

Summary

Meeting dates: August 4-5, 2017

Agenda item: Supplementing the Hydraulic Code Rule Making Record to Comply with an Agreed Court Order – Prospector’s Administrative Procedures Act - Decision

Presenter(s): Pat Chapman, Habitat Program and Margen Carlson, Habitat Program

Background summary:

On November 7, 2014, the Fish and Wildlife Commission adopted changes to the Hydraulic Code rules that included re-organizing and re-codification of all rules existing at that time. The rule changes went into effect on July 1, 2015. This adoption represented the culmination of an exhaustive four-year rule-making process that began in July 2011. Although, overall, the rule changes represented a major overhaul of the chapter only a few changes were made to the mineral prospecting sections of the rules.

Prospectors petitioned the court and challenged both the 2008 and 2014 rule-making processes. Prospectors challenged both rulemaking processes by alleging inconsistency with the Administrative Procedures Acts (APA's) procedural requirements, declaring both sets of rules as arbitrary and capricious, and challenging the 2014 rule regulating prospecting on ocean beaches.

The court reviewed the record and heard oral arguments at a hearing on February 3, 2017. In a letter opinion dated March 10, 2017, the court found in favor of the Commission on all but two of the issues under consideration, and ordered that:

- 1) The Commission must explicitly determine whether the 2014 rule changes pertaining to mineral prospecting were the least burdensome alternative, and
- 2) The Commission must complete the requirements of the Regulatory Fairness Act by explicitly determining whether the 2014 rules pertaining to mineral prospecting will impose more than minor costs. If the rules do impose more than minor costs, the Commission must prepare a Small Business Impact Statement (SBEIS).

The department and the prospectors filed an agreed order which was accepted by the court on June 8, 2017. To comply with the order, the Commission must take the action stated below prior to October 31, 2017. WAC 220-660-300 remains in effect pending these determinations, unless the Commission determines, based upon those reconsiderations or other factors, to revise the mineral prospecting rules.

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

Commission must act to comply with the court’s order prior to October 31, 2017.

Public involvement process used and what you learned:

None outside the court proceedings

Action requested:

To comply with the agreed court order, the Fish and Wildlife Commission, by October 31, 2017, must determine whether:

- 1) The small-scale mineral prospecting Hydraulic Code rules adopted in 2014 were the least-burdensome alternative to regulate small-scale prospectors that also achieved protection of fish life. If the Commission determines the rule was not the least burdensome alternative, the department will need to initiate rule-making to revise the rule.
- 2) The small-scale mineral prospecting Hydraulic Code rules (WAC 220-660-300) adopted in November 2014 imposed more than minor costs on small-scale mineral prospecting businesses. If the Commission determines the rule imposed more than minor costs, then the department must prepare a SBEIS by December 31, 2017.

The department requests that the Commission determine that the rulemaking alternative adopted in 2014 is the least burdensome of the alternatives presented while also achieving protection of fish life.

The department also requests that the Commission determine that the rule changes adopted in 2014 do not impose more than minor costs on small scale mineral prospecting businesses and, based on that determination, declare that a SBEIS is not needed.

Draft motion language:

- 1) I move that the small-scale mineral prospecting Hydraulic Code rules (WAC 220-660-300) adopted in November 2014 were the least burdensome alternative.
- 2) I move that the small-scale mineral prospecting Hydraulic Code rules (WAC 220-660-300) adopted in November 2014 did not imposed more than minor costs to small-scale mineral prospecting businesses and therefore a Small Business Economic Impact Statement is not needed.

Justification for Commission action:**Least burdensome alternative**

The court found that the Commission failed to make a determination that the 2014 rules were the least burdensome alternative.

Department staff presented four alternatives to the Commission in the 2014 rule making:

- No action
 - Additional restrictions or prohibitions especially for suction dredging
 - Restore the authorized work times to those effective in the 1999 rules
 - Consolidate the four mineral prospecting rule sections of the 2008 rules into one section
 - Retain most of the 2008 rule provisions
 - Add an additional sub-section to allow mineral prospecting on ocean beaches to occur under the Gold and Fish pamphlet
 - Lift the restriction limiting the use of gas-powered mini-highbankers because staff determined that the change would not increase impacts to fish life
 - Amend the authorized work timing in six waterbodies and change one waterbody name
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The department recommended that the Commission adopt the last alternative as the least burdensome to mineral prospectors while still meeting department's requirement under Chapter 77.55 RCW to protect fish life. The Commission did adopt that alternative.

Under the statute for changes to significant legislative rules [RCW 34.05.328(1)(e)], the Commission must conduct an analysis of the alternatives and issue a determination that the chosen alternative is the least burdensome alternative that will achieve the general goals and specific objectives of the statute that the rule implements (RCW 77.55.091). Staff had determined that the preferred alternative, which allows mineral prospecting under an individual HPA, is the least burdensome while affording adequate protection to fish life. If the Commission does not agree with staff that it selected the least burdensome alternative, the department will need to initiate new rulemaking.

Small Business Economic Impact

The court found that the 2014 rule-making file did not contain a record of an explicit vote by the Commission as to whether the rule changes would create costs for businesses in the prospecting industry. Following the issuance of the Court's letter opinion, department staff reviewed the analysis completed in 2014, and conducted another analysis specific to mineral prospecting businesses. Staff designed the analysis to identify as many of the mineral prospecting businesses in Washington as possible, and attempted to interview each one to determine the impact to that business from the 2014 mineral prospecting rule changes – particularly the changes to work windows in the Nooksack, or Suiattle Rivers.

Staff found no evidence to suggest the rule will impose more than minor costs on businesses in the metal ore mining industry that are regulated by the hydraulic code. Therefore, a SBEIS is not required under RCW 19.85. If the Commission does not agree with staff that the rule does not impose more than minor costs, it must prepare a SBEIS by December 31, 2017.

Communications Plan:

The department will inform the court and petitioners that the Commission has complied with the agreed order.