

WDFW Response to Petition to Repeal WAC 220-660-300 (6)
of
Dennis E. Petersen
December 28, 2016

Request

On December 28, 2016, Washington Department of Fish and Wildlife (WDFW) received a petition from Dennis E. Petersen to repeal WAC 220-660-300 (6) Mineral prospecting on ocean beaches. The Fish and Wildlife Commission (Commission) adopted that rule on December 2014 and it became effective July 2015.

In his filing, Mr. Petersen contends that the WAC conflicts with another federal, state, or local law or rule and requests its repeal. Specifically, he claims:

1. The WAC conflicts with WAC 352-37-340 (adopted by Washington State Parks and Recreation Commission (Parks)) by adding additional and unsubstantiated rules and requirements for beach mining. WAC 220-660-300 (6) includes language about moving beach driftwood and site excavation requirements that are different from WAC 352-37-340.
2. WAC 220-660-300 (6) conflicts with RCW 34.05 at least minimally in the following ways:
 - a. There is a lack of coordination between beach mining rules in WAC 220-660-300 (6) and with State Parks and Recreation beach mining rules in WAC 352-37-340.
 - b. There has not been any effort to reach an agreement among interested parties (small-scale miners) before the publication of the notice and adoption of the proposed rule.
3. WAC 220-660-300 (6) is poorly written because it conflicts with existing beach mining HPAs that have been approved for the same time window and same locations.

Background

The 2008 Legislature passed SSB 6343, which required WDFW and Parks to establish a 2-year pilot program of ocean beach small scale prospecting and mining. WDFW was included in the bill because it issued Hydraulic Project Approvals (HPAs) for hydraulic projects, including mineral prospecting. Parks was included because it manages ocean beaches encompassed in the Seashore Conservation Area. WDFW and Parks did not permit ocean beach prospecting prior to the bill passage. Following the completion of the pilot program, Parks conducted a State Environmental Policy Act (SEPA) review and subsequently adopted rules regulating certain aspects of ocean beach prospecting under its jurisdiction as the land management agency responsible for access to and activities on the Seashore Conservation Area. That rule is incorporated in WAC 352-37-340 Small-scale beach prospecting and placer mining, which was effective October 2011. Because Parks had issued a final SEPA determination for ocean beach prospecting, the impediment to WDFW issuing HPAs was removed and WDFW issued approximately 1,500 HPAs for that activity between October 2011 and June 2015. To reduce the significant workload associated with those individual permits, WDFW incorporated rules for ocean beach prospecting in its overhaul of Hydraulic Code rules that was completed when the Commission adopted Chapter 220-660 WAC in December 2014. Those rules, including those for ocean beach prospecting went into effect July 2015. To implement WAC 220-660-300 (6) WDFW incorporated that rule into the 2015 version of the Gold and Fish pamphlet. Prospectors holding a copy of the Gold and Fish pamphlet may engage in ocean beach prospecting by following the conditions in the pamphlet without need for further authorization.

WDFW chose not to rescind the previously issued HPAs for ocean beach prospecting and so they remain in effect until they expire. Prospectors with active individual HPAs can choose to operate under authority of their individual HPAs or the Gold and Fish pamphlet.

Response to Petition

After careful consideration of the points made by Mr. Petersen, we recommend the Commission reject the petition to repeal WAC 220-660-300 (6). Following is our response to each of Mr. Petersen's claims.

1. Parks' and WDFW's rules do not conflict. Parks is authorized under Chapter 79A.05 RCW, and WDFW is authorized under Chapter 77.12 RCW to adopt rules necessary to carry out the purposes and duties of each agency. Park's mandate under RCW 79A.05.615 is to administer the Seashore Conservation Area to preserve its present state and to maintain it in the best possible condition for public use. Under RCW 79A.05.620 Parks must seek the cooperation and assistance of federal agencies, other state agencies, and local political subdivisions. All state agencies, and the governing officials of each local subdivision shall cooperate with the commission in carrying out its duties. WDFW's mandate under Chapter 77.55 RCW Construction projects in state waters is to provide for the proper protection of fish life. Protection of fish life is the only ground upon which approval of HPAs may be denied or conditioned.

Parks' rule regarding beach prospecting and placer mining was limited to implementing its mandate to provide for public use of the Seashore Conservation Area in keeping with the requirement to maintain the area in its present state. Because its responsibility is not the protection of fish life (that being the responsibility of WDFW) it adopted a rule focused primarily on the public's access to the beach, use of equipment with minimal potential conflict with other users, and conservation of beach sands. By design, the rule was devoid of fish protection requirements. After Parks completed its SEPA review and rulemaking, WDFW began issuing individual HPAs for beach prospecting that replicated much of Parks' rule, such as equipment restrictions, but also incorporated further conditions for the protection of fish life, such as fish screening requirements. WDFW included those HPA conditions and additional ones developed during rulemaking into its own rules for beach prospecting.

WAC 352-37-340 and WAC 220-660-300 (6) do not conflict; they supplement each other. As the land manager for the ocean beaches, Parks put certain restrictions on access, etc., and WDFW restricted only the aspects of beach prospecting that have an impact on fish life. Parks' rule does not address moving driftwood and WDFW's addresses only the movement of large wood. Both Parks' and WDFW's rules include excavation site requirements, but the language of both is similar, requiring backfilling before moving to another site.

2. WDFW's rule does not conflict with Chapter 34.05 RCW.
 - a. WDFW coordinated closely with Parks' during Parks' rule development, meeting several times with Park staff, viewing the operation of potential new equipment types considered for authorization by Parks, and providing and commenting on draft language for equipment restrictions that would be permissible by WDFW. RCW 34.05.328 (4) requires coordination on implementation and enforcement between Parks and WDFW. Because Parks' rangers and WDFW enforcement officers routinely patrol ocean beaches, they have effectively been sharing enforcement of the rules. There is no time limit

associated with the requirements in RCW 34.05.328 (4) and WDFW and Parks are continuing to work with each other. In June 2016, both agencies signed an interlocal cooperative agreement delegating each agency to enforce the other's enforcement authority over natural resource infractions within the Seashore Conservation Area. Violations of Parks' rules for ocean beach prospecting are infractions. WDFW and Parks have recently begun development of a coordination plan that they believe will be completed soon for enforcement of WDFW's rules on ocean beach prospecting. Although that coordination plan is not in place yet, WDFW believes the proper remedy is to develop one that satisfies the statute as soon as possible rather than repeal the valid rules the plan is intended to facilitate.

- b. The rulemaking requirements in Chapter 34.05 RCW under which WDFW adopted its rules for ocean beach prospecting do not include reaching agreement with interested parties. Rather, a variety of public notices are required, and were complied with, at various steps in the rulemaking process to seek and receive public comment. Those notices were published in the Washington State Register and on WDFW's website. In addition, WDFW went beyond the statutory requirement and established an advisory group composed of interested stakeholders to consult with WDFW on proposed rules. Two members of the prospecting community, Bill Thomas and Robert Cunningham, participated in that workgroup. WDFW also held a series of open public meetings on draft rule language, including one meeting specifically devoted to mineral prospecting. Those meetings occurred on October 17, 23, 24, 28, 29, 30 2013 and November 4 2013. As required by Chapter 34.05 RCW, WDFW provided an open public comment period in which it sought comments specific to the ocean beach prospecting rules. During consideration of the proposed rule, the Commission accepted written and oral comments at an open public meeting prior to rule adoption. In each of these venues, WDFW received a variety of comments, only a few of which applied to the beach prospecting portion of the rule. It carefully considered each one, but ultimately recommended no change to the draft beach prospecting rule and the Commission adopted them unchanged.
3. WDFW's rule is not written poorly. The approximately 1,500 written HPAs issued prior to the adoption of beach prospecting rules remain valid until they reach the expiration date stated in the permit because WDFW did not rescind them after rule adoption. For that reason, those that have not already expired may still be exercised by the permittees, regardless of the content of existing rules. This is the case for all HPAs issued for all other hydraulic project types prior to the adoption and effective date of the current rules. Thousands of prior HPAs are still active despite not adhering to a new set of rules. Because they have fewer conditions than the rules, individual HPAs for beach prospecting may not be as comprehensive as the current rules, but nevertheless are still protective of fish life in the beach environment. A prospector can choose instead to operate under the conditions of the rules incorporated in the Gold and Fish pamphlet and also be in compliance with the law.

In addition to the reasons outlined above, we recommend denial of the petition because a lawsuit against WDFW in Thurston County Superior Court requires the attention of the limited number of rulemaking staff available. That litigation challenged the rule addressed in this petition, and is a rule-making challenge addressing both procedural compliance under the APA and alleging the ocean beach

rule is arbitrary and capricious. A written decision is expected by April 3, 2017. Staff are also focused on assisting the Attorney General's Office with a second rule challenge, also filed in Thurston County Superior Court, related to the agency's jurisdiction.

Even if WDFW repealed the rule, beach prospecting would still require WDFW HPA approval, and repeal would then require the issuance of thousands of individual HPAs, a task for which WDFW does not have sufficient staffing to timely accomplish. Not only would repeal overwhelm WDFW's ability to timely process individual applications, it would be burdensome to prospectors in that they would have to apply for individual HPAs, with likely lengthy delays in processing due to WDFW's inability to provide sufficient staff to handle the workload. We recommend that the Commission deny the petition, because it is a more prudent use of limited state resources to leave the existing rules intact while it awaits the decision on repeal of prospecting rules and ordinary high water line jurisdiction by Thurston County Superior Court.

The agency will continue to address the concerns raised by Mr. Petersen by providing an update to the Commission following the Thurston County Superior Court's decision(s). Based on that outcome, the agency may address future modifications to the prospecting rules concurrently with any other rule changes required by the court's decision, if any.