be the same for public and private entities. **WDFW has determined that the rule does not impose more stringent performance requirements on private entities than on public entities.**

### **9.3 Difference from other state and federal rules**

*RCW 34.05.328 (1)(h) states, “Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by the following:” [(i) explicit state statute..., (ii) substantial evidence that the difference is necessary...].*

#### **9.3.1 Other federal, state, or local agencies with authority to regulate this subject**

WDFW has sole authority to implement the Hydraulic Code Rules (chapter 220-660 WAC) under chapter 77.55 RCW (Construction Projects in State Waters). Pursuant to 77.55.361, Department of Natural Resources has authority to carry out the requirements of the Hydraulic Code for forest practices hydraulic projects regulated under Chapter 76.09 RCW. WDFW and DNR have a process for concurrent review of such projects.

Local and state government regulations pertaining to land use and development, shoreline use, and clean water appear to have overlapping authorities, but have different fundamental purposes. Washington Department of Ecology regulates water diversions, discharges, and stormwater outfalls, features that could occur concurrently with a project that is regulated under the hydraulic code. Local governments have regulations for the location (such as under the Shoreline Management Act) and methods (building codes) for construction projects. These aspects of a construction project also can co-occur with hydraulic project requirements, but none of these other authorities either duplicates or supersedes the hydraulic code authority.

#### **9.3.2 The rule differs from federal regulations or statutes applicable to the same activity**

The Hydraulic Code regulates hydraulic projects for the protection of fish life. Hydraulic projects are construction projects and other work that effects the natural flow or bed of state waters. Federal protections under the Rivers and Harbors Act, Clean Water Act (U.S. Army Corps of Engineers and Washington Department of Ecology), and Endangered Species Act (U.S. Fish and Wildlife Service and National Marine Fisheries Service) may regulate hydraulic projects, however the purposes for these federal acts are very different from the state Hydraulic Code and rules.

Indeed, local, state, and federal agencies may have jurisdiction over the same project. Table 9 provides an overview of the characteristics of some aquatic permits at the federal, state, and local levels. At each jurisdictional level, priorities and legal mandates determine the resources or interests that are protected and the extent of the protection that is applied. Mitigation requirements also vary according to the agencies’ protection priorities and legal mandates. As a result, regulatory efforts may share intentions or could have entirely different animal or habitat protection objectives.

The federal Endangered Species Act (ESA) comes closest to regulating the same subject matter - the protection of fish life. But while the state hydraulic code regulates the way a project is constructed (so that the project is protective of fish life), the federal ESA regulates the “take” or kill of species listed as threatened or endangered under the Act. Federal ESA jurisdiction relates

only to animals or plants listed as threatened or endangered under the Act. The state hydraulic code applies to all fish species.

The HPA fills a unique niche because it is the only permit issued solely to protect (all) fish life. The HPA may be the only permit required when all the criteria below apply:

- Hydraulic projects in streams too small to be considered a shoreline of the state (relevant to the state Shorelines Management Act) or navigable waters (relevant to Corps of Engineers permitting);
- Hydraulic projects not regulated under the Clean Water Act;
- Hydraulic projects not subject to state or federal landowner notification or permit requirements;
- Hydraulic projects exempt from state or national Environmental Policy Act review (refer to SEPA statute and rules for criteria for SEPA exemption); or
- Hydraulic projects exempt from local permits.

### 9.3.3 Determination: Difference is necessary

Differences between state HPA authority (and the current rule proposal) and federal authorities are necessary because there are no federal laws or rule protecting all fish life from the effects of construction projects. **WDFW has determined that the rule differs from any federal regulation or statute applicable to the same activity or subject matter and that the difference is necessary to meet the objectives of the hydraulic code statute.**

## 9.4 Coordination with state, federal and local laws

***RCW 34.05.328 (1)(i) states, "Coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter."***

### 9.4.1 Coordination with state and federal agencies

WDFW has actively engaged with the Department of Ecology since ESHB 1261 was signed into law in March 2020. Discussions particularly centered around how each agency would administer responsibilities under the new statutory language. The shorter-term conversations considered the immediate implementation of the new water quality permitting requirement and prohibitions found in statute. Further conversations covered the statutory requirement to provide proof of compliance with the Clean Water Act when applying for an HPA for mineral prospecting involving motorized or gravity siphon equipment. Both agencies are continuing to explore ways to mutually support the new responsibilities.

WDFW has provided notification of this rule making effort to other state and federal agencies. However, we did not approach those agencies for assistance with developing the rule proposal. The scope of the proposal is limited to primarily administrative processes and does not change how mineral prospecting activities occur on the ground. Additionally, the main objective of the proposal is to align the Chapter 220-660 WAC (Hydraulic Code Rules) with changes to state laws which have already been enacted, that govern hydraulic permitting authority. We turned to internal administrative expertise to achieve this objective.



In the long term, ongoing coordination with federal, state, and local agencies occurs because, while the objectives of regulation are different, projects being reviewed under the HPA program are potentially reviewed by these other jurisdictions as well. WDFW coordinates mitigation requirements with federal agencies so that mitigation required for construction project impacts can satisfy mitigation required for impacts to other authorities; this coordination prevents imposing double the mitigation for the same project impact.

WDFW also solicits input from federal, state, and local agencies on ways to improve HPA program implementation, including both the regulation of projects and with the technical assistance that WDFW provides to other agencies and to project proponents.

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**Table 9 Comparison of some common aquatic permits**

<b>Permit</b>	<b>Agency</b>	<b>Purpose</b>	<b>Trigger activity</b>	<b>Action</b>	<b>Limitations</b>
Hydraulic Project Approval	WDFW	Protect fish/shellfish and their habitats	Projects that use, divert, obstruct, or change the natural flow or bed of salt or fresh state waters.	Construction permit issued with conditions that mitigate impacts	May not optimize conditions for fish or unreasonably restrict a project.
ESA Incidental Take Permit	USFWS, NMFS	Ensure activities are not likely to jeopardize the continued existence of listed species, or destroy or adversely modify their critical habitat	Anyone whose otherwise-lawful activities will result in the “incidental take” of a listed species needs an incidental take permit.	Incidental take permit and terms and conditions	Applies only to ESA-listed species; “take” includes harm to designated critical habitat
Shoreline Substantial Development Permit	Local governments, Ecology	Encourages water-dependent uses, protects shoreline natural resources, and promotes public access.	Any project, permanent or temporary, which interferes with public use of shorelands. Projects in or within 200 feet of marine waters, streams, lakes, and associated wetlands and floodplains.	Development permit issued by local government	Conditional Use and Variance require review by Ecology.
NPDES construction stormwater or general permit	Ecology	Protects and maintains water quality and prevents or minimizes sediment, chemicals, and other pollutants from entering surface water and groundwater.	Construction activities that disturb 1 or more acres of land and have potential stormwater or storm drain discharge to surface water.	Construction permit or general permit with conditions to minimize discharge and/or report	Apply to projects disturbing 1 or more acres of land

Permit	Agency	Purpose	Trigger activity	Action	Limitations
Aquatic Use Authorization	DNR	Allows use of state- owned aquatic lands. Washington State Department of Natural Resources (DNR) determines if aquatic land is state- owned, if it is available for use, and if the use is appropriate.	Project located on, over, through, under, or otherwise impacts state- owned aquatic lands. Aquatic lands are defined as tidelands, shorelands, harbor areas, and the beds of navigable waters.	Use authorization permit or lease	Only for state-owned aquatic lands
Section 404 Permit (Regional, Nationwide, or Individual) for Discharge of Dredge or Fill Material	U.S. Army Corps of Engineers	Restores and maintains chemical, physical, and biological integrity of national waters. Authorized under Section 404 of the Clean Water Act.	Excavating, land clearing, or discharging dredged or fill material into wetlands or other U.S. waters.	Permit to discharge dredged or fill material	Concurrent consultation on 401 Certification, CZM, National Historic Preservation Act, Endangered Species Act, Tribal Trust Issues, and National Environmental Policy Act.

Source: Excerpted from Governor’s Office of Regulatory Innovation and Assistance detailed [comparison of aquatic permits](#) by local, state, and federal agencies.

## 9.4.2 Permittee Responsibilities

Permittees are notified in standard HPA permits and in the Gold and Fish pamphlet that it is the permittee’s or miner’s responsibility to meet legal requirements of other state, federal, and local agencies in order to conduct mining activity. Permits from and notifications to other regulatory agencies may be required and applicable landowners or claim holders must be consulted before conducting any activity. These responsibilities are independent from permitting under the hydraulic code rules in the Gold and Fish pamphlet or HPA permit.

## 9.4.3 Determination: Coordinated with other federal, state, and local laws

WDFW has demonstrated that the rule has been coordinated, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

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## SECTION 10: Sources of Information Used

*RCW 34.05.271(1)(a) states, “Before taking a significant agency action, the department of fish and wildlife must identify the sources of information reviewed and relied upon by the agency in the course of preparing to take significant agency action. Peer-reviewed literature, if applicable, must be identified, as well as any scientific literature or other sources of information used. The department of fish and wildlife shall make available on the agency’s web site the index of records required under RCW [42.56.070](#) that are relied upon, or invoked, in support of a proposal for significant agency action.”*

Following are references for material reviewed and relied upon by WDFW in the course of preparing to take this rule making action (Table 10), which is a significant legislative rule pursuant to RCW 34.05.328(5)(a). Each reference is categorized for its level of peer review pursuant to RCW 34.05.271. A key to the review categories under RCW 34.05.271 is provided on Table 10A.

**Table 10 References for material reviewed in preparation for rule making**

Reference Citation	Category
Certificate of Enrollment, Engrossed Substitute House Bill 1261. Chapter 10, Laws of 2020.	v
The Diggings. 2020. <a href="#">Mining claims and owners</a> reviewed Dec. 15, 2020. Thediggings.com	viii
Washington Department of Fish and Wildlife. CR-102 form WSR 20-06-053 (for HPA Rulemaking Implementing 2SHB 1579). 2020. 95 pp.	viii
Washington Department of Fish and Wildlife. CR-102 form WSR 19-24-081 (for HPA Rulemaking Implementing 2SHB 1579). 2019. 43 pp.	viii
Washington Department of Fish and Wildlife. 2019. Regulatory Analysis of Hydraulic Code Rules Chapter 220-660 WAC 2019 HPA Suction Dredge Rule Making. 45 pp.	viii
Washington Department of Fish and Wildlife. 2020. Regulatory Analysis for Hydraulic Code Rules Chapter 220-660 WAC Incorporating Elements of 2SHB 1579 Into HPA	viii

Reference Citation	Category
Rules. 63 pp.	
Washington Department of Fish and Wildlife. 2019. Small Business Economic Impact Statement for Hydraulic Code Rules Chapter 220-660 WAC 2019 HPA Suction Dredge Rule Making. 20 pp.	viii
Washington Department of Fish and Wildlife. 2019. Suction Dredge Rulemaking 2019 SEPA Checklist, SEPA #19018. 18 pp.	viii

**Table 10A Key to RCW 34.05.271 Categories Relating to Level of Peer Review**

Category Code	RCW 34.05.271 Section 1(c)
i	Independent peer review: Review is overseen by an independent third party
ii	Internal peer review: Review by staff internal to the department of fish and wildlife;
iii	External peer review: Review by persons that are external to and selected by the department of fish and wildlife;
iv	Open review: Documented open public review process that is not limited to invited organizations or individuals;
v	Legal and policy document: Documents related to the legal framework for the significant agency action including but not limited to: (A) Federal and state statutes; (B) Court and hearings board decisions; (C) Federal and state administrative rules and regulations; and (D) Policy and regulatory documents adopted by local governments;
vi	Data from primary research, monitoring activities, or other sources, but that has not been incorporated as part of documents reviewed under the processes described in (c)(i), (ii), (iii), and (iv) of this subsection;
vii	Records of the best professional judgment of department of fish and wildlife employees or other individuals; or
viii	Other: Sources of information that do not fit into one of the categories identified in this subsection (1)(c).

## **SECTION 11: For Further Information**

This report was prepared by:

Theresa Nation  
 Protection Division Environmental Planner 4  
 Habitat Program  
 360-902-2562 [theresa.nation@dfw.wa.gov](mailto:theresa.nation@dfw.wa.gov)

Andy Carlson  
 Protection Division Manager  
 Habitat Program  
 360 628-0962 [andy.carlson@dfw.wa.gov](mailto:andy.carlson@dfw.wa.gov)