



Washington’s Hydraulic Project Approval Program Hydraulic Code Implementation Community Advisory Group

In-person meeting: Olympia, Washington
Natural Resource Building Rm 175A
August 4, 10 AM to 3:30 PM
In-person and Virtual - Hybrid Meeting and Field Tour

Attendance

HCICAG Members: In Person; Clay Antieau, John Nelson, Josie Cummings, Lacey Hoffman, Dave Risvold, Laura Gurley. Virtual; Amy Carey, Jenny Rotsten, Steve West

WDFW Staff: Margen Carlson, Matt Curtis, Hannah Faulkner, Kelly Still, Theresa Nation and Tom Sun

Triangle Associates: Joy Juelson (Facilitator), Ariahna Jones (Tech and documentation support)

Contents

Meeting Summary and Presentation Notes	1
HPA Presentations	2
HPA Program Overview - Hannah Faulkner, WDFW Regulatory Services Section Manager	2
Matt Curtis: APPS Overview & Replacement Project Update	3
Kelly Still: HPA Compliance Program Update	4
Green Cove Creek Culvert – Gwen Lentis	6

Meeting Summary and Presentation Notes

The meeting began at 10 AM

The facilitator, Joy Juelson, provided a Welcome and conducted a round of Introductions with the CAG members and WDFW staff. Members shared their name, Entity/affiliation, subject matter expertise and where they are from. Joy provided a brief orientation and agenda overview.

Welcome from Theresa Nation, WDFW Habitat Program & HCICAG Organizer

Theresa welcomed the group and noted that WDFW staff strive to keep the HCICAG work relevant and meaningful.

Welcome from Margen Carlson, WDFW Habitat Program Director

Margen provided a welcome and WDFW agency updates and a recap of the 2023 Legislature. Margen noted that last biennium the legislature passed three bills that effected rulemaking. This last biennium, the legislature gave additional funding to build out the compliance sector so there is a lot of growth and opportunities to add regional staff (that implement day to day regulatory authority). WDFW is also getting ready for additional rulemaking that incorporates climate change

considerations.

HPA Presentations

Slides attached

HPA Program Overview - Hannah Faulkner, WDFW Regulatory Services Section Manager

Hannah presented an overview of the HPA program including the history of hydraulic authority dating back to 1943 with the first Hydraulic Act passing and giving statutory authority for DFW to regulate hydraulic projects for the protection of fish life.

An introduction to terms was given (and expanded upon in the slide presentation) including hydraulic project, bed and ordinary high-water line (OHWL).

Hannah noted that WDFW jurisdiction CAN still apply above the OHWL as some upland work can affect the bed or state waters and therefore require an HPA.

Hannah and Margen noted that HPA protection includes protection of non-native species (although priority is often given to native species).

Examples of some typical types of hydraulic projects were given such as overwater structures, dredging, water crossing structures (bridges & culverts) and bank protection. An HPA might be needed for the construction, maintenance, repair, replacement or removal of any of the above examples.

Hannah reviewed the **application process**, starting with an individual (or agent acting on behalf of the applicant) applying for an HPA. Before applying, DFW always encourages applicants to talk with their local area habitat biologist to get technical assistance on the proposed project. This could be through a more formal pre-application process, asking if an HPA is required, or an informal process simply talking about project and site specifics with the bio. Resources are available online to help applicants prepare a complete application.

APPS is currently used to submit applications, but DFW can still receive applications as hard copies (largely in the form of a JARPA (joint aquatic resources permit application) or a simplified HPA application for certain projects). In addition, one common and non-standard pathway is the request for an Emergency HPA which doesn't happen via a written application, but rather a call into the area habitat bio when an emergency arises, and immediate issuance of verbal approval is needed.

After an application is submitted, The HPA Processing Unit is the first step in the review process. There are 3 people in this unit that review all applications (except for emergencies) for statutory completeness, to ensure that all the required materials as described in our laws and rules are provided. After an application is deemed statutorily complete, it is forwarded along to the area habitat biologist to review, condition, and issue.

DFW has 50 bios stationed throughout the state in addition to their regional management teams. The first step for bios is to assess project impacts (reviewing application materials, site visits), then, the next step is to quantify project impacts... DFW's priority when reviewing and conditioning an activity, is to first avoid the impact, then to minimize or rectify impacts, and finally to require compensatory mitigation for any unavoidable impacts. DFW bios then condition an HPA using technical and custom provisions as mitigation measures, such as design standards, work windows, fish exclusion methods, constructions BMPs, and more. Finally, after the review is done, and conditions are applied to ensure fish protection, the permit is issued!

Habitat Recovery Pilot Program (HRPP) Review. The HRPP is a new permit streamlining program intended to expedite the environmental permitting process for restoration projects that directly benefit fish or their habitat. Projects approved for inclusion in this program are not subject to SEPA and are not required to obtain other local or state permits other than our HPA (except for permits required for participation in a federal program – as our state law cannot assume federal regulation).

Questions

What are the volumes for standard or expedited? Around 2,000 to 2,500 applications per year. There are bumps in numbers depending on the time of year.

How many applications are denied annually?

Matt – we don't issue many denials. More often than not, if something is not appropriate, we will talk with them and offer technical assistance to get them down the permitting path rather than the denial path. The only time we offer denials is when people are unwilling to work with us.

Kelly Still- We also have a statutory timeline. If we can't provision an HPA and they are not willing to modify.

Theresa Nation noted that WDFW definitely receives more emergency and expedited permits during the winter time.

Tribal lands and HPA jurisdiction?

Matt noted that HPA does not apply on tribal land and there is gray area.

Are you normally dealing with the landowner or the contractor? (Dave)

Hannah Faulkner – we normally work with the agent that is the go-between for the landowner. Kelly Still- For site-visits, the landowner is often present.

Laura – My understanding is that WDFW has a priority for on-site mitigation instead of mitigation banks but that is not a priority for the federal government. Shouldn't the state and federal agencies be aligned?

Matt – joining a mitigation bank is challenging for the agency because we have an obligation to match the mitigation to the project and we can't necessarily do that with a mitigation bank. We are constantly looking for ways to align with the federal government better.

Laura – How does the Orca task force come into play? Is there a better entity to get in on marine mammal concerns.

Matt – until we can convince lawmakers that Orcas are fish it is challenging, but we have made the connection to Orcas through our protection of fish. We probably can't take the lead for Orca protection, but we will do what we can indirectly.

[Matt Curtis: APPS Overview & Replacement Project Update](#)

Why replace APPS? APPS is limited and not customized, making it difficult to update. WDFW received funding from the legislature to pursue an update and it is an opportunity to accomplish other objectives – replacing system, opportunity to look at all different users and looking at gaps and streamline of user experience and accessibility.

A feasibility study was conducted for systems replacement. Outreach was conducted to gain feedback. The study identified three systems that could replace APPS. Each of these systems will undergo a demo and implementation trial. DFW is hopeful that one of the

systems will work rather than creating a fully customized system.
Timeline: Goal of choosing a system by early 2024

Minimal Viable Product (MVP) = the minimum/ baseline that the system has to do.

- For example, a search function for reviewers or incorporation of compliance workflow
 - Future proof is the next level up and means things that may not have to be included now, but we need the system to be able to do in the future.
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Kelly Still: HPA Compliance Program Update

Kelly noted the importance of compliance, stating that effective fish protection includes

- Protective hydraulic code rules.
- Appropriately provisioned HPAs.
- A Compliance Program to ensure permit provisions are implemented and non-permitted violations are identified and corrected.

Overview of the history of the HPA Compliance Program.

- **DFW policy and procedures 5212** explains how enforcement and habitat program staff work together to rectify HPA violations with habitat program. Back in 2001, FWOs inspected permitted hydraulic projects to verify the work complied with the provisions of the HPA. HBs put an enforcement priority on the HPA of 1, 2 or 3. One was the highest priority. The goal was to inspect 100% of the P1 and 50% of the P2 projects. P3 projects were inspected on an ad hoc basis.
- This changed in 2014 when the Enforcement and Habitat Programs modified Policy 5212 – **habitat biologists lead on inspecting permitted projects and enforcement officers lead on investigating unpermitted violations.**
- The policy guides how HBs and FWOs work together to ensure compliance with the state hydraulic code and is still the agency policy and procedures we have today.
- In 2018, the southern resident orca task force recognized the need for the department to have better civil enforcement tools in our toolbox. In 2019, the legislature passed **HB 1579** which implemented the recommendations of task force related to increasing chinook abundance (it was also the bill that removed the single family residence bulkhead exemption). This bill included the additional civil enforcement tools we'd been requesting.
- The Fish and Wildlife Commission adopted rules for the associated changes to the law and these rule changes became effective in June 2020.
- In 2021, the Legislature allocated funding for **Compliance Inspector positions.**
- In August 2021, four Compliance Inspectors were hired.
- The Inspectors are Fish and Wildlife Biologist 3s. This is the same classification as the HBs. However, the inspectors have specialized training in civil administrative enforcement investigations.
- Compliance inspectors have been inspecting projects and assisting fish and wildlife officers on unpermitted hydraulic violations since November 2021.

Differences between Civil and Criminal Enforcement.

Legal Standard (No Difference)

Both civil and criminal liability is strict; it arises simply through the existence of the environmental violation. It does not take into consideration what the responsible party knew about the law or regulation they violated.

Burden of Proof (There is a Difference)

To be found civilly liable for violating environmental laws the standard of proof is based upon "the preponderance of the evidence." This means that the evidence presented is convincing and more likely to be true than not true. Effectively, the standard is satisfied if there is a greater than 50 percent chance that the evidence is true.

Criminal guilt must be established "beyond a reasonable doubt." This is a higher or stricter standard than the civil liability standard.

Results (There is also a Difference)

If a civil defendant is found liable, the result can be:

- a monetary penalty (up to \$10,000 per violation) that is paid to the state or
- injunctive relief (actions required to correct the violation and come into compliance), and/or
- compensatory mitigation - additional actions taken to improve the environment.

If a criminal defendant is convicted or pleads guilty, the result can be:

- a monetary fine paid to the county, and / or
- restitution (reimbursing to the government for the cost of the harm caused by the violation), and/or
- Incarceration.

Not exclusive of each other- but different outcomes

Compliance Inspector's role and inspector approach (see slides)

Overall, we must start at the lowest level necessary for compliance.

Prioritizing Compliance Inspections (handout)

- Guidelines for prioritization.
- Voluntary compliance is always the first step.

Variables informing Civil enforcement response

The inspectors apply the same thought process as a habitat biologist (project and mitigation review) when thinking about impacts, existing regulations to determine the approach and corrective action that is taken. In addition to the WAC- inspectors must consider the investigation case – whether they know the answer to the 4 W's (who, what, where, when) – ie. Do they have all the facts to demonstrate proof and can we identify the responsible project proponent.

Civil Administrative Enforcement Actions

All civil enforcement actions are issued with oversight from the compliance division (whether they are formal or informal actions) - important for consistent use of actions, recordkeeping – how they stand up in court. The rules in WAC are the policy that guide the appropriate type of civil administrative response depending on the violation.

Technical assistance- most permitted violations can be resolved with verbal or written

technical assistance, sometimes an unpermitted violation may also result in a warning (HPA requirement letter etc.)

A CR is used to request corrective actions necessary to prevent or repair damage causing minor harm to fish life. (most frequently used, informal action)

A NTC is used when a violation has occurred and a SWO is unnecessary but there is still a need for actions to prevent, repair and/or compensate for damage causing more than minor harm to fish life.

SWO is used when there is an active hydraulic project; a violation occurring; and immediate action is necessary to prevent continuing or to avoid more than minor harm to fish life.

The department can impose a civil penalty if the responsible party fails to complete the actions recommended in a Correction Request (CR); or required in a Notice to Comply (NTC) or Stop Work Order (SWO). The department may also issue a civil penalty without first issuing a CR, NTC or SWO if the responsible party has had a Hydraulic Project Approval (HPA) enforcement action in the past five years; the violation has a probability of causing more than minor harm to fish life; or the party is conducting or has conducted a hydraulic project without first obtaining an HPA.

The department can also issue a Notice of Intent to Disapprove an HPA Application when a civil penalty is overdue or the terms of a NTC or SWO are violated. The disapproval period lasts for up to one year or until the responsible party comes into compliance, whichever is longer.

Permitted Projects Roles – Habitat Bios and Compliance Inspectors working together and utilizing APPS. (See slides for workflow cartoon).

The program is brand new so we are adaptively growing. We are improving our data and analytics ability. We still need to update our policies and procedures (a work in progress). We want to do more outreach, education and partnering (with Tribes, other agencies etc.).

Compliance Examples ([handout](#)) talk through three different cases to give people insight into policy and how we have been using civil enforcement authority.

Questions

Laura Gurley – are all of the sites in a database that the inspectors can easily view?

Kelly Still - Yes, and that information is available to the public.

Action: Theresa will share the link

Laura Gurley – Does it matter who is on the permit.

Kelly Still – it does not matter who is on the permit. Ultimately the landowner is responsible, but some details can be teased out through the investigation process.

- 40' of fill above the culvert
- 160' long culvert

History:

- Thurston County culvert in November 21' the culvert was starting to get crushed so there was a need for an expedited replacement.
- Green Cove Creek runs through the culvert and outlets into the bay. With it being crushed, there was a potential for the road to be washed out.
- There was proposal to slipline but there were negotiations to include the need for additional work to be done (for fish passage) into the future.
- An additional legal agreement needed to be entered into (after the expedited permit) between WDFW and Thurston County that detailed the timeline for additional implementation.
- Scouring was monitored by Thurston County.

Through the mitigation agreement, there was a lot of community outreach. A bridge was settled upon (150' bridge).

This project speaks to how DFW can work with communities to solve these challenges.

Questions

John Nelson – Where is the funding coming from? It seems like realistically; you cannot replace small culverts with large bridges everywhere.

Matt Curtis – Not sure who the primary funder was (there are multiple funding sources out there). Some things that added to prioritizing the project include community support, fisheries protection, expedition of project due to possibility of road failure.

You can tell that the amount of water fluctuation for this culvert is very large (through site observations).

John Nelson: Is the tribe having an influence?

Matt Curtis: It depends on the tribe – I'm not sure about this project.

Theresa Nation: Squaxin Island Tribe takes the most interest in Thurston County.

Next meeting: December (virtual)