

**Draft Co-manager Hatchery Policy – (Briefing, Public Comment)**

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## Fish and Wildlife Commission Presentation Summary Sheet

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**Meeting date:**

1/27/2023

**Agenda item:**

5. Draft Co-Manager Hatchery Policy – Briefing, Public Comment

**Presenter(s):**

Ron Warren and Ken Warheit, Fish Health and Molecular Genetics Lab Manager

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**Background summary:**

WDFW Commission's Anadromous Salmon and Steelhead Hatchery Policy (C-3624) required the development of a Co-Manager Hatchery Policy, which would become a WDFW Commission Policy. When signed, this new Co-Manager Hatchery Policy would supersede C-3624 in the geographic areas applicable to the Co-Manager policy. Co-Manager policymakers (including representatives of the WDFW FW Commission) approved a draft Co-Manager hatchery policy in November 2022. This draft policy is now being reviewed by all Co-Managers, including this Commission. For this agenda item, staff will present and review the draft Co-Manager Hatchery Policy.

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**Staff recommendation:**

This draft policy is a Commission policy and not a policy recommendation from WDFW staff. For this policy to move forward in its approval process the Commission would need to request staff to initiate both a public review process and SEPA evaluation of the draft policy.

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

Ultimately, the final version of the Co-manager Hatchery Policy would need to be approved or rejected by the Commission. The expected outcome of this agenda item is a decision by the Commission to either release or not release the draft policy for public and SEPA reviews. If the Commission approves public and SEPA reviews, the process moves forward eventually to final edits and a vote to approve or reject the final policy. If the Commission rejects the public and SEPA reviews, the process would stop, unless the Commission requested edits to the draft policy. In which case, WDFW staff and Tribal Co-managers would attempt to include those new edits. After completion of a new version of the document, Co-Manager policymaker representatives (a subset of all Co-Managers) would need to approve the new version of the policy, and reinitiate the comprehensive Co-Manager approval process, which is where we are now, on January 27, 2023.

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**Fiscal impacts of agency implementation:**

Unknown at this time

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**Public involvement process used and what you learned:**

No public involvement to date. Public and SEPA reviews of the policy will be initiated depending on the decisions by the Commission.

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

Decision (1) to submit the draft policy for formal public review; (2) to submit the policy for SEPA review and evaluation; and (3) if the proposed schedule (next steps) is appropriate.

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**Draft motion language:**

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**Post decision communications plan:**

Staff will provide updates to the Commission as to the status of the process, depending on the decisions the Commission makes on January 27, 2023.

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*Form revised 1-20-21*

## Draft Memorandum

To: Washington State and Tribal Co-Managers

From: Rob Jones, NWIFC, on behalf of the Joint Policy and Technical Workgroup

Cc: Joint Policy and Technical Workgroup

Date: November 15, 2022

Re: Development of a Co-Managers Joint Policy Agreement for the Management of Anadromous Salmon and Steelhead Hatcheries

Pages: 3 plus attachment

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Attached for your information and review is a draft Joint Policy Agreement for the Management of Anadromous Salmon and Steelhead Hatcheries between Treaty Tribes and the Washington Department of Fish and Wildlife.

During Co-Managers consultations regarding Washington Fish and Wildlife Commission Anadromous Salmon and Steelhead hatchery Policy C-3624, many Tribes saw C-3624 as an improvement over the previous state hatchery policy but felt it still lacked all the necessary elements of co-management. At the request of Tribes, the final version of the Policy adopted by the Washington Fish and Wildlife Commission (WFWC) committed to development of a co-manager hatchery policy soon thereafter that would supersede C-3624 where applicable. The attached draft Policy reflects recommendations of a Joint Policy and Technical Workgroup for a policy that would supersede C-3624 where applicable.

This draft will soon be presented to the full WFWC to begin their public process and SEPA review. A briefing for Tribal representatives will be provided at the upcoming NWIFC monthly Commission Meeting.

**Action requested:** Please provide comments on the draft to me by December 6, 2022. The workgroup will reconvene to consider any comments received during WDFW's public review and SEPA process, and those provided by Treaty Tribes. If an EIS is not required as per the SEPA process, and once agreement has been reached within the workgroup, the Hatchery Policy will be submitted for consideration and adoption by the WFWC and individual tribal governments. Upon adoption by the WFWC, the signed Co-Manager Policy will be distributed to all applicable Tribes in Puget Sound, Washington Coast and Columbia River regions.

### **Significance**

This draft represents the first ever policy that reflects a commitment to develop agreements among affected Co-Managers for the operation of salmon and steelhead hatcheries on a watershed, or as appropriate, regional basis.

### **Intent of the Policy**

The Hatchery Policy is written to act as an overarching policy that confirms the commitment to co-management in hatcheries and defers details of specific management questions to individual hatchery plans. It outlines the types of hatcheries, the logical and legal reasons for hatchery operations, as well as some of the considerations and principles for co-managing hatcheries in the state.

It is intended to provide flexibility in how Co-Managers might craft or operate in accordance with individual hatchery plans. Individual hatchery plans include Hatchery Genetic Management Plans

required by NOAA under the Endangered Species Act, those developed under watershed or regional plans and those developed consist with court decisions (e.g., United States v. Washington, United States v. Oregon, and Hoh v. Baldrige).

## **Provisions**

The Policy begins with a Purpose Statement outlining the commitment to co-management and the reasons hatchery programs are necessary. The Scope of the Policy describes how it will be applied, including the interaction with the existing State Policy C-3624. It also commits Co-Managers to either develop specific, individual hatchery plans in cases where none exist or defaults to existing legal requirements of co-management. Hatchery Genetic Management Plans already in existence that have been agreed to by Co-Managers will not require updating, reconsultation, or replacement under this Policy.

The Policy lists 6 Guiding Principles and Policy Positions. These Principles represent a foundation for understanding the need for and considerations in operating hatcheries. Principle 1 is Tribal Treaty Rights are supreme law of the land; Principle 2 is that hatcheries are necessary to support the treaty rights of Tribes; Principle 3 is that hatcheries provide for state-managed fisheries—both commercial and recreational; Principle 4 is that Co-Managers will operate hatcheries according to agreed-upon plans or they will develop such plans at the watershed or regional level according to an integrated “all-H” approach; Principle 5 is that hatcheries will be operated using sound science and adaptive management; and Principle 6 is that Co-Managers agree to secure funding necessary to support agreed-upon production levels.

Finally, the Policy has a Dispute Resolution provision to allow for third-party, neutral mediation of disputes as well as a Disclaimer section outlining that the Policy isn’t intended to conflict with any laws, does not create or diminish any legal rights, and that the Policy is intended to reflect a spirit of cooperation. There is also a Signatory section for those Co-Managers that choose to adopt the policy.

## **Development**

In August of 2021, leads for WDFW and NWIFC developed a plan to convene Co-Managers to begin development of a co-manager Hatchery Policy. The first Co-Manager Hatchery Policy Meeting was held September 15, 2021. The Co-Managers requested technical volunteers to begin drafting the various components of a policy for review by policymakers at subsequent Co-Manager Hatchery Policy Meetings.

The technical writing group was made up of WDFW staff, Tribal staff, NWIFC staff, and CRITFC staff with a great deal of organizing and recordkeeping help from a Washington Sea Grant fellow working with NWIFC. The group attempted to meet bi-weekly as schedules allowed between May and July 2022. The writing group developed their final draft for policy consideration on July 21, 2022.

Co-Manager Hatchery Policy Meetings were convened on September 1, 2022, and on September 19, 2022, where they considered a couple redrafts of the writing team’s July 21 product. One of the main outcomes of those two meetings was a decision to end the parallel technical and policy tracks for drafting and request a small Joint Policy and Technical Workgroup to finalize the draft.

That Joint Policy and Technical Workgroup included Washington Fish and Wildlife Commissioners Barbara Baker, Jim Anderson, and Don McIsaac as policy representatives for the State and Ed Johnston, Lisa Wilson, G.I. James, Jason Gobin, and David Troutt as policy representatives for the Tribes along with staff from WDFW, NWIFC, CRITFC, and Tribal natural Resource Departments. They met on October 3 and November 4, 2022, though not all members were present at both meetings. At the conclusion of the November 4 meeting, the Workgroup agreed that the policy differences had been resolved and the language reflected the consensus of those most directly involved in development of the Policy.

**Joint Policy Agreement  
for the  
Management of Anadromous Salmon and Steelhead Hatcheries  
Between Treaty Tribes  
and the  
Washington Department of Fish and Wildlife**

**Purpose**

This Joint Policy Agreement (Co-Manager Hatchery Policy) is entered into between the Tribes reflected in the signature blocks (the “Tribes”) and the Washington Department of Fish and Wildlife (“WDFW”). The Tribes and WDFW are hereinafter collectively referred to as Co-Managers or Parties and may be referred to individually as Co-Manager or Party.<sup>1</sup> This policy establishes the Co-Managers’ expectations for collaborative management of tribal and WDFW salmon and steelhead hatchery programs in Washington State.

Co-Managers recognize that legacy habitat<sup>2</sup> degradation requires ongoing mitigation<sup>3</sup>. Co-managers further recognize that ongoing habitat loss and changing environmental conditions and ecosystem functions<sup>4</sup> preclude for the foreseeable future aggregate natural- and hatchery-fish sufficient to meet the recovery<sup>5</sup> needs and legal requirements of the Co-Managers. Hatcheries are primarily operated to preserve, reintroduce or supplement natural production, and they contribute to both the spawning production of those populations and augment harvest. Hatcheries will contribute to meeting these needs while mitigation, habitat restoration and stock recovery efforts are ongoing.

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<sup>1</sup> The term Co-Manager refers to the Tribes’ and WDFW’s joint management efforts pursuant to their concurrent jurisdiction to regulate the fishery resource, as recognized in various court decisions. *United States v. State of Wash.*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff’d and remanded*, 520 F.2d 676 (9th Cir. 1975); *United States v. State of Or.*, 699 F. Supp. 1456, 1458 (D. Or. 1988), *aff’d*, 913 F.2d 576 (9th Cir. 1990); *Hoh Indian Tribe v. Baldrige*, 522 F. Supp. 683 (W.D. Wash. 1981); and subsequent court orders and sub-proceedings that established equal harvest sharing and resource management responsibilities.

<sup>2</sup> Habitat includes freshwater, estuary, nearshore marine, and offshore marine ecosystems and the environmental conditions anadromous salmonids experience that influence survival and reproduction.

<sup>3</sup> “[Hatchery programs] are designed essentially to replace natural fish lost to non-Indian degradation of the habitat and commercialization of the fishing industry.” *United States v. State of Wash.*, 759 F.2d 1353, 1360 (9th Cir. 1985). This is particularly true for hatcheries that have formal mitigation requirements (e.g., Mitchell Act, FERC agreements, and Flood Control Act). Appropriate uses of hatchery mitigation will change over time depending on the health of individual watersheds and the worsening effects of climate change on freshwater, estuarine, and marine ecosystems.

<sup>4</sup> Ecosystem function is the physical, chemical, and biological processes that transform and translocate energy or materials in an ecosystem.

<sup>5</sup> Recovery, as used in this Policy, refers to the rebuilding of populations to levels that support healthy ecosystem functions and services, including robust harvest, where applicable. Due to the legacy loss of freshwater, estuarine and marine habitats and exacerbating effects of climate change, hatchery production is increasingly relied upon to meet harvest needs that cannot be provided by natural-origin salmon populations, while mitigation and restoration efforts are ongoing.



## Scope of Policy

The Co-Manager Hatchery Policy will apply to all Co-Managed anadromous salmon and steelhead hatchery programs operated by the Co-Managers within Washington State. It is the intent of Co-Managers to subsequently provide additional specification of responsibilities, agreements, and operational requirements at the regional or watershed level through comprehensive planning. Any specific hatchery program plans that are consistent with the Co-Manager Hatchery Policy will supersede direction under the Fish and Wildlife Commission *Anadromous Salmon and Steelhead Hatchery Policy* (Policy C-3624).

Hatchery program release goals, genetic management protocols, and other plans agreed to by Co-Managers as of **MONTH DAY**, 2023, will remain in place until agreed to otherwise in accordance with this Co-Manager Hatchery Policy. If any Tribal Co-Manager does not become a signatory to this policy and there is not a precursory regional- or watershed-specific Co-Manager hatchery program agreement currently in place, then hatchery program management will defer to existing legal requirements and policies.

## Guiding Principles and Policy Positions

In conducting evaluations needed toward achieving an optimal balance of the various benefits and risks of hatcheries, attention shall be given to the explicit purpose and principles of this Policy and any stated objectives in the individual agreed-to hatchery management plans.

**Principle 1:** Tribal Treaty Rights are supreme law of the land<sup>6</sup>. It is acknowledged that hatchery programs are essential components of regional salmonid management plans that support natural resource management responsibilities in sustaining Treaty Rights (*e.g.*, *United States v. State of Wash.*, *United States v. State of Or.*, *Hoh Indian Tribe v. Baldrige* and sub-proceedings).

- Co-Managers acknowledge and re-commit to follow all court orders and management agreements arising under *U.S. v. Wash.*, *Hoh Indian Tribe v. Baldrige*, and *U.S. v. Or.* pertaining to salmonid hatchery operations and management.

**Principle 2:** Hatchery fish support Treaty Right fishing obligations that cannot be provided by natural-origin salmonid populations alone. Harvest of hatchery fish is managed within Co-Manager harvest management processes.

- Hatcheries are recognized as supporting the four basic values recognized by the federal courts associated with tribal treaty-reserved fishing: (1) conservation of the resource to ensure a future supply, (2) ceremonial, religious, and spiritual values, (3) subsistence values, and (4) commercial values.

**Principle 3:** Hatcheries produce fish for state-regulated recreational and commercial fishing opportunities beyond that provided by natural-origin salmonid populations. Such fisheries, and the infrastructure

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<sup>6</sup> The United States Constitution, Article VI states in part, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

support they entail, provide important cultural socio-economic benefits to key fishery-dependent communities.

**Principle 4:** The Co-Managers will develop hatchery program plans and/or operate in accordance with existing hatchery program plans that include clearly-defined hatchery goals and describe hatchery operations at the regional and/or watershed level. The hatchery plans should indicate how the hatchery production is integrated with habitat, hydropower, and harvest, also known as the All-H<sup>7</sup> approach.

- Hatchery program plans should support ecosystem function, such as providing prey for Southern Resident Killer Whales, buffering pinniped and avian predation, and providing nutrients that cycle between freshwater and marine environments.
- Hatchery program plans should consider how natural-origin salmonids support ecosystem function and should size the hatchery program and time of hatchery releases in a manner that considers ecosystem constraints, with recognition of changing environmental and climate conditions.
- Hatchery program plans should consider how hatchery production can contribute to productive natural-spawning populations that are locally adaptive, and genetically diverse to maintain adaptability in the face of changing environmental and climate conditions.
- Hatchery plans should consider how hatchery operations can maintain or enhance the genetic diversity and adaptability of hatchery broodstock.
- Hatchery program goals should strive to balance harvest opportunities, cultural, economic, conservation, and ecological benefits with potential genetic and ecological risks to natural-origin salmonid populations, and environmental conditions such as habitat degradation. Risks and benefits reflect perspectives, values, and biological factors that should be considered in both social and ecological contexts.
- It is recognized that there are hatchery program plans in varying stages of consultation, in specific geographic areas, which are agreed-to by Co-Managers. These hatchery program plans will not be modified without Co-Manager agreement. Development of new hatchery program plans will require approval by—and involvement from—the affected Co-Manager(s) with fishing Rights consistent with *United States v. State of Wash.*, *United States v. State of Or.*, *Hoh Indian Tribe v. Baldrige*, and/or other applicable law.

**Principle 5:** Hatcheries are to be designed and operated in a scientifically-sound and defensible manner, including adaptive management processes for informing decisions that include monitoring, evaluation, and research programs.

- Co-managers will monitor and evaluate hatchery- and natural-origin fish populations and their habitats to track progress for reaching goals established in the hatchery plans. Adaptive management of hatchery programs is to be informed by well-funded, coordinated, and objective monitoring and evaluation programs. Where Co-Managers deem accompanying procedure manuals or evaluation tools are desirable, these must be jointly developed or third-party tools

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<sup>7</sup> All-H refers to managing harvest, hatcheries, hydropower, and habitat (i.e., the 4 Hs) in a comprehensive, integrated manner taking into account the impacts and conditions of each in a holistic management structure.

adapted for use under close coordination, reviewed, evaluated and agreed-to by the Co-Managers prior to implementation.

**Principle 6:** Co-Managers shall work to secure adequate financial resources to meet current and future challenges to the successful use of salmonid hatcheries in accomplishing the purpose of this Policy. This includes planning for the negative effects of climate change on salmonid survival and the resources needed to support them. These efforts shall include:

- Ensuring that adequate funding is acquired to successfully implement plans that use both state and federal appropriation processes as appropriate, as well as private funding associated with mitigation hatcheries.
- Initiating and maintaining coordinated efforts among the Tribes and WDFW to acquire the necessary funds to establish, maintain, and monitor the desired hatchery programs and infrastructure that is built to meet future demands. Efforts will include a timeline for implementation (including evaluation and monitoring), strategies for state, tribal, and federal funding and estimated implementation costs, including updates to cost figures each biennium or fiscal year.
- Ensuring that once Co-Managers agree to watershed or regional hatchery program plans that are consistent with the requirements under *United States v. State of Wash.* (e.g., the Puget Sound Salmon Management Plan), *United States v. State of Or.*, *Hoh Indian Tribe v. Baldrige*, and other legally-binding Co-Manager agreements, the Co-Managers will prioritize and pursue financial support from the legislature and any available federal funding sources.
- Working with the Governor's Office to inform the Legislature on the legal requirements for hatchery production levels and agreements where hatchery funding will be prioritized.
- Developing contingency agreements consistent with requirements under *United States v. State of Wash.*, *United States v. State of Or.*, *Hoh Indian Tribe v. Baldrige* or other applicable agreements for facility operations in the event of reduced funding or other operational impediments, as appropriate.
- Securing sufficient dedicated funding for watershed monitoring requirements and other compliance mandates.
- Securing adequate funding to assess, plan, and implement needed changes to hatchery infrastructure and operations to mitigate for changing environmental conditions.
- Securing adequate funding for fish culture practices to ensure a high level of standard.

### **Dispute Resolution**

The Parties commit to working in good faith to seek consensus agreements. In the event that bona fide disputes arise from this Policy, the disputing Parties will first strive to resolve matters informally through government-to-government discourse at the appropriate level. Any disputant may raise any matter not resolved to a higher official. In the event that the matter is not resolved, the Parties may agree to utilize

neutral third-party mediation. Where other dispute resolution mechanisms are already established, these will be followed.

### **Disclaimers**

Nothing in this Policy is intended to conflict with any applicable federal, state, or tribal law or regulation.

Nothing in this Policy will be construed to grant, expand, create, or diminish any legally enforceable rights, benefits, or responsibilities, substantive or procedural, not otherwise granted or created by existing law. Nothing in this Policy will be construed to alter, amend, repeal, interpret or modify tribal sovereignty, any Treaty Right, or other Rights of any Indian tribe or preempt, modify, or limit the exercise of any such Right.

Nothing in this Policy is intended to waive or diminish the Right of any Party to challenge or appeal another Party's decision or action in accordance with applicable law.

Each Party reserves all Rights, powers, and remedies now or hereafter existing in law, equity, statute, Treaty, or otherwise. A Party's signature to this Policy shall not constitute a waiver of sovereign immunity. This Policy is intended solely to facilitate coordination among the Parties, and nothing herein creates any rights in third parties or gives rise to any right of judicial review.

This Policy commits the Parties to work cooperatively and respectfully toward resolution of issues of mutual interest and concern.

### **Agreement of Co-Managers**

(Insert Signatory Section?)