

Summary

Meeting dates:	October 17, 2014, Commission Conference Call
Agenda item:	Petition requesting the Commission repeal proposed WAC 220-660 Hydraulic Code Rules.
Presenter(s):	Jeff Davis, Assistant Director, Habitat Program Randi Thurston, Protection Division Manager, Habitat Program

Background summary: The Fish and Wildlife Commission received a petition (RCW 34.05) from the Citizens' Alliance for Property Rights to repeal Proposed WAC 220-660 Hydraulic Code Rules.

The petitioners are asking the Commission to repeal proposed WAC 220-660.

The stated reasons for this petition are:

1. *There have been no substantive changes to RCW 77.55.021 so there are conflicts and overlaps with other state, federal, and municipal codes.*
2. *The proposed WAC 220-660 is redundant and burdensome, often superseded by other codes.*
3. *The Cost/Benefit Analysis allocates 95% of the costs to other federal, state, and municipal regulatory programs that the proposed WAC 220-660 overlaps with or is superseded by.*
4. *Citizens have constitutional rights, fish do not. When designing erosion controls, levees, bulkheads, and other protective structure, the first concern should be the protection of human life and property.*
5. *The cost/benefit analysis does not address a WSDOT analysis that suggests the cost of bridge projects would increase between 166% to 807%.*
6. *The cost/benefit analysis uses a relatively unorthodox method, does not use quantitative analysis or adhere to the scientific requirements of RCW 34.05.271 and appears to be biased.*
7. *The department should remove any sections of the hydraulic code that overlap or are superseded by other federal, state, and municipal codes and should consider doing away with HPA permits and simply provide JARPA permits where all of the different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 the proposed project.*

Staff comments in response to this petition:

1. Proposed WAC 220-660 would amend the rules for the department's HPA authority (chapter 77.55 RCW). The department filed the CR-101 in July 2011 and the CR-102 in July 2014 to update WAC 220-110 (recodified as WAC 220-660). In the past three years the department has conducted an extensive public process. The public comment period for the CR-102 closed September 15, 2014 on WAC 220-660. Because these rules have not yet been adopted, this petition is premature and should be denied on that basis. The Commission should instead take these comments into consideration when deciding whether to adopt rules as proposed or to revise the rules if appropriate.
2. The department is mandated by the Legislature (RCW 77.55.021) to use its HPA Authority. The statute specifically requires a person or government agency to secure a permit from the department before they undertake a hydraulic project to ensure the

project is designed and constructed in a manner that protects fish life. Rules are necessary for the department to consistently apply and enforce standards for protection of fish life when issuing HPAs.

3. Petitioning the Commission to repeal rules that are not even in effect is not the appropriate forum to challenge the need or appropriateness of the statutes governing hydraulic projects. But even if the Commission could consider the need or appropriateness of the hydraulic code, the fact that local, state, and federal agencies may have jurisdiction over the same project does not invalidate the hydraulic code or make it unnecessary. At each jurisdictional level, priorities and legal mandates determine the resources protected and the extent of the protection that is applied. Mitigation requirements also vary according to the agencies' protection priorities and legal mandates. As a result, regulatory efforts may share intentions or have entirely different habitat protection objectives. The HPA fills an important regulatory role because it is the only permit issued solely to protect fish life. In many cases, the HPA is the only permit required for hydraulic projects in streams too small to be considered a shoreline of the state or navigable waters. These projects do not undergo a Critical Area Ordinance review because a shoreline or other land use application is not required by the local government. For hydraulic projects that receive a Shoreline Substantial Development Permit Exemption (SSDE) often the only permitting requirement is to obtain an HPA and perhaps a Department of Army Permit.

Ranching, farming and silviculture activities are exempt from a Department of Army Section 404 permit. If the hydraulic project requires a Department of Army permit (Section 404 or Section 10) often the Corps will not make a final permit decision until local or state permits, including the HPA, are issued. If the hydraulic project requires a Department of Army permit, a Section 401 water quality certification is also required. In many cases, an HPA must be obtained before a Department of Ecology Section 401 certification is issued. However, this is not the case for most Corps Nationwide Permits because they have a pre-approved Section 401 Water Quality Certification. The Corps issues nationwide permits for fifty types of projects that are similar in nature and have minimal individual or cumulative impacts. To receive a nationwide permit, hydraulic projects must comply with the General Conditions listed in the document. Usually the provisions in an HPA are more specific to the construction of a hydraulic project than the general conditions in a nationwide permit. As a result, the HPA provides added fish protection especially for non-ESA-listed state priority fish and shellfish species.

In accordance with Section 7 of the ESA, the Corps must consult with the Services on any work proposed in an application including nationwide permits that may affect an ESA-listed species or its designated critical habitat. The Services will provide the Corps with conservation measures to protect federally listed fish species. However, the Services do not recommend conservation measures to the Corps to protect other state priority fish and shellfish species and their habitats. This is the unique purpose of the HPA.

Policy issue(s) you are bringing to the Commission for consideration:

None

Public involvement process used and what you learned: During the public comment period for the CR-102 more than half on the commenters said there is an urgent need to strengthen, not diminish, the hydraulic code rules.

Action requested:

Department staff requests that the Commission deny the petition and maintain the CR-102 public process.

Draft motion language:

I move to **deny** the petition to repeal proposed WAC 220-660.

Justification for Commission action:

The petition requesting the Commission repeal proposed WAC 220-660 is not timely and the statutes require WDFW to regulate hydraulic projects and adopt rules to consistently apply and enforce standards for protection of fish life when issuing HPAs.

Communications Plan: N/A

Form revised 12/5/12