



Fish and Wildlife Commission Presentation Summary Sheet

Meeting date:

10/27/2023

Agenda item:

Fish Passage and Screen Rule Making – Briefing and Public Hearing

Presenter(s):

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Background summary:

On March 14, 2018, Governor Jay Inslee signed Executive Order 18-02, creating the Southern Resident Orca Task Force, in order to identify needed policies and programs, recommend priority actions, highlight budget needs, and suggest legislation to support orca recovery. In November 2018, the Southern Resident Orca Task Force published their report identifying lack of prey as a key threat to Southern Resident Orcas. Contributing to this threat are development activities and fish passage barriers like impassable dams, tide gates, and culverts that have reduced habitat available for salmon and forage fish. Recommendation Three of the report endorsed agencies to apply and enforce laws that protect habitat. Specifically, the task force noted that the governor should direct WDFW to develop rules to fully implement RCW 77.57. The 2019-2021 Operating Budget (ESHB 1109) provided funding for WDFW to increase the availability of salmon for southern resident orcas and directed WDFW to create screening rules. To ensure this was met, WDFW began developing rules to implement and enforce RCW 77.57, known as the Fishway, Flow, and Screening Statute.

This rule proposal will create a new chapter in WAC (220-670) that defines general passability and protection standards for new and existing fishways and water diversions. The department has incorporated considerations for climate change into the design of new water crossing structures in the new rules. Overall, the rule proposal codifies current WDFW practices of using the agency's fish passage inventory and assessment guidance and Water Crossing Design Guidelines, and employs a technical assistance first approach to achieve compliance.

Rule Proposal:

- WAC 220-670-010: Purpose
 - This establishes the department's authority for fish passage and screening under chapter 77.57 RCW.
- WAC 220-670-020: Instructions for using chapter 220-670 WAC
 - The proposed rules are intended to be used in tandem with WAC 220-660 and will reflect best science, technology, and construction practices.
 - WDFW will provide guidance to help people understand and comply with the proposed rules.
- WAC 220-670-030: Definitions
 - Many of the definitions used within the new WAC chapter maintain parity with WDFW's Hydraulic Code, WAC 220-660.
 - There are three new definitions added: climate adapted water crossings, impingement, and fishways.
- WAC 220-670-040: Applicability of fish passage and screening authority
 - Performance Standards: fishways and water diversions will protect or pass all fish species at all life stages.
 - Projects: new and existing fishways and water diversions on lakes, stream, or rivers.
 - Exemptions: Man-made agricultural drainage facilities installed before May 20, 2003; repair/replacement is also exempt. Diversions installed before June 11, 1947, in system with only game fish.
- WAC 220-670-050: Standards for fishways and water diversions
 - Water crossing structures: general passability standards, inclusion of climate considerations for new projects. Existing projects will not need to consider climate change projections if they are passable and legally installed.
 - Fish passage improvement structures: general passability standards, limited use of structures due to design limitations to pass all fish species at all life stages.
 - Water Diversions: parity with WAC 220-660-250 to ensure consistent design standards are met, even when an HPA will not apply.
- WAC 220-670-060: Compliance with chapter 220-670 standards
 - Compliance may be achieved through voluntary measure and technical assistance. In situations of noncompliance, the department may progressively elevate enforcement actions to achieve compliance. The department will issue a notice to comply before exploring civil or criminal remedies.
- WAC 220-670-070: Informal appeal of notice to comply
 - Encourages a person to try to resolve the notice to comply with WDFW staff.
 - Details the process to informally appeal a notice that was issued in response to violations of the chapter.
- WAC 220-670-080: Formal appeal of notice to comply
 - Encourages a person to try to resolve the notice to comply with WDFW staff. Details the formal appeals process for a notice that was issued in response to violations of the chapter.

Staff recommendation:

Briefing and public comment only.

Policy issue(s) and expected outcome:

The department seeks to address the requirements of ESHB 1109 (2019) and the recommendation of the Southern Resident Orca Task Force through the development of a new chapter under Title 220 of the Washington Administrative Code to fully implement RCW chapter 77.57. The department seeks to codify standards and practices already used by WDFW for fishways and water diversions, improving the design and installation of long-lasting and environmentally safe culverts that supporting fish passage and protection.

The proposed rules will allow WDFW to bring noncompliant water diversions and fishways into compliance for passability and fish life safety. Currently, only new projects under a Hydraulic Project Approval (HPA) permit are subject to WAC 220-660 standards. However, the proposed rules will give WDFW a path forward to correct fish passage and water diversion barriers regardless of whether it is a long-standing barrier or a new project. Barriers that are initially considered fish passable can change over time as stream conditions change. A culvert is typically designed to last between 50-100 years. Incorporating the consideration of climate change in water crossing design will ensure that structures will be able to accommodate changing bankfull widths and future peak flows, preventing future fish passage barriers, as well as the failure of a structure or need for total replacement prematurely. The proposed rules will help maintain parity with the Hydraulic Code and further define best management practices used by the agency for fish passage and screening, even in the face of climate change impacts.

As humans have developed the landscape in Washington, there have been growing networks of infrastructure for transportation and economic needs that extend over and around lakes, streams, and rivers. Current estimates of fish passage barriers are between 18,000 to 20,000 in the state. These barriers include road culverts, dams, dikes, and other obstructions. There are an estimated 40,000 surface water diversions throughout the state. There's clear evidence that inadequately screened water diversions and insufficient fishways can strand or even kill fish. The proposed rules will maintain consistent expectations about a structure's passability and safety requirements for fish life.

The expected outcome is that the proposed rules will align with the statute and legislative direction for WDFW to assist in increasing the availability of prey for southern resident orcas.

Fiscal impacts of agency implementation:

There are primarily one-time costs relating to consultant expenses to update the water crossing design guidelines and communication and training materials for department staff, tribal partners, and stakeholders. Staff time is also necessary to continue conducting outreach and for training regional and

headquarters staff on the new rule chapter. Anticipated future costs of the full rule implementation buildout will include:

1. Three additional compliance inspectors to support implementation of 77.57 RCW and WAC 220-670;
 2. Ongoing maintenance of the agency's Culverts and Climate Change Web Application to ensure accurate data and constant availability of the application; and
 3. One environmental planner to assist with the appeals process.
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Public involvement process used and what you learned:

Since the summer of 2020, department staff have worked directly with many stakeholder groups including treaty tribes, Association of Washington Cities, Washington State Association of Counties, state agencies, nongovernmental agencies, and the general public in developing the new rules. Furthermore, the department adhered to the APA requirements and published the pre-proposal and proposal on the agency's website and filed the rules changes with the Code Reviser.

The Notice of Proposed Rule Making was filed on July 17, 2023, and published in Washington State Register 23-15-078 on August 16, 2023. A continuance was filed on September 18, 2023, WSR 23-19-072. The department held a live webinar and discussion for tribal partners on June 15, 2023, and an informational webinar for the public on September 13, 2023. The informational webinar was recorded and posted on the project website and the agency YouTube channel. A complete list of outreach activities can be found in section 6 of the draft Regulatory Analysis document.

The public comment period runs through October 30, 2023, and we are assessing comments as they come in. At the time of this summary sheet, we have received 20 responses. Twelve of those emails were solicitations unrelated to this rule proposal. And additional 3 emails were brief statements that the agency resources would be better spent increasing hatchery production. Based on initial review of the remaining comments, a few themes have emerged. A few comments express concern about whether climate considerations will increase costs of fish passage structures. A few comments express general support for the rule and make suggestions for the climate consideration language in the rule to be more specific and stronger in order to avoid confusion about what is required.

Action requested and/or proposed next steps:

This meeting includes a public hearing, providing the Commission an opportunity to hear perspectives on the rule change proposal.

Draft motion language:

Briefing and public comment only.

Post decision communications plan:

Briefing and public hearing only.
