



Citizens' Alliance for Property Rights

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FISH AND
WILDLIFE COMMISSION

Washington Department of Fish and Wildlife Commission

September 2, 2014

Commission Office Contact:

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Washington State Department of Fish and Wildlife Commissioners:

Please find attached to this letter PETITION FOR ADOPTION, AMENDMENT, OR REPEAL FOR A STATE ADMINISTRATIVE RULE, and Attachment for PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE RULE.

Proposed Title 220-660 WAC - Fish and Wildlife Commission/WDFW

Submitted by the Citizens Alliance for Property Rights (CAPR)

Having heard and reviewed the August 8, 2014 testimony and comments for the proposed Hydraulic Code Rule Changes, Citizens' Alliance for Property Rights submits this above referenced PETITION to the responsible agency with authority to adopt or administer this rule.

Thank you,

Jeff Wright

President,

Legal Fund

Citizens' Alliance for Property Rights



PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE RULE

Print Form

In accordance with [RCW 34.05.330](#), the Office of Financial Management (OFM) created this form for individuals or groups who wish to petition a state agency or institution of higher education to adopt, amend, or repeal an administrative rule. You may use this form to submit your request. You also may contact agencies using other formats, such as a letter or email.

The agency or institution will give full consideration to your petition and will respond to you within 60 days of receiving your petition. For more information on the rule petition process, see Chapter 82-05 of the Washington Administrative Code (WAC) at <http://apps.leg.wa.gov/wac/default.aspx?cite=82-05>.

CONTACT INFORMATION *(please type or print)*

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COMPLETING AND SENDING PETITION FORM

- Check all of the boxes that apply.
- Provide relevant examples.
- Include suggested language for a rule, if possible.
- Attach additional pages, if needed.
- Send your petition to the agency with authority to adopt or administer the rule. Here is a list of agencies and their rules coordinators: <http://www.leg.wa.gov/CodeReviser/Documents/Rclist.htm>.

INFORMATION ON RULE PETITION

Agency responsible for adopting or administering the rule: Fish and Wildlife Commission/WDFW

1. NEW RULE - I am requesting the agency to adopt a new rule.

The subject (or purpose) of this rule is: _____

The rule is needed because: _____

The new rule would affect the following people or groups: _____

2. AMEND RULE - I am requesting the agency to change an existing rule.

List rule number (WAC), if known: _____

I am requesting the following change: _____

This change is needed because: _____

The effect of this rule change will be: _____

The rule is not clearly or simply stated: _____

3. REPEAL RULE - I am requesting the agency to eliminate an existing rule.

List rule number (WAC), if known: Proposed Title 220-660 WAC

(Check one or more boxes)

It does not do what it was intended to do.

It is no longer needed because: See attached.

It imposes unreasonable costs: See attached.

The agency has no authority to make this rule: _____

It is applied differently to public and private parties: _____

It conflicts with another federal, state, or local law or rule. List conflicting law or rule, if known: See attached

It duplicates another federal, state or local law or rule. List duplicate law or rule, if known: See attached.

Other (please explain): _____

**ATTACHMENT FOR PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE
RULE**

Proposed Title 220-660 WAC - Fish and Wildlife Commission/WDFW

Submitted by the Citizens Alliance for Property Rights (CAPR)

This attachment to the attached petition provides detailed reasons why the proposed Title 220-660 WAC should not be allowed to be adopted by the Fish and Wildlife Commission for many reasons. In fact, the legislature should look closely at Chapter 77.55 RCW, because this section of the code predates newer federal, state, and municipal codes that supersede this section of the state code and making the proposed Title 220-660 WAC redundant, Burdensome, and costly to the states citizens. Additionally, the SEPA and supporting documents are flawed and to not properly reflect the impacts, provide the science required by RCW 34.05.271, and do not use the appropriate methods to determine the fiscal impacts of the proposed rule.

IT DOES NOT DO WHAT IT WAS INTENDED TO DO:

The purpose of RCW 77 is to protect fish and wildlife and to insure that the commission “*maximize fishing, hunting, and outdoor recreational opportunities compatible with healthy and diverse fish and wildlife populations*”. Some salmonids were first place on the endangered species list in 1998 (except the Snake River for Chinook salmon in 1992). RCW 77 was revised on November 7, 1995, before most of the species of fish (and mammals, such as orcas) were listed on the endangered species list by the NOAA National Marine Fisheries Service (NMFS) and the United States Fish and Wildlife Service (USFWS).

This revision was also made before the Water Quality Act of 1987 (33 U.S.C. § 1251 et seq.), Section 402 began requiring Municipal Stormwater NPDES Permits (this first of which was issued in 1996) and began requiring General Construction Stormwater NPDES permits (and industrial Stormwater NPDES permits). The Water Quality Act amended the Clean Water Act of 1977, which amended the Federal Water Pollution Control Act Amendments of 1972, which resulted in the Washington State Legislature revising the State Water Pollution Control “Act”, RCW 90.48, promulgated in 1945. This included the protection of all fish and wildlife (see below) and is redundant with Title 77 RCW (and supersedes Title 77).

RCW 77.04.013 - Findings and intent.

The legislature supports the recommendations of the state fish and wildlife commission with regard to the commission's responsibilities in the merged department of fish and wildlife. It is the intent of the legislature that, beginning July 1, 1996, the commission assume regulatory authority for food fish and shellfish in addition to its existing authority for game fish and wildlife. It is also the intent of the legislature to provide to the commission the authority to review and approve department agreements, to review and approve the department's budget proposals, to adopt rules for the department, and to select commission staff and the director of the department.

The legislature finds that all fish, shellfish, and wildlife species should be managed under a single comprehensive set of goals, policies, and objectives, and that the decision-making authority should rest with the fish and wildlife commission. The commission acts in an open and deliberative process that encourages public involvement and increases public confidence in department decision making.

Referendum Bill No. 45, approved November 7, 1995

RCW 90.48 made the Department of Ecology (Ecology) the exclusive regulatory agency for this title (see below), that provides regulatory authority over any pollution of all of the Waters of the State, this includes “cellular dirt” that would be associated with ANY in water or near water projects.

RCW 90.48.010

Policy enunciated

It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state. The state of Washington in recognition of the federal government's interest in the quality of the navigable waters of the United States, of which certain portions thereof are within the jurisdictional limits of this state, proclaims a public policy of working cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation, while at the same time preserving and vigorously exercising state powers to insure that present and future standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington.

[1973 c 155 § 1; 1945 c 216 § 1; Rem. Supp. 1945 § 10964a.]

RCW 90.48.030

Jurisdiction of department.

The department shall have the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington.

[1987 c 109 § 123; 1945 c 216 § 10; Rem. Supp. 1945 § 10964j. FORMER PART OF SECTION: 1945 c 216 § 11; Rem. Supp. 1945 § 10964k, now codified as RCW 90.48.035.]

RCW 90.48 is not limited to regulating discharges to the waters of the State that have NPDES permits (nor is the Clean Water Act limited to discharges that have NPDES permits), in fact it is illegal to discharge pollutants to State waters (or waters of the United States) without a permit.

RCW 90.48.080

Discharge of polluting matter in waters prohibited.

It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter.

[1987 c 109 § 126; 1967 c 13 § 8; 1945 c 216 § 14; Rem. Supp. 1945 § 10964n.]

As is the case with most state codes, Title 77 RCW includes a severability clause, which would be in effect when this code conflicts, overlaps, or otherwise is affected by other codes, including federal, state and municipal codes that were passed before or after the provisions of Title 77 were enacted. When it comes to regulations related to discharges to waters of the State (or United States), Title 77 conflicts with RCW 90.48 and 33 U.S.C. § 1251 et seq. and is redundant, most likely because the legislature underestimated the extent that these codes address anything done in waters of the State or United States. Additionally, Section 10 of the Rivers and Harbors Appropriation Act of 1899 regulates any construction in waters of the United States (33 USC 401, et seq.):

33 U.S.C. 403. Construction of bridges, causeways, dams or dikes generally;

That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

Section 10 (33 USC 403) of the Rivers and Harbors Act covers construction, excavation, or deposition of materials in, over, or under such waters, or any work which would affect the course, location, condition, or capacity of those waters. Activities requiring Section 10 permits include structures (e.g., piers, wharfs, breakwaters, bulkheads, jetties, weirs, transmission lines) and work such as dredging or disposal of dredged material, or excavation, filling, or other modifications to the navigable waters of the United States.

The geographic jurisdiction of the Rivers and Harbors Act includes all navigable waters of the United States which are defined (33 CFR Part 329) as, "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce." This jurisdiction extends seaward to include all ocean waters within a zone three nautical miles from the coastline (the

"territorial seas"). Limited authorities extend across the outer continental shelf for artificial islands, installations, and other devices (see 43 USC 333 (e)). This code is enforced through the Commerce Clause of the United States Constitution.

This federal code combined with the Water Quality Act of 1987 (33 U.S.C. § 1251 et seq.) and the Endangered Species Act of 1973 (ESA; 7 U.S.C. § 136, 16 U.S.C. § 1531 et seq) generally cover any projects conducted in or near the waters of the United States (anything that could impact water quality, endangered species, or navigation). This combined with the USEPA (and Corps) proposed rule changes to 40 CFR 230.3 and 33 CFR 328 would make virtually all surface waters in Washington State jurisdictional under the Clean Water Act and the other federal codes listed above (<http://www2.epa.gov/uswaters/definition-waters-united-states-under-clean-water-act>).

RCW 77 is superseded by the federal codes for any surface water feature that is jurisdictional (waters of the United States). The jurisdictional determinations can only be made by the federal agencies that oversee the program, which in most cases are the USEPA, the Corps of Engineers, the NMFS, and the USFWS. However, the Department of Ecology does oversee three provisions of the Clean Water Act, Section 401, Section 402, and Section 303(d).

The WDFW is not authorized to administer any provision of the federal codes related to the Clean Water Act, the ESA, or the Rivers and Harbors Act. Any sections of RCW 77 or the Proposed Title 220-660 WAC, would be invalid if it conflicts with or duplicates the federal or other state codes. This includes the provisions in other state codes such as the Growth Management Act - GMA (36.70A RCW) and the Shoreline Management Act – SMA (90.58 RCW). It also includes the municipal codes that were promulgated as a requirement of these two state codes (GMA critical areas and SMA critical areas in the Shoreline Master Program).

RCW 77.04.010

Severability -- 1983 c 270: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 270 § 5.]

RCW 90.48.260

Federal clean water act — Department designated as state agency, authority — Delegation of authority — Powers, duties, and functions.

(1) The department of ecology is hereby designated as the state water pollution control agency for all purposes of the federal clean water act as it exists on February 4, 1987, and is hereby authorized to participate fully in the programs of the act as well as to take all action necessary to secure to the state the benefits and to meet the requirements of that act. With regard to the national estuary program established by section 320 of that act, the department shall exercise its responsibility jointly with the Puget Sound partnership, created in RCW 90.71.210. The department of ecology may delegate its authority under this chapter, including its national pollutant discharge elimination permit system authority and duties regarding animal feeding operations and concentrated animal feeding operations, to the department of agriculture through a memorandum of understanding. Until any such delegation receives federal approval, the department of agriculture's adoption or issuance of animal feeding operation and concentrated animal

feeding operation rules, permits, programs, and directives pertaining to water quality shall be accomplished after reaching agreement with the director of the department of ecology. Adoption or issuance and implementation shall be accomplished so that compliance with such animal feeding operation and concentrated animal feeding operation rules, permits, programs, and directives will achieve compliance with all federal and state water pollution control laws. The powers granted herein include, among others, and notwithstanding any other provisions of this chapter or otherwise, the following:

(a) Complete authority to establish and administer a comprehensive state point source waste discharge or pollution discharge elimination permit program which will enable the department to qualify for full participation in any national waste discharge or pollution discharge elimination permit system and will allow the department to be the sole agency issuing permits required by such national system operating in the state of Washington subject to the provisions of RCW 90.48.262(2). Program elements authorized herein may include, but are not limited to: (i) Effluent treatment and limitation requirements together with timing requirements related thereto; (ii) applicable receiving water quality standards requirements; (iii) requirements of standards of performance for new sources; (iv) pretreatment requirements; (v) termination and modification of permits for cause; (vi) requirements for public notices and opportunities for public hearings; (vii) appropriate relationships with the secretary of the army in the administration of his or her responsibilities which relate to anchorage and navigation, with the administrator of the environmental protection agency in the performance of his or her duties, and with other governmental officials under the federal clean water act; (viii) requirements for inspection, monitoring, entry, and reporting; (ix) enforcement of the program through penalties, emergency powers, and criminal sanctions; (x) a continuing planning process; and (xi) user charges.

(b) The power to establish and administer state programs in a manner which will ensure the procurement of moneys, whether in the form of grants, loans, or otherwise; to assist in the construction, operation, and maintenance of various water pollution control facilities and works; and the administering of various state water pollution control management, regulatory, and enforcement programs.

(c) The power to develop and implement appropriate programs pertaining to continuing planning processes, area-wide waste treatment management plans, and basin planning.

(2) The governor shall have authority to perform those actions required of him or her by the federal clean water act.

(3) By July 31, 2012, the department shall:

(a) Reissue without modification and for a term of one year any national pollutant discharge elimination system municipal storm water general permit applicable to western Washington municipalities first issued on January 17, 2007; and

(b) Issue an updated national pollutant discharge elimination system municipal storm water general permit applicable to western Washington municipalities for any permit first issued on January 17, 2007. An updated permit issued under this subsection shall become effective beginning August 1, 2013.

(i) Provisions of the updated permit issued under (b) of this subsection relating to new requirements for low-impact development and review and revision of local development codes, rules, standards, or other enforceable documents to incorporate low-impact development principles must be implemented simultaneously. These requirements may go into effect no earlier than December 31, 2016, or the time of the scheduled update under RCW 36.70A.130(5), as existing on July 10, 2012, whichever is later.

(ii) Provisions of the updated permit issued under (b) of this subsection related to increased catch basin inspection and illicit discharge detection frequencies and application of new storm water controls to projects smaller than one acre may go into effect no earlier than December 31, 2016, or the time of the scheduled update under RCW 36.70A.130(5), as existing on July 10, 2012, whichever is later.

(4) By July 31, 2012, the department shall:

(a) Reissue without modification and for a term of two years any national pollutant discharge elimination system municipal storm water general permit applicable to eastern Washington municipalities first issued on January 17, 2007; and

(b) Issue an updated national pollutant discharge elimination system municipal storm water general permit for any permit first issued on January 17, 2007, applicable to eastern Washington municipalities. An updated permit issued under this subsection becomes effective August 1, 2014.

[2012 1st sp.s. c 1 § 313; 2011 c 353 § 12; 2007 c 341 § 55; 2003 c 325 § 7; 1988 c 220 § 1; 1983 c 270 § 1; 1979 ex.s. c 267 § 1; 1973 c 155 § 4; 1967 c 13 § 24.]

Notes:

Finding -- Intent -- Limitation -- Jurisdiction/authority of Indian tribe under act -- 2012 1st sp.s. c 1: See notes following RCW 77.55.011.

Authority of department of fish and wildlife under act -- 2012 1st sp.s. c 1: See note following RCW 76.09.040.

Intent -- 2011 c 353: See note following RCW 36.70A.130.

Severability -- Effective date -- 2007 c 341: See RCW 90.71.906 and 90.71.907.

Intent -- Finding -- 2003 c 325: See note following RCW 90.64.030.

Severability -- 1983 c 270: "If any provision of this act or its application to any

person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 270 § 5.]

The GMA and SMA critical areas include fish and wildlife habitat conservation areas and wetlands. Any project that requires a permit by any municipality must demonstrate that proposed project will not impact either of these critical areas. The SMA (and WAC 173) specifically regulates shorelines of the state, which is all streams with mean annual flow of 20 cubic feet per second, all marine shorelines, and all lakes (20 acres or larger). The GMA critical areas cover all streams smaller than 20 cubic feet per second and all ponds (smaller than 20 acres).

Between these two codes, all projects that will be conducted on, in, or near surface water features that are natural streams (rivers are big streams), ponds, lakes, and marine shoreline areas and all wetlands. The critical areas requirements of these codes are implemented by the municipalities (municipal code), however, Ecology also enforces the SMA, including the critical areas ordinances. Additionally, the Corps and USEPA still have primary regulatory authority for jurisdictional waters (waters of the United States).

The federal Clean Water Act and the State (Ecology) water quality codes protect water quality of waters of the United States and State, this includes turbidity (sediments), which would be associated with any disturbances of sediments, including near shore and in water disturbances. In most cases (and in all cases by 2016) any ground disturbance activity would require a general construction Stormwater NPDES permit issued by the Department of Ecology.

This permit requires the use of erosion and sediment controls and monitoring of the discharge point. In water work would require an individual NPDES permit issued by Ecology, must meet the requirements of the SMA, SMP, and several other permits issued (or waived) by federal agencies (including the Coast Guard, 33 CFR 26, 67, 80, 110, 157, 160, 161, 162, 164, 165 and 334). Even if permits are issued, pollution of waters of the United States or State is still illegal if water quality standards are exceeded, including standards established by Section 303(d), also known as impaired waters. All of the codes discussed above can include mitigation requirements and the SMA can require restoration if the activities are conducted within 200 feet of the ordinary high water mark or in some cases anywhere in the 1% floodplain (this is more restrictive than the proposed Title 220-660 WAC).

It should be noted that the SMA did not include critical areas until 2010 when the legislature revised this code and that the critical areas include channel migration hazards, geologic hazards, and ecological critical areas that include fish and wildlife habitat conservation areas, which as previously discussed, includes all shorelines of the state. The GMA critical areas regulate all other fish and wildlife habitat conservation areas (neither of these codes affect forest lands regulated by the Forest Practice Act unless these lands are withdrawn from this program, this is similar to the exemptions under RCW 77). The revision process for Title 220 WAC began in 2006, before the SMA was revised by the legislature.

However, the SEPA document dated July 16, 2014 does discuss the major regulatory overlap with numerous state and federal codes, but includes some incorrect assumptions, such as the assumption that the Clean Water Act and the State Water Pollution Control Act only regulate permitted point source outfalls, when in reality any discharge of pollutants to waters of the State or United States is actually illegal without a permit if the discharge exceeds water quality standards (especially Section 303(d) standards). Additionally, Chapter 173 WAC actually regulates nonpoint source flows (the federal Clean Water Act only regulates point source flows at this time).

Municipal Codes include GMA critical areas and SMA critical areas (in the SMP). These codes provide details regarding any critical area and create buffers or setbacks from any stream, lake, pond, river, and marine shoreline. These buffers can extend up to 300 feet landward of the ordinary high water mark or the 1% floodplain, they also cover any in water work and regulate docks, piers, and any other in water or over the water structures. They do

include mitigation requirements and the SMA can require habitat restoration if any activities are conducted in water (this can be prohibited in some shorelines) and in the shoreland (and area located 200 feet landward of the OHWM). These codes provide provisions for piles, pile driving, utilities, and cover virtually everything that the proposed Title 220-660 WAC requires for these types of projects. It is unclear why the proposed 220-660 WAC is necessary considering there are numerous state, federal, and municipal codes that cover the same requirements and several of these codes supersede Title 77 RCW.

Additionally, RCW 77 has not been revised since the legislature changed the SMA in 2010 or since other codes have changed (including federal codes). This leads to redundant codes and WACs that are no longer necessary. The NMFS and the USFWS are the only agencies authorized to administer the ESA and they provide specifications for in water and near water work to protect these species. The USEPA is the exclusive lead for the Clean Water Act, with the Corps of Engineers being authorized to administer Section 404 and Ecology being authorized to administer Section 401, 402, and 303(d). There are no known authorizations for the WDFW to administer any provisions of the Clean Water Act or any other federal codes.

The primary goal of RCW 77 is to protect fish and wildlife and to insure that these species are sufficiently abundant for hunting and fishing as stated below.

RCW 77.04.055
Commission — Duties.

- (1) In establishing policies to preserve, protect, and perpetuate wildlife, fish, and wildlife and fish habitat, the commission shall meet annually with the governor to:*
- (a) Review and prescribe basic goals and objectives related to those policies; and*
 - (b) Review the performance of the department in implementing fish and wildlife policies.*
- The commission shall maximize fishing, hunting, and outdoor recreational opportunities compatible with healthy and diverse fish and wildlife populations.*
- (2) The commission shall establish hunting, trapping, and fishing seasons and prescribe the time, place, manner, and methods that may be used to harvest or enjoy game fish and wildlife.*
 - (3) The commission shall establish provisions regulating food fish and shellfish as provided in RCW [77.12.047](#).*
 - (4) The commission shall have final approval authority for tribal, interstate, international, and any other department agreements relating to fish and wildlife.*
 - (5) The commission shall adopt rules to implement the state's fish and wildlife laws.*
 - (6) The commission shall have final approval authority for the department's budget*

proposals.

(7) The commission shall select its own staff and shall appoint the director of the department. The director and commission staff shall serve at the pleasure of the commission.

[2000 c 107 § 204; 1995 1st sp.s. c 2 § 4 (Referendum Bill No. 45, approved November 7, 1995); 1993 sp.s. c 2 § 62; 1990 c 84 § 2; 1987 c 506 § 7.]

RCW 77.55.21 pertains to the hydraulic project approval (HPA) permit that is issued by the WDFW, however, this code has not been revised by the legislature to address other state code changes (including WAC changes) or changes in federal codes and presumes that point source discharges are only regulated if they are permitted, when in reality, as previously discussed, ANY discharge to the waters of the United States or State that discharges pollutants (above water quality standards, including Section 303(d) standards) is illegal and all point source discharges are regulated by the Federal Clean Water Act (including turbidity – sediments).

Section 502 of the Clean Water Act includes the general definitions, the following are from this section:

"(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." The Clean Water Act is not limited to those who possess an NPDES permit.

"(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources."

"(7) The term "navigable waters" means the waters of the United States, including the territorial seas." Waters of the United States are defined in 33 CFR 328 and in 40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401. As previously discussed, the USEPA is in the process of changing these definitions (Federal Register / Vol. 79, No. 76 / Monday, April 21, 2014 / Proposed Rules, page 22188), possibly by January 1, 2015. If these proposed changes are adopted, there will be almost no non jurisdictional waters in the state of Washington, which would eliminate most waters of the state, and would place virtually all surface water features under direct federal regulatory authority. This could also affect the ESA regulatory enforcement and the Rivers and Harbors Act (33 USC 401, et seq.) enforcement. It would also meant that virtually all wetlands would be regulated under the federal codes (Clean Water Act).

"(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." This establishes how far the Clean Water Act's jurisdiction extends from the marine shorelines.

"(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone." This pertains to the jurisdiction near international boundaries such as the boundary with Canada.

“(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.”

“(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.”

This establishes the maximum concentration levels (MCLs) of pollutants that can be discharged from a point source. NPDES permits do not use these levels for monitoring; they use benchmark levels which are lower than the MCLs.

“(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.” This includes any pollutants added from any source. This includes pollution from projects conducted in or near waters of the United States.

“(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.”

This protects ALL organisms, including aquatic organisms. This also prevents the use of creosote and pressure treated pilings.

“(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” Point sources can be manmade or natural drainage features (many ephemeral streams are regulated as point sources because their source water is storm water from private and municipal sources). Agriculture drainage ditches and irrigation return flows are exempt under the Clean Water Act, but not under the State codes (Ecology).

“(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.” This indicates that one of the purposes of the Clean Water Act is to protect fish life and other aquatic organisms. There are separate water quality standards established for aquatic life in fresh water and saltwater.

“(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.” This is not limited to a point source.

“(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water”. This includes temperature changes and is not limited to a point source.

It should be noted that any discharge of a point source is regulated by the Clean Water Act and the State of Washington Water Pollution Control Act and that the provisions in all General Municipal Stormwater NPDES permits (Phase I and II) is that all new storm water facilities must meet specific standards and must adhere to the provisions of the Storm Water Management Manual for Western and Eastern Washington, Ecology, 2012 (which is currently being revised) or an equivalent manual approved by Ecology. These discharges are regulated as if they have an NPDES permit however, they are not protected by a permit if they discharge pollutants above applicable water quality standards (which means that without a permit, the discharger can be fined \$10,000 per day per violation under state code and \$37,500 per day per violation under federal code – Clean Water Act). It should be noted that the NMFS

also regulates virtually all streams, lakes, ponds, and marine shorelines in Washington State (in some cases the USFWS will regulate ponds and lakes and streams that do not have migratory fish (such as salmonids). This includes protecting habitat functions and specifying design standards for projects <http://www.westcoast.fisheries.noaa.gov/habitat/conservation/index.html>.

RCW 77.55.021
Permit.

- (1) Except as provided in RCW [77.55.031](#), [77.55.051](#), [77.55.041](#), and [77.55.361](#), in the event that any person or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.*
- (2) A complete written application for a permit may be submitted in person or by registered mail and must contain the following:*
- (a) General plans for the overall project;*
 - (b) Complete plans and specifications of the proposed construction or work within the mean higher high water line in saltwater or within the ordinary high water line in freshwater;*
 - (c) Complete plans and specifications for the proper protection of fish life;*
 - (d) Notice of compliance with any applicable requirements of the state environmental policy act, unless otherwise provided for in this chapter; and*
 - (e) Payment of all applicable application fees charged by the department under RCW [77.55.321](#).*
- (3) The department may establish direct billing accounts or other funds transfer methods with permit applicants to satisfy the fee payment requirements of RCW [77.55.321](#).*
- (4) The department may accept complete, written applications as provided in this section for multiple site permits and may issue these permits. For multiple site permits, each specific location must be identified.*
- (5) With the exception of emergency permits as provided in subsection (12) of this section, applications for permits must be submitted to the department's headquarters office in Olympia. Requests for emergency permits as provided in subsection (12) of this section may be made to the permitting biologist assigned to the location in which the emergency occurs, to the department's regional office in which the emergency occurs,*

or to the department's headquarters office.

(6) Except as provided for emergency permits in subsection (12) of this section, the department may not proceed with permit review until all fees are paid in full as required in RCW 77.55.321.

(7)(a) Protection of fish life is the only ground upon which approval of a permit may be denied or conditioned. Approval of a permit may not be unreasonably withheld or unreasonably conditioned.

(b) Except as provided in this subsection and subsections (12) through (14) and (16) of this section, the department has forty-five calendar days upon receipt of a complete application to grant or deny approval of a permit. The forty-five day requirement is suspended if:

(i) After ten working days of receipt of the application, the applicant remains unavailable or unable to arrange for a timely field evaluation of the proposed project;

(ii) The site is physically inaccessible for inspection;

(iii) The applicant requests a delay; or

(iv) The department is issuing a permit for a storm water discharge and is complying with the requirements of RCW 77.55.161(3)(b).

(c) Immediately upon determination that the forty-five day period is suspended under (b) of this subsection, the department shall notify the applicant in writing of the reasons for the delay.

(d) The period of forty-five calendar days may be extended if the permit is part of a multiagency permit streamlining effort and all participating permitting agencies and the permit applicant agree to an extended timeline longer than forty-five calendar days.

(8) If the department denies approval of a permit, the department shall provide the applicant a written statement of the specific reasons why and how the proposed project would adversely affect fish life.

(a) Except as provided in (b) of this subsection, issuance, denial, conditioning, or modification of a permit shall be appealable to the board within thirty days from the date of receipt of the decision as provided in RCW 43.21B.230.

(b) Issuance, denial, conditioning, or modification of a permit may be informally appealed to the department within thirty days from the date of receipt of the decision. Requests for informal appeals must be filed in the form and manner prescribed by the department by rule. A permit decision that has been informally appealed to the department is appealable to the board within thirty days from the date of receipt of the

department's decision on the informal appeal.

(9)(a) The permittee must demonstrate substantial progress on construction of that portion of the project relating to the permit within two years of the date of issuance.

(b) Approval of a permit is valid for up to five years from the date of issuance, except as provided in (c) of this subsection and in RCW 77.55.151.

(c) A permit remains in effect without need for periodic renewal for hydraulic projects that divert water for agricultural irrigation or stock watering purposes and that involve seasonal construction or other work. A permit for stream bank stabilization projects to protect farm and agricultural land as defined in RCW 84.34.020 remains in effect without need for periodic renewal if the problem causing the need for the stream bank stabilization occurs on an annual or more frequent basis. The permittee must notify the appropriate agency before commencing the construction or other work within the area covered by the permit.

(10) The department may, after consultation with the permittee, modify a permit due to changed conditions. A modification under this subsection is not subject to the fees provided under RCW 77.55.321. The modification is appealable as provided in subsection (8) of this section. For a hydraulic project that diverts water for agricultural irrigation or stock watering purposes, when the hydraulic project or other work is associated with stream bank stabilization to protect farm and agricultural land as defined in RCW 84.34.020, the burden is on the department to show that changed conditions warrant the modification in order to protect fish life.

(11) A permittee may request modification of a permit due to changed conditions. The request must be processed within forty-five calendar days of receipt of the written request and payment of applicable fees under RCW 77.55.321. A decision by the department is appealable as provided in subsection (8) of this section. For a hydraulic project that diverts water for agricultural irrigation or stock watering purposes, when the hydraulic project or other work is associated with stream bank stabilization to protect farm and agricultural land as defined in RCW 84.34.020, the burden is on the permittee to show that changed conditions warrant the requested modification and that such a modification will not impair fish life.

(12)(a) The department, the county legislative authority, or the governor may declare and continue an emergency. If the county legislative authority declares an emergency under this subsection, it shall immediately notify the department. A declared state of emergency by the governor under RCW 43.06.010 shall constitute a declaration under this subsection.

(b) The department, through its authorized representatives, shall issue immediately, upon request, verbal approval for a stream crossing, or work to remove any obstructions, repair existing structures, restore stream banks, protect fish life, or protect property threatened by the stream or a change in the streamflow without the necessity

of obtaining a written permit prior to commencing work. Conditions of the emergency verbal permit must be reduced to writing within thirty days and complied with as provided for in this chapter.

(c) The department may not require the provisions of the state environmental policy act, chapter 43.21C RCW, to be met as a condition of issuing a permit under this subsection.

(d) The department may not charge a person requesting an emergency permit any of the fees authorized by RCW 77.55.321 until after the emergency permit is issued and reduced to writing.

(13) All state and local agencies with authority under this chapter to issue permits or other authorizations in connection with emergency water withdrawals and facilities authorized under RCW 43.83B.410 shall expedite the processing of such permits or authorizations in keeping with the emergency nature of such requests and shall provide a decision to the applicant within fifteen calendar days of the date of application.

(14) The department or the county legislative authority may determine an imminent danger exists. The county legislative authority shall notify the department, in writing, if it determines that an imminent danger exists. In cases of imminent danger, the department shall issue an expedited written permit, upon request, for work to remove any obstructions, repair existing structures, restore banks, protect fish resources, or protect property. Expedited permit requests require a complete written application as provided in subsection (2) of this section and must be issued within fifteen calendar days of the receipt of a complete written application. Approval of an expedited permit is valid for up to sixty days from the date of issuance. The department may not require the provisions of the state environmental policy act, chapter 43.21C RCW, to be met as a condition of issuing a permit under this subsection.

(15)(a) For any property, except for property located on a marine shoreline, that has experienced at least two consecutive years of flooding or erosion that has damaged or has threatened to damage a major structure, water supply system, septic system, or access to any road or highway, the county legislative authority may determine that a chronic danger exists. The county legislative authority shall notify the department, in writing, when it determines that a chronic danger exists. In cases of chronic danger, the department shall issue a permit, upon request, for work necessary to abate the chronic danger by removing any obstructions, repairing existing structures, restoring banks, restoring road or highway access, protecting fish resources, or protecting property. Permit requests must be made and processed in accordance with subsections (2) and (7) of this section.

(b) Any projects proposed to address a chronic danger identified under (a) of this subsection that satisfies the project description identified in RCW 77.55.181(1)(a)(ii) are not subject to the provisions of the state environmental policy act, chapter 43.21C RCW. However, the project is subject to the review process established in RCW 77.55.181(3)

as if it were a fish habitat improvement project.

(16) The department may issue an expedited written permit in those instances where normal permit processing would result in significant hardship for the applicant or unacceptable damage to the environment. Expedited permit requests require a complete written application as provided in subsection (2) of this section and must be issued within fifteen calendar days of the receipt of a complete written application. Approval of an expedited permit is valid for up to sixty days from the date of issuance. The department may not require the provisions of the state environmental policy act, chapter 43.21C RCW, to be met as a condition of issuing a permit under this subsection.

[2012 1st sp.s. c 1 § 102; 2010 c 210 § 27; 2008 c 272 § 1; 2005 c 146 § 201.]

Notes: **Finding -- Intent -- Limitation -- Jurisdiction/authority of Indian tribe under act -- 2012 1st sp.s. c 1:** See notes following RCW [77.55.011](#).

Authority of department of fish and wildlife under act -- 2012 1st sp.s. c 1: See note following RCW [76.09.040](#).¹

Intent -- Effective dates -- Application -- Pending cases and rules -- 2010 c 210: See notes following RCW [43.21B.001](#).²

Part headings not law -- 2005 c 146: See note following RCW [77.55.011](#)

As previously discussed there have been no substantive changes to RCW 77.55.021 since the code was originally promulgated. There have been many changes to other state and federal codes since this code was promulgated and this should be reflected in this code (especially the addition to critical areas to the SMA). Since this section has not been revised to address conflicts and overlaps with other state, federal, and municipal codes, the proposed Title 220-660 WAC becomes redundant and burdensome, often superseded by the other codes.

The WDFW Hydraulic Code Rules -Cost/Benefit Analysis & Small Business Economic Impact Statement, dated February 5, 2014 acknowledges this which is why the projected costs associated with the WAC 220 revisions are projected to be relatively low (when they actually are not). The Cost/Benefit Analysis allocates 95% of the costs to other federal, state, and municipal regulatory programs that the proposed Title 220-660 WAC overlaps with or is superseded by.

Title 220-660 WAC proposes to restrict the use of rockwalls and limit the materials that would be used in bulkheads even though there is no long term studies that demonstrate that any soft armoring will match the durability and

¹ RCW 76.09.040 – Forest Practices - **Authority of department of fish and wildlife under act -- 2012 1st sp.s. c 1:** "Nothing in this act authorizes the department of fish and wildlife to assume authority over approval, disapproval, conditioning, or enforcement of applications or notifications submitted under chapter [76.09](#) RCW." [2012 1st sp.s. c 1 § 217.]

² RCW 43.21B.001 – Definitions - Notes: **Intent -- 2010 c 210:** "It is the intent of the legislature to reduce and consolidate the number of state boards that conduct administrative review of environmental and land use decisions and to make more uniform the timelines for filing appeals with such boards. The legislature intends to eliminate the hydraulics appeals board and the forest practices appeals board by transferring their duties to the pollution control hearings board. The legislature further intends to eliminate certain preliminary informal appeals heard internally by agencies. The legislature also intends to consolidate administratively and physically collocate the growth management hearings boards into the environmental and land use hearings office by July 1, 2011." [2010 c 210 § 1.]

duration that rock or other hard armoring offers. Additionally, there is no “current” science provided by the WDFW to demonstrate that hard armoring presents any harmful effects to fish and the WDFW ignores the requirement that humans and their property are to be protected preferentially over fish. Citizens have constitutional rights, fish do not. When designing erosion controls, levees, bulkheads, and other protective structures, the first concern should be the protection of human life and property.

RCW 77.55.141
Marine beach front protective bulkheads or rockwalls.

- (1) In order to protect the property of marine waterfront shoreline owners it is necessary to facilitate issuance of permits for bulkheads or rockwalls under certain conditions.*
- (2) The department shall issue a permit with or without conditions within forty-five days of receipt of a complete and accurate application which authorizes commencement of construction, replacement, or repair of a marine beach front protective bulkhead or rockwall for single-family type residences or property under the following conditions:*
 - (a) The waterward face of a new bulkhead or rockwall shall be located only as far waterward as is necessary to excavate for footings or place base rock for the structure and under no conditions shall be located more than six feet waterward of the ordinary high water line;*
 - (b) Any bulkhead or rockwall to replace or repair an existing bulkhead or rockwall shall be placed along the same alignment as the bulkhead or rockwall it is replacing. However, the replaced or repaired bulkhead or rockwall may be placed waterward of and directly abutting the existing structure only in cases where removal of the existing bulkhead or rockwall would result in environmental degradation or removal problems related to geological, engineering, or safety considerations; and*
 - (c) Construction of a new bulkhead or rockwall, or replacement or repair of an existing bulkhead or rockwall waterward of the existing structure shall not result in the permanent loss of critical food fish or shellfish habitats; and*
 - (d) Timing constraints shall be applied on a case-by-case basis for the protection of critical habitats, including but not limited to migration corridors, rearing and feeding areas, and spawning habitats, for the proper protection of fish life.*
- (3) Any bulkhead or rockwall construction, replacement, or repair not meeting the conditions in this section shall be processed under this chapter in the same manner as any other application.*
- (4) Any person aggrieved by the approval, denial, conditioning, or modification of a permit under this section may appeal the decision as provided in *RCW [77.55.021\(4\)](#).*

[2010 c 210 § 28; 2005 c 146 § 501; 1991 c 279 § 1. Formerly RCW [77.55.200](#), [75.20.160](#).]

Finding -- Intent -- 2002 c 368: "The legislature finds that hydraulic project approvals should ensure that fish life is properly protected, but conditions attached to the approval of these permits must reasonably relate to the potential harm that the projects may produce. The legislature is particularly concerned over the current overlap of agency jurisdiction regarding storm water projects, and believes that there is an immediate need to address this issue to ensure that project applicants are not given conflicting directions over project design. Requiring a major redesign of a project results in major delays, produces exponentially rising costs for both public and private project applicants, and frequently produces only marginal benefits for fish.

The legislature recognizes that the department of ecology is primarily responsible for the approval of storm water projects. The legislature believes that once the department of ecology approves a proposed storm water project, it is inappropriate for the department of fish and wildlife to require a major redesign of that project in order for the applicant to obtain hydraulic project approval. The legislature further believes that it is more appropriate for the department of fish and wildlife to defer the design elements of a storm water project to the department of ecology and focus its own efforts on determining reasonable mitigation or conditions for the project based upon the project's potential harm to fish. It is the intent of the legislature to restore some balance over conditions attached to hydraulic permits, and to minimize overlapping state regulatory authority regarding storm water projects in order to reduce waste in both time and money while still providing ample protection for fish life." [2002 c 368 § 1.]

It is clear that the legislature has concerns regarding the overlapping of jurisdiction which is caused by codes not being updated to address these conflicts. This overlap is not only with the Ecology storm water related codes, it is also with every aspect of the WDFW code (Title 77 and the proposed Title 220-660 WAC) as it relates to other federal, state, and municipal codes.

In reality this code should have been modified by the legislature to reflect all of these overlaps and redundancies and any overlaps and redundancies should have been removed. There is no need for a hydraulic code considering there are several other codes (federal, state, and municipal) that address all of the same issues the hydraulic code does and the NMFS and USFWS already provide design requirements to protect endangered species and these design standards will protect other aquatic life.

In essence, Title 77 has not been updated to keep current with other codes and case law. The proposed Title 220-660 WAC is already obsolete and if the USEPA and Corps are successful at changing the definition for Waters of the United States, the remaining portions of this code that may not overlap and are superseded by other codes will be moot because virtually all surface waters in Washington State will become waters of the United States.

IT'S NO LONGER NEEDED BECAUSE:

As previously discussed the proposed Title 220-660 WAC is redundant with other state, federal, and municipal codes, largely because Title 77 has not been revised by the legislature to address this overlap, although the legislature has expressed its concern over the overlap of the storm water regulations (federal and state, including the Clean Water Act and the State Water Pollution Control Act (33 U.S.C. § 1251 et seq. and Chapter 90.48 RCW), but

especially the conflicts pertaining to the lead agency, which the legislature designates as Ecology). However, the severability clause in Title 77 invalidates portions of this code that conflict with or overlap by codes that supersede this code.

The Growth Management Act of 1990 (GMA) has always included the provisions for critical areas ordinances that municipalities must adopt. This includes geologic hazards (that include channel migration zones) and ecological critical areas that include wetlands and fish and wildlife habitat conservation areas). However, as previously discussed, the Shoreline Management Act (SMA) was revised in 2010 to also include the same critical areas that the GMA requires. This significantly broadened the influence of fish and wildlife habitat conservation areas in all shorelines of the state.

The primary aspect of the revised SMA is that there is no net loss of existing habitat functions created by any proposed project. This code also includes a requirement for a substantial development permit for any projects that cost more than \$5,000 as adjusted for inflation:

"Substantial development" shall mean any development of which the total cost or fair market value exceeds five thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state. The dollar threshold established in this subsection (3)(e) must be adjusted for inflation by the office of financial management every five years, beginning July 1, 2007, based upon changes in the consumer price index during that time period.

A substantial development permit can be required even if the project costs nothing, if it interferes with normal public use of the water or the shorelines of the state. This permit includes numerous requirements for studies, design, and mitigation/restoration activities for any project that will impact the existing habitat functions and will impact fish and wildlife habitat conservation areas (or other critical areas, including wetlands).

Almost all of the SMA requirements in a shoreline master program are redundant with the proposed requirements of Title 220-660 WAC (as do the provisions of GMA required municipal critical areas codes). As previously discussed, the federal codes also supersede Title 77 and overlap or supersede this code (and would supersede the proposed Title 220-660 WAC). It is believed that the legislature overlooked revising Title 77, assuming that it did not conflict with other codes, there was no overlap (although the legislature voice concern about the overlap) and was not superseded by other codes; most likely because this code is very old (although the state's Water Pollution Control Act is older).

The following is the history of the State of Washington's regulations that pertain to fish and wildlife from the WDFW's website:

March 1890 - The first Fish Commissioner was James Crawford, appointed by Governor Elisha Ferry

1891 - State Legislature appropriated funds for a salmon hatchery.

1895 - The first salmon hatchery was built and dedicated in 1895 on the Kalama River.

1915 - Legislature passed a new Game and Game-Fish Code that provided for a Chief Game Warden and a Fish Commissioner both managed under Chief Game Warden L. H. Darwin, Department of Fish and Game

1921 - Legislature abolished the Fish Commission and replaced it with a Department of Fisheries with a Division of Fisheries and a Division of Game and Game Fish.

1932 - An initiative separated food fish and game fish and created a Department of Fisheries (food fish) under an appointed Director and a Department of Game (game fish) under a six member commission.

1987 - Legislature changed Department of Game, with a Commission-appointed director, to Department of Wildlife with a Director appointed by the Governor.

1994 - Legislature merged Department of Wildlife and Department of Fisheries, creating Department of Fish and Wildlife (WDFW). WDFW has a 9-member Commission and the WDFW Director is appointed by the Commission.

This suggests that there have not been any substantial changes to Title 77.55 since 1994, however, many changes have been made to federal, state, and municipal codes since this time (except for hobby mining, the current Title 220-110 WAC – hydraulic code has not been changed since 1994 which is why the WDFW is proposing to create Title 220-660 (rather than revising the existing WAC, due to the significant number of changes). However, because RCW Title 77 has not been substantially revised since 1994, there is overlap, conflicts, and superseding federal, state, and municipal codes that impact the proposed Title 220-660.

Additionally, the WDFW is not authorized to administer any of the federal codes and cannot specify protection less than the federal agencies require, however, the Hydraulic Code Rules -Cost/Benefit Analysis & Small Business Economic Impact Statement, dated February 5, 2014 states that several of the requirements (such as culverts) in the proposed Title 220-660 are less stringent than those required by the NMFS. This can cause problems with unauthorized takings of endangered species.

State agencies that are authorized to administer federal codes, such as Ecology's administration of Section 401, 402, and 303(d) of the Clean Water Act allow the agency to make requirements more stringent, but the agency cannot make the requirements less stringent than the federal requirements. It should be noted that no state agency has authorization to administer Section 404 of the Clean Water Act which can raise some conflicts with existing codes, especially wetlands under the GMA and SMA because if a municipality makes a determination on a wetland that the Corps or the USEPA disagree with, that municipality can face fines and mitigation costs.

Regardless, it is clear that the proposed Title 220-660 WAC is unnecessary because it is unclear if any of the provisions in this proposed rule are not covered by other federal, state, and municipal codes. The Hydraulic Code Rules -Cost/Benefit Analysis & Small Business Economic Impact Statement, dated February 5, 2014, suggests that there are no provisions in the proposed hydraulic code that are not covered by existing federal, state, and municipal codes that supersede Title 77 and the proposed Title 220-660 WAC. One exception pertains to storm water outfalls that are not permitted by an NPDES permit, however, as previously discussed, these outfalls are regulated by the Clean Water Act and the State Water Pollution Control Act and in many cases are regulated by a municipality's Municipal Stormwater NPDES permit that places requirements on all storm water discharges (and storm water systems) that must use the AKART BMPs described in the Stormwater Management Manuals for Western and Eastern Washington, Ecology, 2012 (which is being revised).

It should also be noted that the Proposed Title 220-660 WAC does not introduce "current science" as is required by RCW 34.05.271. A review of the references list (which is not cited anywhere; how and where these references were used (over 1,800 of them) indicates that only 21 of these references would be considered to be current (published in the last 5 years) and most of these 21 references are by the same author and are limited to toxics, acoustics, and do

not focus on design or other biological aspects the proposed revisions require (including habitat restoration, which is already required by the SMA, GMA, CWA, the ESA and other federal and state codes).

IMPOSES UNREASONABLE COSTS:

The WDFW has not demonstrated that the existing hydraulic code (Title 220-110 WAC) is resulting in losses to fish life or that the existing code does not provide adequate protection. This would be necessary to justify more comprehensive rules that impose mitigation requirements and impose mandatory studies and other activities that increase the costs to obtain the permit (and costs after the permit is issued, such as monitoring and other adaptive management requirements).

Based on the comments the WDFW received in December 2013 that included the fact the not cost – benefit analysis was conducted for the proposed Title 220-660, the WDFW retained the services of an ecologic firm named Cardno ENTRIX to prepare the February 5, 2014, Hydraulic Code Rules -Cost/Benefit Analysis & Small Business Economic Impact Statement.

As previously discussed, this analysis attributes virtually all additional costs to other codes that the Cardno Entrix agrees, supersede Title 77 RCW and the proposed Title 220-660 WAC. However, this analysis is unorthodox and does not focus on quantitative analysis, makes numerous assumptions, uses questionable data that does not meet the requirements of RCW 34.05.271, and conflicts with analysis conducted by WSDOT in March 2013, entitled POTENTIAL FISCAL IMPACT ASSOCIATED WITH VERSION 4 OF WDFW'S PROPSOED WAC REVISIONS, prepared by the Environmental Services Office (see attached). This document was not discussed by Cardno Entrix, even though it was prepared before the February 5, 2014 Cost/Benefit Analysis.

The WSDOT Fiscal Impact analysis states:

The following is an overview of the proposed WAC revisions we feel will have the most fiscal impact on WSDOT. Key elements of proposed WAC highlighted in gray. These elements are requirements that do not exist in current WAC an create substantial fiscal impacts to WSDOT. See exhibits for more details.

These were developed for discussion purposes and are to show the relative change in magnitude of our interpretation of the existing WAC vs the proposed WAC. Given the requested short turnaround from WDFW, they were developed based on available information (project files, GIS, etc) and should be considered a "scoping/conceptual" level.

Proposed WAC 220-190 – (4) (b) States:

(b) A full span design must pass the one-hundred year peak flow or other design flood flow approved by the department. (Related requirements in (4)(e) and (4) (f)) This table is an overview of what the increased costs could be for bridge replacement projects under the proposed WAC standards compared to the cost under the current WAC requirements.

Structure	Cost under <u>CURRENT WACs</u>	Cost under <u>PROPOSED WAC</u>	Percent <u>Increase</u>
US 101 Duckabush River Bridges Jefferson County	\$6.5 million	\$31 million	376%
US 101 Hamma Hamma River Bridge Jefferson County	\$9.6 million	\$39.6 million	312%
SR 7 Ohop Creek Bridge Pierce County	\$3.5 million	\$30.8 million	785%
Touchet – Gardena Road Bridge Walla Walla County	\$4.3 million	\$39 million	807%
US 12 Touchet River Bridge Walla Walla County	\$13.5 million	\$35.9 million	166%

Note: See the attached sheets for additional information and assumptions used for these bridge costs. Also attached is a copy of the bridge replacement projects for WSDOT's 2013 – 2015 biennium scheduled for replacement. We also included a list of bridges put together by our Highway and Local Programs Office that lists the bridges the city and counties need replaced as federal dollars (through WSDOT) become available. Not all of these bridges listed from Highways and Local Programs will require an HPA, the intent is to give WDFW an idea of the amount of bridges that are being considered for replacement. Both lists are subject to change based on funding and priorities.

This WSDOT analysis suggests that the increased cost just for bridges would range from 166% to 807% more under the provisions of Title 220-660 WAC than under the existing Title 220-110 WAC. These requirements would also apply to municipal bridges, which would lead to significant fiscal impacts, especially to smaller municipalities and counties.

The Cardno Entrix cost/benefit analysis does not address this and as previously stated uses relatively unorthodox methods and does not use quantitative analysis or adhere to the scientific requirements of RCW 34.05.271 and appears to be biased. One of the reasons it is unorthodox is because it attributes virtually all addition costs to codes that supersede Title 77 and the proposed Title 220-660 WAC (federal, state, and municipal).

The WSDOT analysis (attached) includes discussion on unattainable standards, including:

Section 200

Fish passage improvement structures

The requirements in this section apply to fish ladders, weirs constructed for fish passage management, roughened channels, trap-and-haul operations, and hydraulic design culvert retrofits.

(7) FISH LADDER MAINTENANCE

(a) Continuously supply the fish ladder with sufficient water to safely and efficiently pass fish at least ninety percent of the time, both upstream and downstream of the obstruction. If target fish species are present and actively migrating, sufficient water must be available to pass fish through the fish ladder, or the fish must be able to safely pass without the need of a fish ladder.

(b) An owner must inspect the fish ladder for proper function at a frequency determined by the department.

(c) Individuals performing operations or maintenance must be sufficiently trained to operate the fish ladder.

(d) The department may require shutdown of the fish ladder during high flows if the flow exceeds the fish passage design flow. However, a fish ladder must not be inoperable due to high flows for a period greater than seven days during the migration period for the target fish species.

Fiscal Impact –

- Continuously supplying sufficient water – This proposal should clarify whether this requirement is specific to fishways at dams that are capable of controlling flow. WSDOT owns and maintains approximately 110 fishways associated with highway water crossings.*

Some of these locations are intermittent streams. Achieving this expectation would be unattainable.

- Inspection – Currently we pay WDFW staff \$20,000 [source: Jon Peterson] to inspect our facilities per year. This cost can be used to factor the fiscal impact depending on WDFWs requirement.*

- Train maintenance staff [\$500 @ 24 (west side maintenance staff) = \$12,000.*

- Shutting down fish ladders under highways = Shutting down fish ladders during high flows could lead to the following unattainable costs:*

- o Flooding and damage to the highway resulting in road closure*

- o Economic impact associated with lost commerce*

WSDOT addresses other provisions of the proposed 220-660 WAC such as:

Section 030 Definitions

(47) "Fish habitat" means habitat, which is used by fish life at any life stage at any time of the year including potential habitat likely to be used by fish life, which could reasonably be recovered by restoration or management and includes off-channel habitat.

WSDOT discussed our concern regarding this proposal with Randi following the release of V 3. She understood our concern dealt with WDFW asking to mitigate for the loss of potential habitat [relict channels, migration zones] on the other side of our highways from the river. Basically, this is the concept of lost opportunity in ISPG Chapter 4. She said she would recommend they remove it but this didn't happen.

Fiscal Impact –

o Average number of erosion repair and culvert maintenance work – 30 per year that may occur in floodplains, alluvial fans or CMZ areas.

o Currently, this mitigation requirement is conceptual (ISPG Chapter 4), and as such, we are not aware of any field examples to reference the cost impact. Tokul Creek [Source: Doug Swanson] scour repair project involved off site mitigation for stream, riparian, and LWD impacts in the table below. The total mitigation cost was \$564,268. This project could provide a reference in determining fiscal impacts associated with the proposal.

[The] Tokul Creek restoration information [impact area, replacement ratio, and restored area] is provided in the table below. Total project cost was \$564,268 X 30 projects per year = \$16,928,040 per year.

	Permanent Impacts (sqft)	Replacement Ratio	Area Needed (sqft)	Area to be Restored(sf)
Stream	15,580	1.25:1	19,475	42,340
Riparian	4,222	1.5:1	6,333	46,086
LWD	~12 trees	0.67:1	9 key pieces	9 key pcs
	19,802		25,808	
	0.45 acres		0.59 acres	

These costs are limited to the costs to WSDOT, although the WSDOT analysis does include a list of bridge replacements that could include municipal (city and county) replacements. There are 1,000s of bridges and there are numerous other costs discussed in the WSDOT analysis that will pertain to municipalities. This can add annual costs to state, municipal, and private project in the millions to billions of dollars state wide.

The Cardno Entrix cost/benefit analysis Table 3 shows that private and government projects will be impacted the most (government 36% and private 37%). The costs to government means that all citizens are affected because if, as WSDOT projects, that costs can be 700% higher just for bridges and major increases for all projects, the money available to WSDOT to conduct road improvements and to construct new bridges will be significantly less than it is now. Additionally, if the costs increase for private projects, housing prices will increase, which will impact low income housing and those who are on fixed incomes.

IT CONFLICTS WITH ANOTHER FEDERAL, STATE, OR LOCAL LAW OR RULE. LIST CONFLICTING LAW OR RULE, IF KNOWN:

The Cardno Entrix cost/benefit analysis dedicates most of Section 2 to discussing all of the codes that supersede or overlap with the proposed Title 220-660 WAC. This is how Cardno Entrix justifies the potential increased costs that would be associated with Title 220-660 WAC (page 1) would not exceed \$3.6 million, which is inconsistent with WSDOT’s quantitative analysis (Cardno Entrix prefers to use qualitative analyses):

The estimated annual costs of the proposed rules changes, for those that could be quantified, ranges between \$290 thousand to \$3.6 million. Despite the number of proposed rule changes the estimated cost of adopting the rule changes is not as large as might have been expected.

Many of the proposed rule changes are consistent with or less restrictive than existing federal (e.g. U.S. Army Corps of Engineers and National Marine Fisheries Services) and

State (Shoreline Management Act) regulations. Additionally the recent United States Western District of Washington ruling, United States of America v. State of Washington – No. C70 – 9213, requires state agencies to comply with some of the proposed rule changes.

The CBA focuses only on those sections of the proposed rule changes that are not attributable to these other existing regulation or court ruling. Further, cost estimation, even when project specifications are known, is frequently plagued with uncertainties. In estimating costs for this analysis the project specifications are not known, creating a higher degree of uncertainty. Notwithstanding this uncertainty the costs and/or savings of the proposed rule changes were quantified where possible and qualified if not possible.

The estimated annual benefits of the proposed rule changes were qualified rather than quantified. Quantifying benefits would have necessitated an estimate of the avoided fish losses, which was not done. However, several other recently completed studies have quantified benefits of both 1) avoided fish loss and 2) the broader ecosystem services created when preserving fish habitat.

The recent ECY analysis of the Water Resources Management program for the Dungeness Portion of the Elwha-Dungeness Water Resources Inventory Area 18 estimated the annual benefit of avoided fish loss ranges between \$3.8 million and \$6.8 million (ECY 2012). Broadening the type of ecosystem goods and service benefits, beyond avoided fish loss, a recently completed report. The benefits range between \$9.7 billion and \$83.0 billion (Batker et.al. 2010)

As previously discussed, state agencies can only administer their code and can only make rules that pertain to the code that give the agency the authority to make rules, in this case Title 77. State agencies can only administer federal codes if the lead federal agency authorized the agency to administer these federal codes (as is the case with Ecology for Section 402, 401, and 303(d) of the Clean Water Act).

The WDFW is not “authorized” to administer any federal codes or any other state or municipal codes, which means it cannot create rules that pertain to the other RCWs, U.S.C., CFR, or municipal codes. It also means that the WDFW cannot create rules that are less restrictive than other state, federal, or municipal codes.

The documents the WDFW used from Ecology and the Earth Economics document references above do not meet the requirements of any science, but especially do not meet the requirements of RCW 34.05.271 (2014).

The July 16, 2014 cover for the draft SEPA document (SDPEIS 14-049), signed by Lisa Wood SEPA/NEPA Coordinator Agency Responsible Official Protection Division Habitat Program, provides the reasons for the major revisions to the WDFW hydraulic code, which is so extensive that it is recodified as Title 220-660 WAC:

The purposes of the proposed rule changes are to update the rules to better align with statutory changes, meet current fish science and design technology, and improve procedural and administrative requirements. Specifically the rule changes will:

- Incorporate up-to-date fish science and technology;*
- Simplify the permitting of certain types of projects;*

|| Improve procedural and administrative requirements to better align with statutory changes made since the rules were last revised; and

|| Establish a structure for adaptive management that responds to changing science and technology and/or the results of effectiveness monitoring.

The references provided by the WDFW include over 1,800 references which are not cited in any of the proposed rules. However, only 21 of these references were published between 2009 and 2013 (none were from 2014). These “current” references pertain mostly to acoustics and toxics and many are by the same authors and it is questionable if these references actually meet the requirements of RCW 34.05.271.

However, if the revised hydraulic rules were to be revised to “*better align with statutory changes made since the rules were last revised*”, in reality, the rules should have removed anything regulated by other federal, state, and municipal codes (this would simplify the rules and would eliminate overlap and conflicts with superseding codes. Instead, the proposed hydraulic code wraps all of the overlapping and superseding codes into the revised hydraulic code creating major conflicts and major cost increases that are surprisingly attributed to the codes that have been added into the revised hydraulic code.

If the proposed revised WAC is to truly align with other state, federal, and municipal codes, it should remove all of the requirements of these codes from the hydraulic code and stick with the JARPA permits that are reviewed by all of the federal and state agencies that administer the federal and state codes and by the municipalities who administer state mandated codes.

As previously discussed, the proposed hydraulic code overlaps other federal, state, and municipal codes the WDFW is not authorized to administer. At best, the hydraulic code should remain the way it is (Title 220-110 WAC), however, if a revision will be made, all sections that are redundant with or superseded by other federal, state, and municipal codes should be removed.

IT DUPLICATES ANOTHER FEDERAL, STATE OR LOCAL LAW OR RULE. LIST DUPLICATE LAW OR RULE, IF KNOWN:

Chapter 2 of the Cardno Entrix cost/benefit analysis provides a reasonably good overview of all the other federal, state, and municipal codes that the proposed hydraulic code will overlap with or is superseded by. The WDFW is NOT authorized to administer any of these other codes and Title 77 has not been revised to address these overlaps, which triggers the severability clause in this code.

These duplicate codes and rules include (which are also discussed in the SDPEIS 14-049):

- The Endangered Species Act, **ESA**; [7 U.S.C. § 136](#), [16 U.S.C. § 1531](#) et seq. Administered by the National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS) and the United States Fish and Wildlife Service (USFWS). 50 CFR, Chapters I – VI. The WDFW has no authority to administer this Act.
- The Water Quality Act of 1987 (AKA the Clean Water Act – although this was promulgated in 1977 and the Water Quality Act of 1987 reauthorizes this Act, and for the first time regulated storm water as a pollutant), 33 U.S.C. § 1251 et seq. 40 CFR Parts 22, 230 – 233, Parts 100 – 149, 33 CFR Parts 200 – 384. The WDFW has no authority to administer any provisions of this Act.
- Title 23 U.S.C., Title 47 RCW, Federal Highway Administration. The WDFW has no authority to administer this federal code.

- Rivers and Harbors Act of 1899 as revised, 33 U.S.C. 403; Chapter 425, March 3, 1899; 30 Stat. 1151, 33 U.S.C. 401, 33 U.S.C. 407; 30 Stat. 1152, title IV of P.L. 92-500, 33 U.S.C. 1341-1345; 86 Stat. 877, (16 U.S.C. 661-667e; 48 Stat. 401 is administered by the Corps of Engineers (33 CFR). These activities are coordinated with the USFWS. The WDFW has no authority to administer this Act.
- Resource Conservation and Recovery Act (RCRA) is administered by the USEPA and Ecology (which is authorized to administer this program). This is codified as 42 U.S.C. §6901 et seq., and is regulated by 40 CFR Parts 260 – 268, 270 – 273, 279-282. This federal program pertains to wastes, both solid and hazardous wastes that are generated by facilities that use hazardous materials. This program is a permitting program that pertains to all landfills (sanitary and hazardous), the storage and disposal of wastes, including hazardous wastes and includes correction action provisions when hazardous wastes are released to the environment (including all surface water features and ground water). This is the regulation that pertains to the releases from Hanford that are moving towards the Columbia River. This code is administered by the USEPA and Ecology. The WDFW has no authorization.
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), AKA Superfund (P.L. 96-510, 42 U.S.C. § 9601(14) & (33), 40 CFR Parts 300 and 302. CERCLA regulates any environmental impacts from hazardous materials and is known as the Superfund. It regulates in water Superfund sites such as the Commencement Bay, Duwamish Waterway, and the Hylebos Waterway superfund sites. Cleanup is paid for by the federal government (USEPA funds) and by parties who are determined to be probable responsible parties (PRPs). This code includes restoration and mitigation activities called natural resource damage assessments (NRDAs) and is overseen by the USEPA, Ecology, and other entities (such as the tribes, the NOAA, the USFWS, etc.). This would include any toxic sources in any surface water features, including bed sediments (such as the dioxin contamination in the Budd Inlet). The Model Toxics Control Act (MTCA) is in part covered by CERCLA. However, the WDFW has no authorization to administer this code.
- The USEPA's 2014 propose revisions of 33 CFR 328 and 40 CFR 230.3, which would make virtually all surface waters, waters of the United States. The final comments are due October 15, 2014 with the agency expecting to adopt these changes early in 2015. This will place most of the surface waters (and all marine shorelines) in Washington State under the direct authority of USEPA Region 10 and the Seattle District of the Corps of Engineers. The WDFW has no authority to administer any provisions of the Clean Water Act and the only entities that can determine if a surface water feature is jurisdictional (by the federal government) is the USEPA and/or the Corps.
- Chapter 36.70A RCW, Growth Management Act (GMA), requires those municipalities who are required to plan or wish to plan adopt critical areas ordinances that address the critical areas listed in this Act (RCW 36.70A.030), the WAC 365 includes the rules:

(5) "Critical areas" include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

This includes fish and wildlife habitat conservation areas and every municipal code includes mitigation requirements for impacts to buffers and the critical areas. This also include development standards for projects that can impact critical areas.

Each municipalities' critical areas are unique to that municipality, however, all must follow the requirements established by the GMA, this is overseen by the Growth Management Act Hearings Board, which insures that municipalities code meet the intent of the GMA and also meet the requirements of Best Available Science (RCW 36.70A.172). The GMA critical areas ordinances are only regulated by the municipalities that adopt the Critical Areas ordinance, no state agencies are authorized to administer these municipal codes.

- Chapter 90.58 RCW, the Shoreline Management Act of 1972 (SMA), as amended (especially in 2010 when critical areas were added to this code), and WAC 173. This code requires that there be no net loss of existing habitat functions in the shorelines of the state (including areas waterward of the shoreline) or within 200 feet of the ordinary high water mark (OHWM). This "Act" can also regulate 1% flood plains as shorelines of the State (as is the case in King County).

Once critical areas were added to the Act in 2010, wetlands and fish and wildlife habitat conservation areas became major restrictions for all projects located in water, over water, in shorelines, or within 200 feet of the OHWM of shorelines of the state. The SMA does require mitigation and restoration activities as project conditions and can completely restrict projects from the higher rated shorelines. This Act requires ALL municipalities with shorelines of the state in their jurisdiction to adopt Shoreline Master Programs (SMPs) that must be approved by Ecology. All SMPs approved by the Ecology include buffers and setbacks as a condition of any proposed project in the water, shoreline, or shoreland. Other mitigation and restoration requirements are also required if there is a potential net loss in existing habitat functions. Ecology has sole authority for the SMA, the WDFW has no authority; however, every municipality has authority over their SMP that has been approved by Ecology.

- Washington State Water Pollution Control Act, Chapter 90.48 RCW (WAC 173), has been codified since 1948, with major revisions in 1972 when the Federal Water Pollution Control Amendments were promulgated. This code regulates all Waters of the State and is administered by Ecology. It is generally consistent with the Clean Water Act and adopts this Act by rule. Ecology is authorized to administer Sections 401, 402, and 303(d) of the Clean Water Act (CWA). The WDFW is not authorized to administer any of the provisions of the CWA or the Washington State Water Pollution Control Act.
- MTCA (Model Toxics Control Act), Chapter 70.105D RCW, Uniform Environmental Covenants Act Chapter 64.70 RCW and Chapter 173-340 WAC; this Act includes regulation of in water sediments. This state of Washington code is used to address the cleanup of sites impacted by "dangerous wastes" and can include surface water features. It is administered by Ecology, with no other agencies in the state authorized to administer this Act.

The WDFW's proposed revisions of the hydraulic code overlap or are superseded by the codes listed above. There is no reason for the overlap or to have provisions in the hydraulic code that are already regulated by other codes, especially when the WDFW is not authorized to administer these other codes and the WDFW cannot develop less stringent requirements than the other codes require.

The legislature needs to revise RCW 77 because many sections of this code are inapplicable due to this overlap and the severability clause in the code. The WDFW should be removing any sections of the hydraulic code that overlap or are superseded by other federal, state, and municipal codes and should consider doing away with HPA permits and simply provide JARPA permits where all of the different agencies who administer the other codes (including municipalities) sign off on a proposed project.