



## Fish and Wildlife Commission Presentation Summary Sheet

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**Meeting date:**

11/19/2021

**Agenda item:**

Hydraulic Code rule making (E2SHB 1382)

**Presenter(s):**

Margen Carlson, Habitat Program Director

Theresa Nation, HPA Rule Making Coordinator

Josh Peters, Protection Division Manager

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**Background summary:**

Habitat Program staff will brief the Commission on Hydraulic Code rule making planned for the current biennium. Staff will also brief the Commission on the specifics of a proposed amendment to Chapter 220-660 WAC – Hydraulic Code Rules in preparation for upcoming adoption of the proposed changes. The rule amendment is necessary to implement E2SHB 1382.

WDFW plans to conduct rule making for Chapter 220-660 WAC to implement the following bills from the 2021 legislative session. These bills all made changes to Chapter 77.55 RCW – Construction Projects in State Waters.

[E2SHB 1382 Habitat Recovery Pilot Program.](#) Creates the Habitat Recovery Pilot Program. The program is intended to advance habitat restoration projects to construction as quickly and efficiently as possible. Local governments will maintain their ability to implement floodplain planning. The program expires on June 30, 2025. Expedited rule making is being utilized so that the regulated community may realize the benefits of the program as quickly as possible.

[SSB 5273 Concerning the replacement of shoreline armoring.](#) Requires a site assessment and alternatives analysis when replacing a marine shoreline stabilization or armor structure. The project must utilize the least impacting technically feasible bank protection alternative for the protection of fish life. The scope is limited to residential marine projects. Standard rule making will be conducted during the winter and spring of 2022.

[SSB 5381 Addressing fish passage project permit streamlining.](#) This bill modifies the existing Fish Habitat Enhancement Project (FHEP) streamlined permitting process. It addresses the ability of local governments to meet National Flood Insurance Program requirements and has language on multiagency permit coordination. It also amends FHEP streamlining of HPA permits to include WDOT fish passage barrier corrections as part of larger projects (not stand alone, as previously). It adds federally recognized tribes to the list of project sponsors. WDFW intends to use the expedited rule making process to implement SSB 5381. Anticipated start date is spring 2022.

Rule making for each bill will take place in the order they are listed above. The bills 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 during 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.

WDFW is proposing a new rule in WAC 220-660 in order to implement Engrossed Second Substitute House Bill (E2SHB) 1382 <sup>[1]</sup>. E2SHB 1382 is now codified in [RCW 77.55.480](#) and it creates 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. The pilot program is different from the 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 ([RCW 34.05](#)) allows certain rule proposals to undergo an expedited rule making process. Expedited rules are exempt from several standard requirements, including a Small Business Economic Impact Statement, significant legislative rule analysis, and public hearing. Our rule proposal qualifies for the expedited process because it incorporates a statute into rule by reference. We anticipate that rule making will take under four months. Standard rule making can take upward of a year to complete. 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 order adopting the rule is filed with the Office of the Code Reviser (OCR), and the rule becomes effective 31 days after filing.

The anticipated timeline for rule making to implement E2SHB 1382:

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 ends and WDFW is free to move forward with adoption.
Dec. 2	The Fish and Wildlife Commission votes on rule adoption.
Mid-Dec.	WDFW files the adopted rule with the Office of the Code Reviser.
Mid-Jan. 2022	The new rule goes into effect 31 days after filing.

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<sup>[1]</sup> Laws of 2021, Chapter 75

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 briefing.

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**Staff recommendation:**

N/A. This is a briefing only.

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**Policy issue(s) and expected outcome:**

The rule proposal incorporates statute by reference into rule. Therefore, 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.

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**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.

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**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 during the SEPA comment period. Protection Division staff are working with the restoration community on a case-by-case basis and participating in organizational meetings such as the Floodplains by Design action group. Overall, the lion's share of interest has been about 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. To date, no party has expressed opposition to the rule or the expedited process. As we work through the logistics of pilot program operations, staff will also embark on a more comprehensive outreach effort to inform the restoration community about this new opportunity to streamline permitting for their projects.

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**Action requested and/or proposed next steps:**

If the waiting period for expedited rule making ends with no objections, then the Commission will vote on rule adoption during the Dec. 3 meeting. If a written objection to expedited rule making is received by Nov. 22, then WDFW will revert to standard rule making and begin development of the required analyses.

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**Draft motion language:**

N/A.

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**Post decision communications plan:**

N/A.

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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>.