



Fish and Wildlife Commission Presentation Summary Sheet

Meeting date:

12/3/2021

Agenda item:

6. Hydraulic Code rule making (E2SHB 1382)

Presenter(s):

Margen Carlson, Habitat Program Director
Theresa Nation, HPA Rule Making Coordinator

Background summary:

Staff are bringing a proposed rule to the Commission today for a decision. The rule is necessary to implement Engrossed Second Substitute House Bill (E2SHB) 1382^[1] as codified in [RCW 77.55.480](#). The bill became effective July 25, 2021.

Rules to implement [Chapter 77.55](#) RCW are contained within [Chapter 220-660](#) of the Washington Administrative Code (WAC) - *Hydraulic Code Rules*. This WAC chapter establishes regulations for administration of the Hydraulic Project Approval (HPA) program. HPA permits are issued to protect fish and their habitat from the impacts of construction. The Hydraulic Code Rules set forth 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.

E2SHB 1382 created the Habitat Recovery Pilot Program. The purpose of the pilot program is to create further opportunities for streamlined permitting of habitat restoration projects. Specifically, it applies to projects that will directly benefit freshwater, estuarine, or marine fish, or their habitat. The program streamlines state and local permitting in order to advance the projects to construction as quickly and efficiently as possible. Local governments will maintain their ability to implement floodplain planning. The pilot program is different from the Fish Habitat Enhancement Project (FHEP) process that is described in [RCW 77.55.181](#). The pilot program is significantly larger in scope than the FHEP process and has its own distinct review process. It expires June 30, 2025.

The Administrative Procedure Act (APA), [Chapter 34.05 RCW](#), allows certain rule proposals to undergo an expedited rule making process ([RCW 34.05.353](#)). Our rule proposal qualifies for the expedited process because it incorporates a statute by reference without material change. Expedited rules are exempt from several standard

^[1] Laws of 2021, Chapter 75

requirements, including a Small Business Economic Impact Statement ([RCW 19.85.025\(2\)](#)) and public hearing. Expedited rule making involves the following steps:

- Publication of the rule proposal in the State Register;
- A 45-day waiting period. Any person may file an objection to the expedited process during this time;
- If no objections, then the rule may be adopted;
- An adoption order is filed with the Office of the Code Reviser (OCR), and the rule becomes effective 31 days after filing.

Timeline for this rule making:

| Date | Action |
|---------------|---|
| Oct. 6 | The rule proposal was published in the State Register. A 45-day waiting period was initiated. The SEPA comment period also began. |
| Oct. 20 | SEPA comment period ended. Two comments were received, both supporting. |
| Nov. 22 | The waiting period ended with no written objections. |
| Dec. 3 | The Fish and Wildlife Commission will vote on rule adoption. |
| Mid-Dec. | WDFW will file the adopted rule with the Office of the Code Reviser. |
| Mid-Jan. 2022 | The new rule will go into effect 31 days after filing. |

The rule is excepted from APA requirements for significant legislative rules in [RCW 34.05.328](#) because it incorporates a statute by reference without material change.

Rule Proposal:

The rule proposal creates a new section in Chapter 220-660 WAC. The rule adopts [RCW 77.55.480](#) by reference. The proposal is attached to this summary sheet. No changes have been made to the rule since it was published in the State Register. Under the APA, an expedited rule cannot be changed before adoption, with the exception of correcting typographical errors.

Staff recommendation:

Staff recommends adoption of the rule.

Policy issue(s) and expected outcome:

The rule proposal incorporates statute by reference into rule. It does not add any additional procedures or requirements. We do not expect any policy issues related to the rule itself. The expected outcome is that the Hydraulic Code Rules will align with statute. WDFW staff are currently working to implement the pilot program as described in statute. Most considerations relate to the logistics of setting up the program. In particular, this means communicating with other involved parties (stage agencies, tribes, and local governments) to determine how each will carry out their roles as prescribed by statute. WDFW is hiring a statewide coordinator to work with those parties, as well as members of the restoration community who wish to utilize the pilot program. Aside from those considerations, WDFW biologists will review applications and issue HPA permits as with any other project type. We do not expect that local governments will need to revise their ordinances in response to the rule or the statute.

Fiscal impacts of agency implementation:

Implementation of E2SHB 1382 began in July. The proposed rule will not change the cost of implementing the pilot program. The primary cost associated with the program is staff time. Implementation and program operations will require significant time. The department is in the process of hiring a new statewide Habitat Recovery Pilot Program coordinator. This position is expected to last four years. The legislature provided funding with E2SHB 1382 for operating expenditures. The funding covers 3.1 FTEs during the 2021-23 biennium and 3.0 FTEs during the 2023-25 biennium. Other anticipated costs include outreach and modification of the online permitting system (APPS). WDFW does not expect the overall number of HPA applications to change.

Public involvement process used and what you learned:

The department sent emails and held a webinar for federally recognized tribes regarding rule making. Public notice was provided in the State Register, by press release, and on the WDFW website. The department received two supporting letters and one question during the SEPA comment period. Overall, interest has been on the pilot program itself. That interest has come from the tribes, state agencies, funding organizations, and potential project proponents. The rule proposal has received only a small amount of attention, primarily from those interested in learning more about the expedited rule process.

No party filed opposition to the rule or the expedited process during the 45-day waiting period.

Action requested and/or proposed next steps:

Staff requests adoption of the rule. If the rule is adopted, staff will file the rule with the Office of the Code Reviser and continue with implementation of the Habitat Recovery Pilot Program.

Draft motion language:

Motion: I move to adopt the rule as presented by staff.

Is there a "second?"

If so, then motion maker discusses basis for motion; other Commissioners discuss views on the motion; and a vote is taken. An expedited rule may not be amended. It must be adopted or rejected as presented.

Post-decision communications plan:

Staff have already begun communications regarding the pilot program, including convening a Multiagency Permitting Team. That team will continue to function for the life of the program. Additional communications will primarily focus on three categories: local governments, tribes, and restoration practitioners. Communication will utilize the WDFW website, online webinars, professional organizations, email, press releases, and written guidance.

NEW SECTION

WAC 220-660-490 Habitat recovery projects. Projects must satisfy the requirements outlined in RCW 77.55.480, to be processed as a streamlined habitat recovery project. Requirements outlined in that statute are incorporated herein by reference as if fully set forth herein. Copies of this statute, available to the public on request, are also available online at <https://app.leg.wa.gov/RCW/default.aspx?cite=77.55.480>.