



Washington
Department of
**FISH and
WILDLIFE**

**2018 Hydraulic Code Rule Amendments
WAC Sections 220-660-050
220-660-300
220-660-460
220-660-470**

Final Regulatory Analyses

**Final Cost-Benefit Analysis
Least Burdensome Alternative Analysis
Regulatory Fairness Act Compliance
Administrative Procedure Act Determinations**

Washington Department of Fish and Wildlife
Habitat Program
Protection Division
Olympia, Washington

April 13, 2018

Mission
of the
Washington Department of Fish and Wildlife

*To preserve, protect and perpetuate fish, wildlife, and ecosystems
while providing sustainable fish and wildlife
recreational and commercial opportunities.*

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Executive Summary

This report presents determinations made by Washington Department of Fish and Wildlife (WDFW) as required in RCW 34.05.328 and Chapter RCW 19.85 RCW relating to rule making for Significant Legislative Rules and compliance with the Regulatory Fairness Act.

The Hydraulic Code, chapter 77.55 RCW, is intended to ensure that construction or performance of work that will use, divert, obstruct or change the natural bed or flow of state waters adequately protects fish life. WDFW is responsible to promulgate rules to implement the statute. WDFW maintains Hydraulic Code Rules that are consistent with the statute, provide an administrative framework under which to implement the statute, and provide information about the effects of hydraulic projects on fish life and the ways in which projects can be adjusted to protect fish life.

WDFW's primary objective for initiating rule making at this time is to adopt an emergency rule (WSR 17-22-013) as a permanent rule, modifying authorized work times under WAC 220-660-300(7) for the Sultan River. Other objectives include amendments to make the rules consistent with statute regarding the sunset of application fees; applying new science to authorized work times in the Similkameen and Sultan Rivers; and other administrative and housekeeping amendments that improve transparency, accuracy, and clarity but do not change the effect of the rules.

The amendment proposals are detailed in Section 1, and summarized by analysis group here:

GROUP	GROUP TITLE	INCLUDES CHANGES THAT...
A	Amendments relating to HPA procedures	Justify expedited application processing; criteria for revoking HPAs
B	Amendments relating to Mineral Prospecting Authorized Work Times	Amend Authorized work times – Okanogan County, Similkameen River and Snohomish County, Sultan River
C	Amendments relating to fee sunset	Remove references to fee requirements
D	Other amendments implementing administrative changes	Make housekeeping changes, wording clarifications, or relate only to internal governmental operations

WDFW has determined that:

- Benefits outweigh costs for each proposed change (Section 2);
- The rules proposed for adoption are the least burdensome alternatives (Section 3); and
- There are no small businesses in Washington that are impacted by the proposed changes, so no Small Business Economic Impact Statement is required (Section 4).
- Other determinations required for Significant Legislative Rules are presented in Appendix A.

Consequences of not adopting the rule

The consequences of not adopting these rule changes are summarized below, and detailed in Table 7.

- Group A: Processing HPA applications is not improved and the ability to transfer HPAs is not reinstated. Accountability and transparency are not improved.
- Group B: Harm to fish life will occur in the Sultan because emergency rules to reduce the authorized work times will not be renewed. Loss of opportunity for miners in the Similkameen because the additional work time would not be adopted.
- Group C: Rules relating to application fees will remain in the WAC, although the fee has expired per statute. This causes confusion and reduces efficiency.
- Group D: Not adopting these minor housekeeping changes would perpetuate confusion about requirements, possibly to the detriment of fish life.

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Section 1 Background and Introduction

1.1 Introduction

This report presents Washington Department of Fish and Wildlife (WDFW) analyses and determinations required under Chapters 34.05 and 19.85 Revised Code of Washington (RCW) for proposed amendments to Hydraulic Code Rules in Chapter 220-660 Washington Administrative Code (WAC).

Rules promulgated to implement Chapter 77.55 RCW are identified by the Legislature as Significant Legislative Rules.

WDFW promulgates Hydraulic Code Rules to implement Chapter 77.55 RCW entitled *Construction Projects in State Waters* and also known as the *Hydraulic Code*.

Rules developed to implement Chapter 77.55 RCW are identified in section 34.05.328 of the Administrative Procedure Act (APA) as Significant Legislative Rules.

The Washington Legislature passed the Regulatory Reform Act of 1995 to help ensure that policies established by the Legislature for the protection of public health and safety and the preservation of Washington's extraordinary natural environment are clearly understood, fairly applied, and uniformly enforced. The Regulatory Reform Act contributes to meeting these goals by instituting measures whereby agencies adopt rules that are justified, reasonable, and truly in the public interest. Agencies demonstrate this by reporting on the rigor and deliberation with which rules are evaluated before they are proposed for adoption. What follows are WDFW's analyses and determinations.

The Regulatory Reform Act helps rules ensure that policies are... clearly understood, fairly applied, and uniformly enforced

1.2 Document Organization

Section 1 of the report (this section) includes background and an introduction to the 2018 HPA Rule Change Proposals as well as provisions of the APA and other statutory requirements for rule making.

RCW 34.05.328(1)(d) requires WDFW to evaluate rule proposals to “*determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the law being implemented.*” Section 2 describes that analysis and determination.

RCW 34.05.328(1)(e) requires WDFW to “*determine, after considering alternative versions of the rule...that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives*” of the governing and authorizing statutes [RCW 34.05.328(1)(d)]. Section 3 of this document discusses those determinations.

The Regulatory Fairness Act Chapter 19.85 RCW, requires state agencies to evaluate whether proposed rules impose disproportionate impacts between small and large businesses. If the proposals cause disproportionate costs to small businesses, a Small Business Economic Impact

Statement is required. Section 4 discusses how WDFW complied with the Regulatory Fairness Act.

Finally, APA provisions for Significant Legislative Rules require WDFW to make several other determinations [RCW 34.05.328(1)(a)-(c) and (f)-(h)]. Appendix A documents these determinations.

WDFW's conclusions are based on the best available information as it existed on July 1, 2017 unless otherwise noted.

1.3 Background

1.3.1 Purpose of the Hydraulic Code

The state Legislature gave WDFW the responsibility to preserve, protect, and perpetuate all fish and shellfish resources of the state. To help achieve that goal, the Legislature passed a state law in 1943 called *Protection of Fish Life*. The Legislature has amended the law (now recorded as [Chapter 77.55 RCW](#)) since it was originally enacted; however, the basic authority has been retained. Now titled *Construction projects in state waters*, the entire text of the statute can be found at: <http://app.leg.wa.gov/RCW/default.aspx?cite=77.55> .

[RCW 77.55.021](#)(1) states

“...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 from the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.”

[RCW 77.55.011](#)(11) defines a “hydraulic project” as

“the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwater of the state.”

WDFW issues a construction permit called a Hydraulic Project Approval (HPA). The sole purpose of the HPA is to protect fish life from construction and other work in or near the water. The HPA program requires protection for all fish life, which makes it broader in scope than federal Endangered Species Act (ESA; 16 U.S.C. § 1531 et seq.) authorities and narrower in scope than local land use regulations. HPAs are also site-specific, meaning that provisions are tailored to the species and site conditions of each particular project. The HPA contains conditions that a permittee must follow in order to mitigate¹ impacts to fish life caused by the project. WDFW cannot unreasonably withhold or unreasonably condition the HPA [[RCW 77.55.021](#)(7)(a)], nor can WDFW impose conditions that optimize fish life [[RCW 77.55.231](#)(1)]. Chapter 77.55.231 paragraph 1 clarifies HPA authority with respect to conditioning a permit as

¹ “Mitigation” is defined in WAC 220-660-030(100) to mean sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts to fish life or habitat that supports fish life.

follows:

“Conditions imposed upon a permit must be reasonably related to the project. The permit conditions must ensure that the project provides proper protection for fish life, but the department may not impose conditions that attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project.”

This statute is especially important in emphasizing that the HPA authority is a protection authority, not a restoration or recovery authority.

The HPA is a protection authority, not a restoration or recovery authority.

1.3.2 Purpose of the Hydraulic Code Rules

State statutes give state agencies the authority to issue regulations (WACs) to administer state laws. [Chapter 220-660 WAC - Hydraulic Code Rules](#) - establishes regulations for administration of the permit program. The Hydraulic Code Rules set forth procedures for obtaining an HPA, define a complete application, and outline steps for HPA appeals and civil compliance. This WAC chapter also incorporates criteria generally used by WDFW to review and condition hydraulic projects to protect fish life.

1.3.3 Specific Objectives for this Rule Making

WDFW’s primary objective for initiating rule making at this time is to adopt an emergency rule (WSR 17-14-079, WSR 17-22-013) as a permanent rule, modifying authorized work times under WAC 220-660-300(7) for the Sultan River.

Other objectives WDFW has identified for this rule making activity include:

- Provide consistency with Chapter 77.55 RCW regarding to the curtailment of application fees (WAC 220-660-050);
- Ensure Authorized Work Times in WAC 220-660-300(7) for the Similkameen and Sultan Rivers are based on the best available science;
- Update WDFW’s mailing address published in WACs 220-660-460 and -470; and
- Make other changes to sections -050 and -300 that clarify language or accommodate administrative changes without changing the intent of the rules.

1.3.4 History of Rule Making

In November 2014, the Washington Fish and Wildlife Commission adopted a comprehensive update of the state's Hydraulic Code Rules. The most recent rule updates before 2014 had occurred in 1994, 1998, and 2009.

Rules regulating mineral prospecting activities under authority of RCW 77.55.091 were adopted in 1998 and subsequently amended in 2009. In 2006, the Fish and Wildlife Commission directed staff to conduct a stakeholder process that would lead to rule changes improving mineral prospecting provisions. A workgroup comprising seventeen individuals from the prospecting community, federal and state agencies, tribes, and environmental interests met between January 2007 and March 2008 and negotiated new proposed rules that implemented authorized mineral prospecting work times for individual water bodies to times of the year

when salmonids aren't spawning and incubating. Following rule adoption by the Commission, WDFW published a new Gold and Fish pamphlet for prospectors' use beginning in 2009.

The purposes of the 2014 rule changes were to update the Hydraulic Code Rule provisions to respond to statutory changes, integrate current fish science and design technology, and improve procedural and administrative requirements. The 2014 rule change represented a significant reorganization for all the rule information formerly residing in Chapter 220-110 WAC, resulting in creation of a new rule section - Chapter 220-660 WAC.²

Almost all of the information in the former 220-110 WAC was reorganized, but not all information was substantively changed. Because the mineral prospecting rule section had been recently reviewed and updated (2009), there were no substantive changes to most of that section. The 2014 changes consolidated four WAC sections containing mineral prospecting rules into one section and added a provision to allow mineral prospecting on ocean beaches under the Gold and Fish pamphlet. Substantive changes also occurred for authorized work times in a few basins.

1.4 Summary of 2018 HPA Rule Change Proposals and Reasons for the Changes

Table 1 presents a summary of 2018 Hydraulic Code Rule Change Proposals (HPA Rule Change Proposals). The table presents changes in order by WAC number, and includes the title of the rules (from Chapter 220-660 WAC) for which changes are proposed, descriptions of the proposed changes, and the reasons for the changes.

Table 1 WDFW 2018 HPA Rule Change Proposals sorted by section number

SECTION (SUBSECTION)	CHANGE	REASON FOR THE CHANGE
050 PROCEDURES - HPA		
050 (9) How to get an HPA (a) pamphlet	Adds language that a person can <u>download and save or print</u> pamphlet HPA from the WDFW web site.	Allows digital versions of pamphlets as valid copies on the work site. WDFW has made a PDF version of each pamphlet available for years. This change seeks to clarify that a digital version of a pamphlet on the project site is as acceptable as a printed version.
050 (9) How to get an HPA (b) emergency HPA	Specifies instructions for contacting WDFW after business hours and for times when biologists can't be contacted.	Clarifies how to contact a habitat biologist or the HPA program to receive an emergency HPA.

² A summary of changes proposed in the 2014 rule making activity is provided on Table 2-6 of the Final Programmatic Environmental Impact Statement for 2014 Hydraulic Code Rule Changes.

SECTION (SUBSECTION)	CHANGE	REASON FOR THE CHANGE
050 (9) How to get an HPA (c) How to get a standard, expedited, or chronic danger HPA (iii) complete application package (A) application form and required attachments	Accepts copy of easement or signature of an easement holder in lieu of landowner signature.	The intent is to allow a copy of an easement to serve in place of a landowner signature if that is easier for the applicant. WDFW consulted with commenters from utility companies to modify language for this provision in the adopted rule to clarify that an easement holder can sign in lieu of the property owner.
050(9)(c)(iii) (G) Payment of application fee required; and (H) Seeking approval under farm and agricultural land fee exemption	These two subsections are deleted, removing reference to payment of application fee to complete an application.	Although the fee has been curtailed per statute ³ , deleting these WAC sections eliminates applicant confusion about paying fees that are no longer authorized. Additional changes regarding fees occur later in this section.
050 (9)(c)(iii)(New subsection G)	Proposed new language: <u>(G) For an expedited application, an explanation of why normal processing would result in significant hardship for the applicant or unacceptable environmental damage</u>	WDFW needs a brief statement from applicants about why normal processing would result in significant hardship to the applicant or unacceptable environmental damage. This new requirement will reduce the pre-review time and will result in quicker determination that an application is complete (and therefore ready for habitat biologist review).
050(10) Incomplete applications (c) closing incomplete applications	Revises the time period after which WDFW can close inactive permits. Current period of inactivity is 6 months; staff and applicants asked to expand that to 12 months. This change also allows applicants to postpone closure for an additional 12 months (for a total of 24 months) before the application is closed.	WDFW proposes an amendment extending this period to 12 months to enable applicants more time to resolve application issues, with the possibility of a single 12-month extension, if needed, after which the application will be closed. Read on for additional changes that implement this solution.
050 (11) fee refund	Removes paragraph/subsection (11) and promotes subsection (12) (application review period) to (11)	Striking provisions for refund of an application fee. Necessary for consistency with statute.

³ From July 2012 through June 2017, a \$150 application fee was charged for each new application and major project modification. A few project types including mineral prospecting were exempt from this fee. The fee provisions ended effective July 1, 2017 under RCW 77.55.321.

SECTION (SUBSECTION)	CHANGE	REASON FOR THE CHANGE
050 (12 11) new subsection (c)	Requires the habitat biologist to place written documentation into the application record within three days of issuing WDFW-declared emergency, expedited, and imminent danger written HPAs.	By issuing the HPA, a habitat biologist is implicitly acknowledging an emergency, imminent danger, or request for expedited processing. This change requires a habitat biologist to make that determination explicitly and include it in the permit record. Documentation must justify the reasons for declaring an imminent danger, applicant hardship, or immediate threat to public safety or environmental damage.
050 (13 12) Suspending the Review Period (c) closing an application delayed for processing	Revises the time period after which WDFW can close inactive permits. Current period of inactivity is 6 months; staff and applicants asked to expand that to 12 months. This change also allows applicants to postpone closure for an additional 12 months (for a total of 24 months) before the application is closed.	Continuation of changes needed to implement a longer elapsed time period for inactive applications before WDFW can close the application. This subsection says more about the process WDFW must follow to close an application, and clarifies that the applicant can request up to an additional 12 months before WDFW closes the application.
050 (16 15) Requesting a time extension, renewal, modification or transfer(a)(c)(e)and(f)	Change allows the transfer an HPA to a new permittee and provides clarity for conditions for transfer.	New provision provides benefits to entities wishing to transfer a permit from one project manager to another. Currently, WDFW requires a new application to transfer a project from one project manager to another.
050 (16 15) Time extension etc. (d) pertaining to fees	Remove language pertaining to fees for HPA modifications	Consistency with statute.
050 (17 16) fee for modifications (c) modifications initiated by WDFW	Remove language pertaining to fees for HPA modifications	Consistency with statute.
050 (17) requesting a transfer (section deleted)	Subsection (17) prohibiting transfers is deleted.	Striking this section restores the ability to transfer a permit to a new permittee.
050 (17) New Subsection: Revoking an HPA	Adds conditions under which WDFW can revoke an HPA	This new subsection provides transparency on the conditions under which WDFW can revoke an HPA as well as the process for notifying the permittee.

SECTION (SUBSECTION)	CHANGE	REASON FOR THE CHANGE
300 MINERAL PROSPECTING		
300 (3) General requirements (b) Individual HPA application	Change reference from -060 to -050	Corrects a typo in the 2014 adopted rules so that the rule is referencing the correct WAC section.
300 (4) Mineral prospecting in freshwater without timing restrictions (g) Processing aggregate (xi) habitat improvement structures	Add word “fish” to clarify which habitat improvement structures may not be disturbed	Clarification for consistency with the term “fish habitat improvement structure” currently defined in WAC 220-660-030. Will avoid confusion for permittees when trying to identify habitat improvement structures to avoid.
300 (5) Mineral prospecting in freshwater without timing restrictions (k) habitat improvement structures	Add word “fish” to clarify which habitat improvement structures may not be disturbed	[Same as above]
300 (5) Mineral prospecting in freshwater without timing restrictions (p) excavate...toe of the slope	Replace Figure 8 caption with correct version	Will correct an inadvertent error and fully describe the subject matter for Figure 8 that shows permitted and prohibited excavation site locations. Reduces the likelihood that a permittee will excavate in a prohibited location.
300 (6) Ocean beach prospecting (j) relating to disturbance of large woody material or jams	Add word “embedded” to clarify that (for ocean beach prospecting) non-embedded large wood can be moved, but embedded large wood can’t be cut, disturbed, or moved.	Clarifies which large wood must be left undisturbed; reduces confusion about the type of large wood that is most ecologically valuable to be left undisturbed.
300 (7) authorized work times	Change “Negro Creek” to “Etienne Creek” in Peshastin	USGS changed the name of this creek and “Etienne” is now the more common reference locally. This change will make it easier for prospectors to identify the stream on official maps.

SECTION (SUBSECTION)	CHANGE	REASON FOR THE CHANGE	
300 (7) authorized work times – Okanogan County, Similkameen River	Split a section of the Similkameen River into two new sections with differing authorized work times	<p>Recent surveys in the Similkameen River between Enloe Dam and Palmer Creek have shown there is no rainbow trout spawning habitat in this section. Mountain whitefish have emerged by late May in this section in most years. This means that the authorized work times can be extended.</p> <p>From Palmer Creek to the Canadian border, there is better habitat for rainbow trout spawning so WDFW is retaining the current authorized work time in this new section of the Similkameen.</p>	
	STREAM SECTION	CURRENT WORK WINDOW	PROPOSED WORK WINDOW
	Similkameen River (49.0325) - Upstream of Enloe Dam <u>to Palmer Creek</u>	July 1 – October 31	<u>June 1 – October 31</u>
	<u>Similkameen River upstream of Palmer Creek</u>	na	<u>July 1 – October 31</u>
300 (7) authorized work times – Snohomish County, Sultan River	Change Sultan River authorized work times	<p>Anadromous fish passage has been opened up in a section of the Sultan River upstream of the City of Everett diversion dam. WDFW proposed new work windows because anadromous fish are actively using the newly-opened reach for spawning and incubation. Data on spawn timing for the species using these sections of the Sultan suggest that authorized work times for the lowermost river segment can be expanded to match times for the new segment from the diversion dam to Culmback Dam. This change also splits the section from the diversion dam to Elk Creek into two sections. Change is consistent with emergency rules WSR 17-14-079 and WSR 17-22-013 and associated spawn timing data.</p>	
	STREAM SECTION	CURRENT WORK WINDOW	PROPOSED WORK WINDOW
	Sultan River (07.0881) Mouth to Diversion Dam at river mile 9.4	August 1 – August 15	<u>August 1 - August 31</u>
	Sultan River (07.0881) - Diversion Dam to Elk Creek <u>anadromous fish blockage at river mile 15.7 (0.7 miles downstream of Culmback Dam)</u>	July 16 – February 28	<u>August 1 - August 31</u>

SECTION (SUBSECTION)	CHANGE	REASON FOR THE CHANGE	
	<u>Sultan River(07.0881) - From anadromous fish blockage at river mile 15.7 (0.7 miles downstream of Culmback Dam) to Elk Creek</u>	na	<u>July 16 - February 28</u>
460-470 APPEALS			
460 Informal Appeal (5) and 470 Formal Appeal (6)	Change address to HPA PO box.	WDFW recently changed official mailing address for headquarters. This rule change will ensure that appellants submit requests to correct mailing address and that WDFW will receive these requests in a timely fashion.	

1.5 Grouping Rules for Analysis

WDFW evaluated these twenty-four subsections containing 2018 HPA Rule Change Proposals and divided them into groups having similar effects (Table 2). WDFW also evaluated the groups to determine which require additional analysis and documentation as Significant Legislative Rules and which will also be analyzed under the Regulatory Fairness Act. APA section 34.05.328 RCW specifies rules developed to implement Chapter 77.55 RCW as Significant Legislative Rules. Significant Legislative Rules generally include:

- Rules that adopt substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction [RCW 34.05.328(5)(c)(iii)(A)];
- Rules that establish, alter, or revoke any qualification or standard for the issuance, suspension, or revocation of a license or permit [RCW 34.05.328(5)(c)(iii)(B)]; or
- Rules that adopt a new policy or regulatory program or that make significant amendments to a policy or regulatory program [RCW 34.05.328(5)(c)(iii)(C)].

Rules under the following categories are excluded from the analysis requirements for Significant Legislative Rules:

- Rules pertaining only to internal governmental operations [RCW 34.05.328(5)(b)(ii)⁴],
- Rules implementing statutes without material change [RCW 34.05.328(5)(b)(iii)],
- Rule correcting typographical errors, making address or name changes, or that clarify the language of a rule without changing its effect [RCW 34.05.328(5)(b)(iv)]; and
- Procedural rules containing only process requirements for making application to an agency for a license or permit [RCW 34.05.328(5)(c)(i)(B)].

2018 HPA Rule Change Proposal Groups A and B include rule change proposals relating to HPA

⁴ RCW 34.05.328(5)(b)(i) excepts emergency rules from evaluation as Significant Legislative Rules; this subsection does not apply to the current rule proposal.

procedures. These changes add burden to the applicant, add requirements to the action of obtaining or retaining a permit, and change authorized work times for mineral prospecting in the Similkameen and Sultan Rivers. Proposal Groups C and D are exempt from the Significant Legislative Rules analysis. The Group C rule changes reflect the expiration of the fees; these changes are necessary for consistency with statutes. Group D comprises regulatory changes that are administrative in nature and do not change the intent or effect of the rules.

These groupings make it easier for WDFW to present the regulatory analyses.

Table 2 WDFW 2018 HPA Rule Change Proposal groups

GROUP	GROUP TITLE	SIGNIFICANCE	RULE SECTION
A	Rule change proposals relating to HPA procedures	Additional application requirement	050 (9)(c)(iii)(New subsection G) (justify expedited processing)
		Revoke HPA	050 (17) New Subsection: Revoking an HPA
B	Rule change proposals relating to Mineral Prospecting Authorized Work Times	Similkameen Authorized Work Times	300 (7) authorized work times – Okanogan County, Similkameen River
		Sultan Authorized Work Times	300 (7) authorized work times – Snohomish County, Sultan River
C	Rule change proposals relating to fee sunset	Implement statute (fee-related changes)	050(9)(c)(iii) (G) Payment of application fee required; and (H) Seeking approval under farm and agricultural land fee exemption 050 (11) fee refund 050 (16 15) Time extension etc. (d) pertaining to fees 050 (17 16) fee for modifications (c) modifications initiated by WDFW
D	Other rule change proposals implementing administrative changes	Rules relating only to internal governmental operations	050 (12 11) new subsection (c) (written documentation)
		Transfer HPA	050 (16 15) Requesting a time extension, renewal, modification or transfer(a)(c)(e) and (f) 050 (17) requesting a transfer (section deleted)
		Rules that only correct typographical errors	300 (3) General requirements (b) Individual HPA application 300 (5) Mineral prospecting in freshwater without timing restrictions (p) excavate...toe of the slope [correct figure caption]

GROUP	GROUP TITLE	SIGNIFICANCE	RULE SECTION
		Rules that make address or name changes	300 (7) authorized work times – Chelan County – Negro Etienne Creek 460 Informal Appeal (5) and 470 Formal Appeal (6)
		Rules that clarify the language of a rule without changing its effect.	050 (9) How to get an HPA (a) pamphlet [electronic OK] 050 (9) How to get an HPA (b) emergency HPA [clarify contact instructions] 050(10) Incomplete applications (c) closing incomplete applications [extend to 12 months] 050 (13 -12) Suspending the Review Period (c) closing an application delayed for processing 300 (4) Mineral prospecting in freshwater without timing restrictions (g) Processing aggregate (xi) [fish] habitat improvement structures 300 (5) Mineral prospecting in freshwater without timing restrictions (k) [fish] habitat improvement structures 300 (6) Ocean beach prospecting (j) relating to disturbance of [embedded] large woody material or jams 050 (9) How to get an HPA (c) How to get a standard, expedited, or chronic danger HPA (iii) complete application package(A) application form and required attachments [easement OK in lieu of landowner signature]

Section 2 Cost-Benefit Analysis and Conclusions

2.1 Introduction

WDFW receives about 2,300 HPA applications statewide every year. About 15 percent of these are for water crossing structures (e.g., culverts or bridges), 14 percent are for overwater structures (e.g., docks), 16 percent are for freshwater or marine bank protection, and four percent are for mineral prospecting (Figure 1). About seven percent of applications are for Emergency HPAs, on average, and seven percent are for Expedited Processing. Seventeen percent of all applications are not issued as individual HPA permits because the applications are withdrawn or denied.

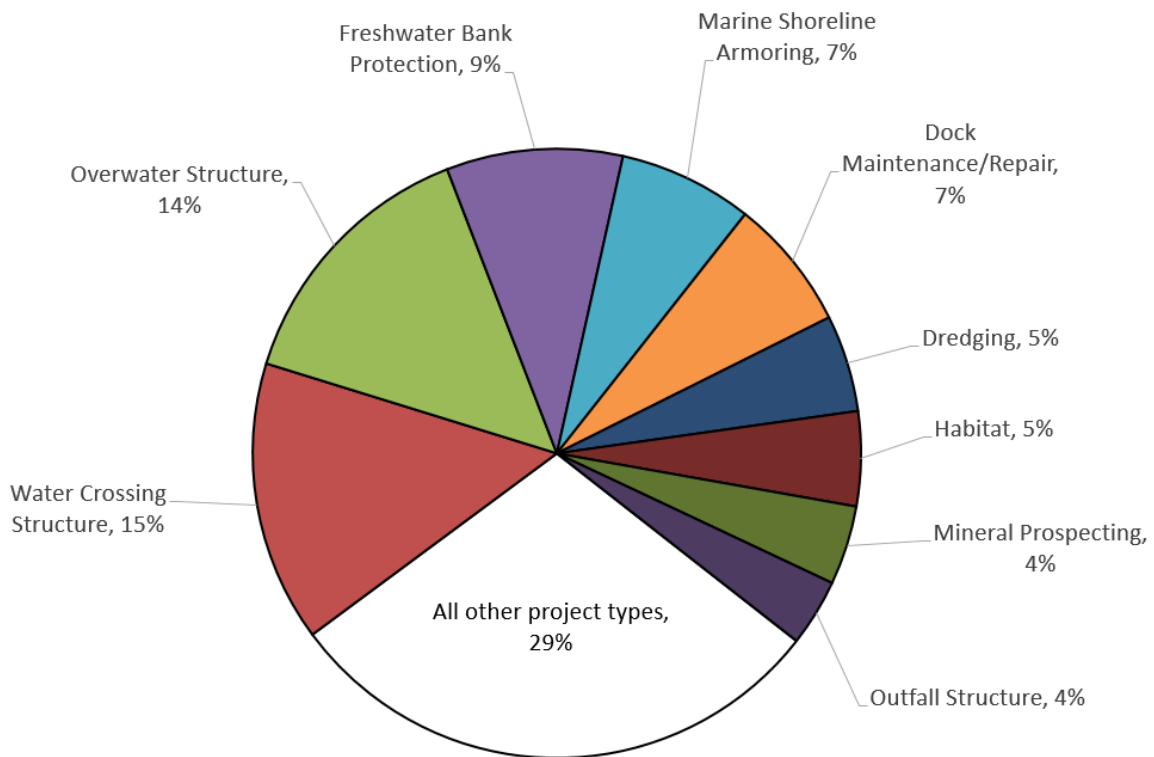


Figure 1 Average Percentage of HPA Applications by Project Type

Costs and benefits of Hydraulic Code Rules can be characterized generally as shown on Table 3. It is difficult to quantify costs or benefits for some changes because they are incrementally small or inherently qualitative in nature (e.g. “opportunity”). Some changes can be quantified to a certain extent; for example, changes to authorized work times for mineral prospecting allow us to quantify prospecting time in number of days.

Table 3 Examples of costs and benefits for changes to Hydraulic Code Rules

COSTS	BENEFITS
Losses to fish production	Prevent losses of fish production and environmental productivity
Losses to business revenue	Increased business revenue
Increased time to complete an application	Reduced application costs
Costs of lost environmental productivity	Reduced construction costs
Less time available to complete the project	More time to complete the project
Lost recreational opportunity	Increased recreational opportunity
Confusing rules = poor compliance/projects that don't adequately protect fish life	Improved regulatory clarity = improved compliance /projects that adequately protect fish life

The baseline for this cost-benefit analysis is the HPA program and rules as they existed on July 1, 2017. Changes proposed for this rule making activity will be compared with permanent rules as they existed on that date.

2.2 People Impacted by Rule Group

Several categories of people may be potentially affected by the 2018 HPA Rule Change Proposals (Table 4).

Table 4 People impacted by the WDFW 2018 HPA Rule Change Proposals

GROUP	DESCRIPTION	POPULATION IMPACTED	NUMBER IMPACTED
A	Significant Legislative Rules related to HPA procedures	Persons applying for expedited permits Persons whose HPA would be revoked	About 160 applications per year ⁵ About 5 per year ⁶
B	Significant Legislative Rules for Mineral Prospecting Authorized Work Times	Mineral prospectors in the Similkameen River upstream of Enloe Dam	About 40 miners ⁷
		Mineral Prospectors in the Sultan River between the diversion dam and the anadromous fish blockage at river mile 15.7	About 25 miners ⁸
C	Other rules relating to statutory changes (fee sunset)	All persons who were eligible to pay the HPA application fee	Less than 2,300 applicants per year because some HPA types were exempt from fees
D	Other rules implementing administrative changes	All persons applying for an HPA People requesting HPA transfers Mineral prospectors statewide	About 2,300 permits per year About 15 transfers per year ⁹ About 1,140 active miners ⁵

⁵ T. Scott Analysis of HPA applications (December 2017)

⁶ Pers. communication Pat Chapman, November 28, 2017.

⁷ Estimates provided by Sean Wheeler and Scott Brown in October and November 2017.

⁸ Estimate discussed in section 2.3.2.3.

⁹ Currently prohibited, so baseline is estimated.

2.3 Costs and Benefits by Rule Group

Some of the 2018 HPA Rule Change Proposals impose new restrictions or expenditures of time or effort on prospective applicants, applicants, or permit holders. Groups A and B impose substantive changes or expenditures of time. Group C (deleting references to fees) does not directly affect applicants but could be confusing if not changed. Group D (administrative changes) are likely to benefit applicants and permittees.

The following subsections discuss costs and benefits by rule group. Each subsection includes the rationale for how the costs and benefits for specific elements were developed.

When costs to applicants are expected, WDFW is using a range of costs to reflect the range of types of people applying for HPAs. Assuming that an applicant or agent is compensated, WDFW estimates the cost for their time would range from \$20 per hour for a layperson to \$150 per hour for a skilled contractor or engineer. These figures are used throughout this analysis.

2.3.1 Group A – Rule change proposals related to HPA procedures

Group A for this proposed rule includes the new requirements that an applicant must meet in order to have a complete application. First is the new requirement that an applicant explain in their application why expedited processing prevents significant hardship or unacceptable environmental damage. Group A also includes the HPA Rule Change Proposal adding criteria for revoking an HPA.

2.3.1.1 Provide justification for expedited processing

The main impact to applicants in this group will be the added time it takes to provide a justification statement for expedited HPA processing. We estimate it will take an applicant about five minutes to explain in their application why normal processing will result in significant hardship or unacceptable environmental damage. Assuming that an applicant or agent is compensated, the cost per application would range from \$1.66 for five minutes at \$20 per hour to \$12.50 for five minutes at \$150 per hour. We process approximately 160 expedited HPAs annually so we estimate the total annual cost to be between \$266 and \$2,000 for those 160 expedited permits. Having this information available as part of a complete permit application saves WDFW permit review time, which means a permit might be issued sooner. There is also an intangible benefit of having that justification in the permit record for accountability and transparency.

2.3.1.2 Revoking a permit

Currently, a permit can be revoked under authority of Chapter 77.55 RCW. However, the permittee might not understand the criteria used to make that decision. The proposed rule informs permittees of the criteria before any situation occurs in which permit revocation is a possible outcome. The added transparency afforded by the proposed rule is a benefit to permittees. In some cases, if permittees know the criteria they can avoid situations that could lead to a revoked permit.

2.3.2 Group B – Rule change proposals for mineral prospecting authorized work times

It is difficult to estimate the economic loss from this proposal because WDFW does not have a precise count of prospecting activity under the Gold and Fish Pamphlet or the average amount of gold recovered by prospectors per day. This makes estimating the costs of this HPA Rule

Change Proposal especially challenging. The following subsections describe the assumptions we made in order to estimate costs shown on Table 6.

2.3.2.1 Common assumptions for these mineral prospecting analyses

WDFW used the spot price of gold¹⁰ per troy ounce as the basis for the analyses. We collected the spot price of gold on January 3rd, 2018, which was \$1,316 per troy ounce. For both analyses, we took the advice of sources in the mineral prospecting community¹¹ and assumed a daily yield of 3 grams or .0965 troy ounces per day. A prospector yielding .0965 troy ounces per day would make \$127 per day. Prospectors cite a cost of \$125 for each day of mineral prospecting activity (e.g., transportation, food, and fuel), so the average net income is \$2 per day.

Estimates for effects to prospectors from changes in authorized work times are based on the use of suction dredge equipment because this equipment would extract the highest amount of gold per day and therefore have the most to lose from loss of prospecting days.

2.3.2.2 Similkameen River authorized work times

At least twelve mineral prospectors work under individual HPA permits in the section of the Similkameen River affected by the 2018 HPA Rule Change Proposals. Sources in the mineral prospecting community estimated 40 participants might be affected by this change. We used the prospectors' estimate for this analysis.

The primary benefit of this HPA Rule Change Proposal to mineral prospectors is the increased opportunity to placer mine in the river section between Enloe Dam and Palmer Creek from June 1 to June 30. Opportunity gained in this section of the Similkameen River is 30 days in June. If we assume that prospectors are placer mining every day, then the increased benefit of an additional 30 days of mining in the Similkameen is 30 days multiplied by \$2 per day net income or \$60 per prospector for the added time. If the prospector only placer mines on weekend days, the additional time is 9 days and the net income is \$18 for the added time. Given this range of potential additional mineral prospecting days and a total of 40 prospectors in this section of the Similkameen River, then the net benefit to prospectors from the proposed one-month extension ranges between \$720 and \$2,400 per year.

2.3.2.3 Sultan River authorized work times

How many miners?

The HPA Rule Change Proposal affects a section of river that is six miles long and contains twenty-one claims. Thirteen of these claims are private, and eight are owned by the Washington Prospectors Mining Association (WPMA, a club that allows members to work on club-owned claims). WDFW has issued nineteen individual HPAs, to eighteen individual prospectors, most of whom use the WPMA claims. However, two of these permit holders will also prospect up to four private claims in the Diversion Dam-to-Culmback Dam reach and one individual owns two private claims in this area. For this analysis, we will assume eighteen individuals with HPAs plus one user for each of five of the private claims and two users on the sixth. Based on this information, we estimate that the proposed change in authorized work

¹⁰ The spot price of gold is the current price in the marketplace.

¹¹ Sean Wheeler, et al. November 21, 2017

time might affect 25 prospectors.

We basing our estimate of affected prospectors partly on the number of prospectors having individual HPAs even though, strictly speaking, these individual would not be affected by the rule change proposal. This is because individual HPAs provide customized work times relating to individual circumstances that might not be limited to the Gold and Fish work times. We made the decision to include these prospectors in the baseline for this analysis in order to represent the full breadth of placer mining activity in this area so that a complete depiction of the potential impacts from the proposed rule can be evaluated.

How frequently do they work?

The current rules contain authorized work times from July 16 through February 28 each year (228 days). The proposed new authorized work time is August 1-31 (31 days). The primary impact to mineral prospectors of the proposed new authorized work time is the lost opportunity to prospect in this section of the Sultan River from July 16-July 31 and from September 1 through February 28. WDFW assumes that most mineral prospecting in this area occurs between July 16 (opening of the current work window) and October 31 (after which weather, rainfall or snowfall, and high stream flows bar most mining activities). However, prospectors tell us that they previously mined this area every day of the July 16 through February 28 period. Using prospectors’ estimates, total opportunity lost in this section of the Sultan River is 197 days: From July 16 through July 31 (16 days) and from September 1 through February 28 (181 days) each year.

How much gold?

For this scenario, we acknowledge the Sultan River is a very productive gold area. We have accepted the prospector’s proposed average recovery amount of three grams (.0965 troy ounces) of gold per day.

Estimate of lost income for small scale mineral prospectors

If we assume 25 prospectors would have placer mined every day of the previous authorized work time and each recovered .0965 troy ounces of gold per day for 228 days, net prospector revenues would have been \$456 and the net revenue for all 25 prospectors in this area would have been \$11,400. Under the proposed 31-day work window, net revenues for individual prospectors would be \$62, and the net value of the gold recovered by 25 prospectors in this section would be \$1,550 per year. Assuming that 197 days of mining time is lost, the per-pro prospector net losses would be \$394 per year and the net losses for all prospectors would be \$9,850 per year (Table 5).

Table 5 Estimated net value of recovered gold in Sultan River

ELEMENT	VALUE	DESCRIPTION
Current 228 day work window	228 days	Jul 16 - Feb 28
Per prospector	\$456	per prospector per season
All prospectors	\$11,400	per area-season
Proposed/Emergency 31 day work window	31 days	August 1-31
Per prospector	\$62	per prospector per season

All prospectors	\$1,550	per area-season
Placer mining days lost per prospector	197 days lost	7/16-7/31 and 9/1-2/28
Per prospector for the whole season	-\$394	per prospector per season
All prospectors for the whole season	-\$9,850	Per area-season

These estimates are problematic for several reasons. First, access is extremely limited in this section of the Sultan River so participation is likely to be less frequent for many individuals. Second, gold that is not removed on a particular day is not lost, but remains to be collected on another day. Prospectors working on a claim have exclusive use of that area for gold mining for the life of that claim, so, theoretically, the same amount of gold will be collected whether it takes five, 50, or 500 days to gather it. Still, annual income over the short term would be reduced if fewer work days are available, and this represents a lost opportunity.

WDFW has no evidence that individuals or business entities make a living exclusively through mining in the affected section of the Sultan River. In addition, no prospectors or businesses have provided testimony, evidence, or public comment showing that WDFW is regulating individuals or entities who make their living conducting mineral prospecting.

Increased fish production in the Sultan

Chinook and coho salmon and steelhead now spawn in the newly-opened section of the Sultan River between the Diversion Dam and Culmback Dam whereas no anadromous salmonids used this section previously. Chinook salmon and steelhead in the Sultan River are listed under the federal Endangered Species Act. In 2016, (the first year passage was opened), two redds were documented in the section of the Sultan River upstream from the Diversion Dam. In 2017, 45 chinook redds and nine steelhead redds were counted through November 14th. Coho have also been observed spawning in this area, but there are no formal survey counts available for this species. Observations of coho fry indicate high numbers of spawners are using the area¹². These data indicate immediate colonization of this newly-opened stream section, with second-year numbers far higher than the first-year counts. However, pre- and post-passage comparisons have not yet been made, so an evaluation of the overall production attributable to the newly-opened section of the Sultan River is not yet available.

Based on numbers of wild chinook spawners in the Skagit River¹³ under good freshwater conditions (i.e. lower freshwater mortality), a spawning pair can produce 4,500 fertilized eggs, of which 990 smolts survive to migrate to saltwater, ten adults return to fisheries, and seven adults return to the river to spawn. Using these estimates for good freshwater conditions, 45 new redds could produce 315 additional fish returning to spawn. Under poor freshwater conditions (greater freshwater mortality), 4,500 eggs yield 135 smolts entering saltwater, with one adult returning to fisheries and to spawn. So, under poor freshwater survival in the Sultan River e.g., without these shortened authorized work times), only 45 fish would return to spawn from those 45 redds. This example is based on historical survival information in the Skagit River

¹² Preliminary survey data provided November 14, 2017, from Larry Lowe via Keith Binkley, both of Snohomish County P.U.D.

¹³ 1998 Skagit Freshwater Production Evaluation research funded by Seattle City Light; project ongoing and newer figures are likely available

(not the Snohomish system) but serves to illustrate how dramatic a difference freshwater conditions can make in the numbers of returning spawners.

The incremental value of each additional fish to population productivity and returning to fisheries is large and mainly qualitative. However, the cost to recover a stock is known. The estimated cost of the captive broodstock program to establish Redfish Lake sockeye salmon, listed as an endangered species in 1991, for FY 2014 to FY 2018 is approximately \$20,293,955 (i.e. approximately \$4.1 million annually). The total estimated cost of recovery actions for the ESA-listed Snake River Sockeye Salmon ESU over the next 25 years is projected to be about \$101,469,775¹⁴.

How can we quantify the economic value of 45 to 315 additional pairs of spawning salmon in the Sultan River? Under common circumstances, we might estimate the average weight of these fish, determine the average cost per pound at the fish market, and thus quantify the benefit of increasing the Sultan River fish run by this number of fish. Another approach might be to determine the value of expanded fishing opportunity in Puget Sound or Pacific Coastal fisheries attributable to the presence of each additional Sultan River fish. Such comparisons do not capture the full breadth of societal value for these fish beyond the local economic setting.

For this cost-benefit analysis, WDFW determines that benefits of protecting fish that are newly colonizing this section of the Sultan River prevail over costs to prospectors.

2.3.3 Group C – Rules referencing fees

It is not critical that WDFW update rules to remove references to the now-curtailed application fee. The fee is set in statute, and its absence in statute means there is no fee. The primary benefit of removing references to the fee in rule is to avoid confusion and misinterpretation of the rules. Because the primary reason to promulgate rules for implementing the Hydraulic Code is to provide transparency, it seems prudent and efficient to remove these references in Hydraulic Code Rules.

2.3.4 Group D - Other rules implementing administrative changes

“Other rules” includes administrative change proposals that correct typographic errors and make clarifying changes that do not change the effect of the rule. It also includes the proposed reinstatement of the ability to transfer a permit.

2.3.4.1 Digital copies of the Gold and Fish pamphlet allowed

The Gold and Fish Pamphlet is 42 pages in length. We estimate the cost of printing a black and white double-sided pamphlet at 4 cents per page is \$1.68. Assuming that 1,140 individuals can avoid this cost of printing a pamphlet each year, then \$1,915 is saved by those individuals.

2.3.4.2 Permit Transfers

To transfer an HPA to another person, current rules require the person receiving the transferred HPA to submit a complete application and go through the normal application review process. The 2018 HPA Rule Change Proposal allows a permittee to directly transfer an HPA to another person. We estimate that fifteen HPAs a year will be transferred. We estimate the rule change proposal will save a person two hours of time because they won't have to

¹⁴ June 2014 Snake River Sockeye Salmon Recovery Plan Executive Summary

resubmit the entire application. Assuming that an applicant or agent is compensated, the cost would range from \$40.00 (\$20.00 hourly) to \$300.00 (\$150.00 hourly) per application. We estimate the savings will be between \$640 and \$4,500 annually for the fifteen transferred permits. There would be an overall benefit to permit holders requesting to transfer a permit to another person because the time currently required to fill out a new application form to implement a transfer would be avoided in the future. WDFW determines that the benefits to permittee convenience exceed the costs of this action.

2.3.4.3 Geographic place names

The state Board of Geographic Names (Board of Natural Resources) changed Negro Creek’s name to Etienne Creek on May 15, 2009. The U.S. Board on Geographic Names (U.S. Geological Service) changed the name on May 27, 2009. Currently, GIS base maps in common use refer to this creek as “Etienne” so WDFW proposes to update the WAC with the new creek name.

ID:	1523606
Name:	Etienne Creek
Class:	Stream (Definitions)
History:	Named for Antoine Etienne, a freed slave who lived along the stream.
Description:	In Wenatchee National Forest, heads on the E slope of the Wenatchee Mountains, flows NE to enter Peshastin Creek at the N end of Windmill Point.
Citation:	U.S. Board on Geographic Names. Geographic Names Post Phase I Board/Staff Revisions. 01-Jan-2000. Board decisions referenced after Phase I data compilation or staff researched non-controversial names.

Figure 2 USGS Board of Geographic Names Entry for Etienne Creek, formerly known as Negro Creek

2.4 Costs and Benefits Summary

Analyses of costs and benefits are summarized on Table 6. This table includes the WAC citation, description of the element, the estimated costs to applicants for implementing the change, benefits to applicants and the public, and WDFW’s determination regarding whether the benefits outweigh the costs for that particular change. Note that estimates of costs to WDFW are largely excluded from the table because they are not relevant to the stakeholder perspective. When costs are more than minimal for WDFW, that notation is included.

Table 6 Costs and benefits for proposed rules by group

GROUP A				
WAC 220-660-	ELEMENT	COSTS	BENEFITS	DETERMINATION
050 (9)(c)(iii) G)	Justify expedited processing	Increased time to complete application would be between \$266 and \$2,000 for those 160 expedited permits annually	Reduces application review time; increases process transparency	Benefits outweigh costs
050 (17)	Revoking an HPA	No change	Increased process transparency	Benefits outweigh costs
GROUP B				
WAC 220-660-	ELEMENT	COSTS	BENEFITS	DETERMINATION
300 (7) Authorized Work Times	Okanogan County, Similkameen River	Costs to WDFW/prospectors for re-publishing /downloading new Gold & Fish pamphlet	Increases prospecting opportunity; benefits for all area prospectors is estimated between \$18 and \$720 annually	Benefits outweigh costs
	Snohomish County, Sultan River	Individual net losses of up to \$394 per year per miner and the net losses for all miners could be \$9,850 annually in this section of the Sultan river. Recovery costs for one stock total over \$4.1 million annually.	Increased steelhead, chinook, & coho salmon production in the Sultan River; In 2017, 45 chinook redds & 9 steelhead redds have been counted as of 11/14/2017.	Benefits outweigh costs

GROUP C				
WAC 220-660-	ELEMENT	COSTS	BENEFITS	DETERMINATION
050(9)(c)(iii) (G) application fee required; and (H) farm and agricultural land fee exemption 050 (11) fee refund 050 (16 15)(d) Time extension etc. pertaining to fees 050 (17 16) (c) fee for modifications	Removes reference to application fees	No cost	Reduces applicant confusion & uncertainty	Benefits outweigh costs
GROUP D				
WAC 220-660-	ELEMENT	COSTS	BENEFITS	DETERMINATION
050 (9)(a)	Allow digital pamphlet	No change	Saves \$1,915 in permittee costs; Simplifies compliance	Benefits outweigh costs
050 (9)(b)	Emergency contact clarifications	No change	Faster WDFW response time	Benefits outweigh costs
WAC 220-660-	ELEMENT	COSTS	BENEFITS	DETERMINATION
050 (9)(c)	Require site access permission forms for all sites	No change	Reduces application review time	Benefits outweigh costs
050(10)	Closing inactive applications after 12 months	No cost	Fewer applications have to be started over	Benefits outweigh costs
050 (12 11) (c)	WDFW must document emergency, expedited, imminent danger	More WDFW time during permit review to provide documentation	More complete permit records	Benefits outweigh costs
050 (16 15) (a)(c)(e) and(f) & 050(17)	Allowing HPA transfers	Costs in additional staff time to process transfers are excluded from this analysis	Reduces time to complete application; savings for 15 permit transfers would be between \$640 and \$4,500 annually	Benefits outweigh costs
300(3)	Typo: change reference from 060 to 050	No cost	Increased clarity and transparency	Benefits outweigh costs

WAC 220-660-	ELEMENT	COSTS	BENEFITS	DETERMINATION
300(4)(g) and (k)	Add word "fish" to properly identify fish habitat improvement structures	No cost	Improves clarity; increases compliance	Benefits outweigh costs
300 (5)(p)	Replace Figure 8 caption with correct version	No cost	Improves clarity; increases compliance	Benefits outweigh costs
300 (6)(j)	Add word "embedded"	No cost	Improves clarity; increases compliance	Benefits outweigh costs
300 (7)	Authorized work times – Chelan County Change "Negro" to "Etienne" Creek	Costs to WDFW/prospectors for re-publishing /downloading new Gold & Fish pamphlet	Improves clarity; increases compliance	Benefits outweigh costs
460 (5) & 470 (6)	Change address to HPA P.O. box	No costs	Shortened time to receive and respond to appeals	Benefits outweigh costs

2.5 Conclusions on Costs and Benefits of the 2018 HPA Rule Change Proposals

The APA asks agencies to consider aggregate costs and benefits of the proposed rule. Based on the quantified and qualitative costs and benefits likely to arise from the proposed rule, WDFW concludes that the probable benefits of the proposed rule are greater than their probable costs. The primary reasons for beneficial determinations are that the 2018 HPA Rule Change Proposals reduce impacts to fish life, improve accountability and transparency of administrative rules, and reduce confusion for applicants.

WDFW concludes ... that the probable benefits of the proposed rules are greater than their probable costs.

Section 3 Least Burdensome Alternative Analysis

3.1 Introduction

The Least Burdensome Alternative analysis is required for Significant Legislative Rules so that others can have a clear understanding of the agency's thinking when rule changes are proposed. The Significant Legislative Rules statute, RCW 34.05.328(1)(e), requires WDFW to "...[d]etermine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection." Subsections cited in the statute are:

- (a) *Clearly state in detail the general goals and specific objectives of the statute that the rule implements;*
- (b) *Determine that the rule is needed to achieve the general goals and specific objectives stated under (a) of this subsection, and analyze alternatives to rule making and the consequences of not adopting the rule;*
- (c) *Provide notification in the Notice of Proposed Rule Making under RCW 34.05.320 [i.e. the CR-102] that a preliminary cost-benefit analysis is available. The preliminary cost-benefit analysis must fulfill the requirements of the cost-benefit analysis under (d) of this subsection. If the agency files a supplemental notice under RCW 34.05.340, the supplemental notice must include notification that a revised preliminary cost-benefit analysis is available. A final cost-benefit analysis must be available when the rule is adopted under RCW 34.05.360;*
- (d) *Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented;*

In other words, to be able to propose and adopt the rule, WDFW is required to consider alternatives to rule making as well as to evaluate alternative versions

WDFW must show that we considered alternatives to rule making as well as alternative versions of the rule.

of the rule, and then to determine that the rule proposed for adoption is the least burdensome set of requirements that will achieve the goals and objectives of the authorizing statute(s).

3.2 Goals and Objectives of the Authorizing Statute and Rule

The goal of the Hydraulic Code is to ensure that hydraulic projects adequately protect fish life, and the Hydraulic Code Rules are promulgated to implement the statute. WDFW maintains rules that are consistent with the statute, provide an administrative framework for implementation that is transparent, easy for applicants to understand and use, and supports compliance with laws and rules; provide information to applicants about the effects of

hydraulic projects and the means for mitigating those effects; and provide common provisions that reflect the best science, technology, and construction practices related to the protection of fish life.

WDFW's primary objective for initiating rule making at this time is to adopt the emergency rule (WSR 17-20-109) modifying authorized work times under WAC 220-660-300 for the Sultan River as a permanent rule. Other objectives include amendments to rules to provide consistency with statute with respect to the curtailment of application fees; apply new science to authorized work times in the Similkameen River; and other administrative and housekeeping amendments that improve clarity but do not change the effect of the rules.

3.3 Alternatives

This rule making is limited in scope. WDFW focused on changes that are needed now to protect fish life, to update the science basis for rules, and to improve transparency, accuracy, and clarity. WDFW purposefully avoided proposing rule changes that require significant levels of stakeholder engagement because there has not been sufficient time since implementing the 2014 rule change to develop and discuss substantive rule improvements with stakeholders. Because of this, only 1) the proposed rule change, and 2) the current rule (no change) were considered.

3.4 Discussion of Alternatives

Alternative 1 – Proposed Rules

Alternative 1 comprises the 2018 HPA Rule Change Proposals as provided in this action. Updates that eliminate confusion about application fees are a priority for this rule making action. WDFW also identified several process and administrative rules having small changes that will improve the permit application process or clarity about the intent of the rules. The proposed rules for authorized work times in WAC 220-660-300(7) are the least burdensome alternative because they provide authorized work times within which spawning or incubating salmonids are least likely to be within Similkameen and Sultan River sections, and because the change continues to allow mineral prospecting work under the Gold and Fish pamphlet without need for individual HPA permits.

In the Hydraulic Code (RCW 77.55.091 small scale prospecting and mining rules), the Legislature directed WDFW to promulgate rules so that small scale prospecting could be conducted in Washington without the need for individual HPA permits. In its findings associated with this statute, the Legislature declares that small scale prospecting and mining be regulated in the least burdensome manner that is consistent with the state's fish management objectives and the federal endangered species act. WDFW concludes that the small scale prospecting rules in WAC 220-660-300, as amended by this rule making action, are the least burdensome to

Goal of the Statute:

Ensure that hydraulic projects adequately protect fish life.

General Objectives:

Consistency with statute;

Provide an administrative framework for implementation that is transparent, easy for applicants to understand and use, and supports compliance with laws and rules; and

Provide information to applicants about the effects of in-water construction projects and the means for mitigating those effects;

Provide common provisions that reflect the best science, technology, and construction practices related to the protection of fish life.

prospectors.

Alternative 2 – No Changes

Alternative 2 could place salmon and other fish species in the Sultan River at risk of harm if work occurred under the current rule. Without changes to the authorized work times in the Sultan River, small scale prospecting could occur at the same time that fish are spawning or eggs are incubating in the stream gravels. This could result in direct and indirect mortality of eggs and newly-hatched fish. Work in or near a stream can also change salmon migration and mating behavior, disturb fish such that they leave their nests, expose eggs and newly-hatched fish to predation, and cause physical injury or stress resulting in lower reproductive success or death.

Evaluation of Least Burdensome Alternative

Table 7 includes evaluations of each of the 2018 HPA Rule Change Proposals relative to the Least Burdensome Alternative requirements.

Table 7 Evaluation of Least Burdensome Alternative for 2018 HPA Rule Change Proposals

GROUP	WAC 220-600-	ELEMENT	ALT. 1 PROPOSED RULES	ALT. 2 NO CHANGES	LEAST BURDENSOME ALTERNATIVE
A	050 (9)(c)(iii) G)	Justify expedited processing	Improves accountability for expedited processing	Less accountability	Alt. 1
	050 (17)	Revoking an HPA	Criteria are transparent	No criteria in rule, so less transparency	Alt. 1
B	300 (7) Authorized Work Times	Okanogan County, Similkameen River	More work time	No change in work time	Alt. 1
		Snohomish County, Sultan River	Improved protection for fish life	Inadequate protection for fish life	Alt. 1
C	050(9)(c)(iii) (G) application fee required; and (H) farm and agricultural land fee exemption 050 (11) fee refund 050 (16 15)(d) Time extension etc. pertaining to fees 050 (17 16) (c) fee for modifications	Removes reference to application fees	Reduced confusion	Readers confused about applicability of fees	Alt. 1

GROUP	WAC 220-600-	ELEMENT	ALT. 1 PROPOSED RULES	ALT. 2 NO CHANGES	LEAST BURDENSOME ALTERNATIVE
D	050 (9)(a)	Allow digital pamphlet	Allow – reduces printing costs	Not allowed	Alt. 1
	050 (9)(b)	Emergency contact clarifications	Reduces time to contact	Confusion remains	Alt. 1
	050 (9)(c)	Require site access permission forms for all sites	Required	Not required, so pre-review takes longer	Alt. 1
	050(10)	Closing inactive applications after 12 months	More time before closed	Might be closed too soon; inefficiency	Alt. 1
	050 (12 11) (c)	WDFW must document emergency, expedited, imminent danger	Better accountability	Less accountability	Alt. 1
	050 (16 15) (a)(c)(e) and(f) & 050(17)	Allowing HPA transfers	Allowed, so saves application time	Not allowed; more time to complete application	Alt. 1
	300(3)	Typo: change reference from 060 to 050	Corrected	Confusion remains	Alt. 1
	300(4)(g) and (k)	Add word “fish” to properly identify fish habitat improvement structures	Reduced confusion	Confusion remains	Alt. 1
	300 (5)(p)	Replace Figure 8 caption with correct version	Reduced confusion	Confusion remains	Alt. 1
	300 (6)(j)	Add word “embedded”	Clarifies intent	Intent remains unclear	Alt. 1
	300 (7)	Authorized work times – Chelan County Change “Negro” to “Etienne” Creek	Aligned with state and federal place names inventory	Not aligned with state/federal rules and GIS layers	Alt. 1
	460 (5) & 470 (6)	Change address to HPA P.O. box	Mail appropriately directed	Mail misdirected	Alt. 1

3.5 Conclusion

When WDFW analyzed the 2018 HPA Rule Change Proposals, we considered goals and objectives of the authorizing statutes as well as objectives for this rule making activity. Throughout development of the Rule change proposals, and as part of pre-filing outreach, WDFW considered alternatives to rulemaking as well as alternative rule language for each element determined to require amendment. Elements that did not meet the specific objectives for this rule making activity or for which alternatives could be found, were placed on hold and not included in this package of rule change proposals. WDFW anticipates future rule change activities will occur until all the modifications identified as necessary can be brought through the rule making process. We think this is a more efficient and less burdensome approach than waiting to conduct an overhaul of all the Hydraulic Code Rules at once, as was necessary back in 2014.

After considering alternatives to the proposed rule's contents, as well as the goals and objectives of the authorizing statute, WDFW determined that the proposed rule represents the least-burdensome alternative of possible rule contents meeting these goals and objectives.

Section 4 Regulatory Fairness Act Compliance

The Legislature found that administrative rules adopted by state agencies can have a disproportionate impact on the state's small businesses because of the size of those businesses. The Legislature enacted the [Regulatory Fairness Act](#) with the intent of reducing the disproportionate impact of state administrative rules on small business ([Chapter 19.85 RCW](#)).

The two 2018 HPA Rule Change Proposals addressing authorized work times for mineral prospecting and placer mining projects [WAC 220-660-300(7)] could potentially impact a small business. WDFW reviewed the available information on small businesses in the metals mining industry and concluded that there are no small businesses affected by the 2018 HPA Rule Change Proposals; therefore, no small business economic impact statement is required under the Regulatory Fairness Act.

WDFW conducted research to 1) determine which industries would be required to comply with Hydraulic Code Rules, 2) discover what businesses exist in Washington in that industry, and 3) determine whether those businesses would be impacted by the rule. WDFW concludes that no small businesses are impacted by the rule change proposals.

A discussion of WDFW's research follows.

4.1 Rules in this Rule Making that are Subject to the Regulatory Fairness Act

WDFW has evaluated the 2018 HPA Rule Change Proposals summarized on Table 2 and concluded that only the authorized work time rule change topics [Group B rules from WAC 220-660-300(7)] are relevant for this Regulatory Fairness Act analysis.

The Regulatory Fairness Act does not apply to the adoption of rules described as follows:

RCW 34.05.310(4) This section does not apply to:

- (a) Emergency rules adopted under RCW [34.05.350](#);*
- (b) Rules relating only to internal governmental operations that are not subject to violation by a nongovernment party;*
- (c) Rules adopting or incorporating by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule;*
- (d) Rules that only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect;*
- (e) Rules the content of which is explicitly and specifically dictated by statute;*
- (f) Rules that set or adjust fees under the authority of RCW [19.02.075](#) or that set or adjust fees or rates pursuant to legislative standards, including fees set*

or adjusted under the authority of RCW [19.80.045](#); or

(g) Rules that adopt, amend, or repeal:

(i) A procedure, practice, or requirement relating to agency hearings; or

(ii) A filing or related process requirement for applying to an agency for a license or permit.

Provisions of the Regulatory Fairness Act do not apply to other changes proposed for how to get an HPA (WAC 220-660-050), conducting small scale prospecting (WAC 220-660-300), and addressing changes in the appeals rules (220-660-460 and -470). The Regulatory Fairness Act does not apply to Group A because these are process requirements for applying for a permit [RCW 34.05.310(4)(g)(ii)]. The Regulatory Fairness Act does not apply to Group C because it refers to fees [RCW 34.05.310(4)(f)]. Group D is excepted because rules in this group correct typographical errors, make address and name changes, clarify language of a rule without changing its effect, or relate to agency hearings [RCW 34.05.310(4)(d)].

Table 8 shows the 2018 HPA Rule Change Proposals WDFW evaluated for Regulatory Fairness.

Table 8 2018 HPA Rule Change Proposals for analysis under the Regulatory Fairness Act

GROUP	GROUP TITLE	SIGNIFICANCE	RULE SECTION
B	Rule change proposals relating to Mineral Prospecting Authorized Work Times	Similkameen Authorized Work Times	300 (7) authorized work times – Okanogan County, Similkameen River
		Sultan Authorized Work Times	300 (7) authorized work times – Snohomish County, Sultan River

4.2 Industries Required to Comply with the 2018 HPA Rule Change Proposals

The Regulatory Fairness Act defines a small business as:

"Small business" means any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that is owned and operated independently from all other businesses, and that has fifty or fewer employees.

An industry is defined as follows:

"Industry" means all of the businesses in this state in any one four-digit standard industrial classification as published by the United States department of commerce, or the North American industry classification system as published by the executive office of the president and the office of management and budget. However, if the use of a four-digit standard industrial classification or North American industry classification system would result in the release of data that would violate state confidentiality laws, "industry" means all businesses in a three-digit standard industrial classification or the North American industry classification system.

Agencies are directed to prepare a small business economic impact statement as follows:

In the adoption of a rule under chapter 34.05 RCW, an agency shall prepare a small business economic impact statement ... if the proposed rule will impose more than minor costs on businesses in an industry.

Analysis under the Regulatory Fairness Act considers costs to “businesses in an industry” in Washington State. This means that impacts, for this document, are not evaluated for non-profit or government agencies, even though those entities can be affected in the same manner as businesses.

WDFW assumed that businesses directly affected by WDFW regulation of mineral prospecting under WAC 220-660-300 fit under North American Industry Classification System (NAICS) code 2122 for metals mining (Figure 3). WDFW did not identify other NAICS codes that are regulated by Section 220-660-300 of the WDFW Hydraulic Code rules.

2122	Metal Ore Mining^T
21221	Iron Ore Mining ^T
212210	Iron Ore Mining
21222	Gold Ore and Silver Ore Mining ^T
212221	Gold Ore Mining
212222	Silver Ore Mining
21223	Copper, Nickel, Lead, and Zinc Mining ^T
212230	Copper, Nickel, Lead, and Zinc Mining
21229	Other Metal Ore Mining ^T
212291	Uranium-Radium-Vanadium Ore Mining
212299	All Other Metal Ore Mining

Figure 3 North American Industry Classifications (NAICS) for metals mining

4.3 Businesses Required to Comply with the 2018 HPA Rule Change Proposals

WDFW conducted research to determine whether the rule change proposals impact businesses in an industry, and whether any of those are small businesses. Agencies must first identify the businesses affected. Washington Department of Revenue maintains a database of businesses¹⁵ that are registered with them, so WDFW assumed that only registered businesses would be considered for a Regulatory Fairness Act analysis. WDFW next assumed that prospectors holding individual HPAs represent the overall pattern of prospectors, if not the total magnitude.

WDFW took four different approaches to searching for businesses that would be required to comply with the proposed rule.

- 1) Businesses directly affected by WDFW regulation of mineral prospecting fit under NAICS code 2122 for metals mining. We requested a list of businesses registered under code 2122 from the Department of Revenue. Records were received from Department of Revenue on May 31, 2017, with a list of nineteen businesses. The records request returned businesses in categories including corporations, limited liability companies or partnerships, and sole proprietorships. Five out-of-state businesses were excluded from further analysis because the Regulatory Fairness Act is targeting small businesses in Washington State.

¹⁵ Licensing: <http://www.dol.wa.gov/business/checkstatus.html?hcwp>
Revenue: <https://secure.dor.wa.gov/gteunauth/>

Because the list did not include contact phone numbers, we used Google and other common internet tools to research phone numbers for the businesses on the list. We obtained working phone numbers for five businesses using this method, and an email address for another. Telephone surveys were conducted on 6/1/2017 - 6/2/2017 to determine whether the businesses on the list are still engaged in mineral prospecting, whether they have 50 employees or less, and whether they are independent from other businesses owned by the same person or corporation.

Out of the fourteen businesses identified in June, we were able to discuss business status with five businesses. None of the five businesses contacted qualifies as a business affected by WDFW Hydraulic Code Rules. Four of the businesses are hard rock (terrestrial) mining companies that aren't regulated by the Hydraulic Code. A principal for a fifth company indicated that his business has been closed for several years, and he has not mined in Washington for "decades." Nine businesses remained unresolved from the June 2017 phone surveys.

- 2) In October 2017, WDFW conducted additional research, including online business searches (Department of Licensing; Office of the Secretary of State for corporations) and found several businesses with "prospecting" or "gold mining" in the business name. After eliminating "closed" or "inactive" businesses from these new lists, we cross-checked these businesses with the Department of Revenue business lookup tool¹⁶ to determine the NAICS codes registered for those businesses.

Most of the businesses among these results indicate NAICS activities that are distinct from gold mining or metals mining, such as education, retail, or machinery/equipment merchants or wholesalers. Only one "new" business name emerged under the NAICS code 2122.

- 3) In November, 2017, WDFW compiled our list of ten unresolved businesses (nine from step 1 and one from step 2) and sent registered letters to each. Those letters requested a return phone call or email if the business is affected by changes in authorized work times in the Similkameen or Sultan Rivers specifically.

All but one of the registered-letter responses were delivered to the intended recipients. The one returned was unable to be forwarded because no forwarding address was available. We received one phone call and one email letting us know that the business is not affected by the proposed changes in the Similkameen or Sultan Rivers. None of the other recipients responded to WDFW.

- 4) Finally, WDFW researched each person holding an individual mineral prospecting HPA for the Sultan or Similkameen Rivers using the Revenue business lookup tool to determine whether any businesses are owned by those individuals. The search turned up no active businesses for the 2122 NAICS code registered to the people holding these HPAs. One permittee lists a business name on his HPA, yet the industry code for that business does not match the code that is regulated by the Hydraulic Code. No other permittee in the

¹⁶ <http://apps.dor.wa.gov/BRD/default.aspx>

Sultan or Similkameen Rivers had gold mining businesses, though many had businesses of other types.

WDFW diligently pursued information that would link any small businesses with the rule change proposals. Because none were found, WDFW has concluded that no small businesses are impacted by the 2018 HPA Rule Change Proposals.

4.4 Conclusion - A Small Business Economic Impact Statement is Not Required

Based on research and analysis conducted pursuant to the Regulatory Fairness Act– Chapter 19.85 RCW – WDFW has preliminarily concluded that there are no small businesses registered with the state of Washington that are regulated under WAC 220-660-300(7). Therefore, these proposed rules do not apply to small businesses and WDFW is not required to prepare a small business economic impact statement according to RCW 19.85.025(4).

RCW 19.85.025 Application of chapter— Limited (4) This chapter does not apply to the adoption of a rule if an agency is able to demonstrate that the proposed rule does not affect small businesses.

WDFW reviewed the available information on small businesses in the metals mining industry and concluded there are no small businesses affected by the proposed rule changes; therefore, no small business economic impact statement is required under the Regulatory Fairness Act.

For Further Information

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Changes from the preliminary version of this document:

- 3/2/2018 Added summary of consequences of not adopting the proposed rule amendment.
- 3/2/2018 Added detail under Appendix A.2 relating to RCW 34.05.328(1)(g) and 1(h).
- 4/13/2018 Updated the detail in Table 1 to reflect changes made between the proposed and adopted versions of the rules.
Added information under Section 4 Regulatory Fairness Act analysis pertaining to the businesses in Step 3 for which no response had been received prior to publication of the preliminary analysis. This information did not change the conclusions.
Other minor edits and corrects to the text.

Appendix A Documentation of Determinations

A.1 Summary of WDFW Determinations

Table A-1 presents a recap of the determinations made in Sections 1, 2, and 3 of this document.

Table A-1 Recap of determinations made by WDFW by group and WAC

GROUP	WAC	ELEMENT	COST-BENEFIT DETERMINATION	LEAST BURDENSOME ALTERNATIVE	AFFECTS SMALL BUSINESSES
A	050 (9)(c)(iii) G)	Justify expedited processing	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
	050 (16 15) (a)(c)(e) and(f) & 050(17)	Allowing HPA transfers	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
	050 (17)	Revoking an HPA	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
B	300 (7) Authorized Work Times	Okanogan County, Similkameen River	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable. WDFW reviewed the available information on small businesses in the metals mining industry and concluded that there are no small businesses affected by the 2018 HPA Rule Change Proposals; therefore, no small business economic impact statement is required under the Regulatory Fairness Act.
		Snohomish County, Sultan River	Benefits outweigh costs	Alt. 1 (Proposed Action)	

GROUP	WAC	ELEMENT	COST-BENEFIT DETERMINATION	LEAST BURDENSOME ALTERNATIVE	AFFECTS SMALL BUSINESSES
C	050(9)(c)(iii) (G) application fee required; and (H) farm and agricultural land fee exemption 050 (11) fee refund 050 (16 15)(d) Time extension etc. pertaining to fees 050 (17 16) (c) fee for modifications	Removes reference to application fees	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
D	050 (9)(a)	Allow digital pamphlet	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
	050 (9)(b)	Emergency contact clarifications	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
	050 (9)(c)	Require site access permission forms for all sites	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
	050(10)	Closing inactive applications after 12 months	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
	050 (12 11) (c)	WDFW must document emergency, expedited, imminent danger	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
	300(3)	Typo: change reference from 060 to 050	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
	300(4)(g) and (k)	Add word "fish" to properly identify fish habitat improvement structures	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
	300 (5)(p)	Replace Figure 8 caption with correct version	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable

GROUP	WAC	ELEMENT	COST-BENEFIT DETERMINATION	LEAST BURDENSOME ALTERNATIVE	AFFECTS SMALL BUSINESSES
	300 (6)(j)	Add word "embedded"	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
	300 (7)	Authorized work times – Chelan County Change "Negro" to "Etienne" Creek	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable
	460 (5) & 470 (6)	Change address to HPA P.O. box	Benefits outweigh costs	Alt. 1 (Proposed Action)	Not applicable

A.2 Determinations Required for Significant Legislative Rules

This section restates determinations made in this document listed in order as they appear in Significant Legislative Rules statute, RCW 34.05.328.

RCW 34.05.328 (1)(a) Clearly state in detail the general goals and specific objectives of the statute that the rule implements

The Hydraulic Code is intended to ensure that hydraulic projects adequately protect fish life. Refer to Section 1 for a full discussion.

RCW 34.05.328 (1)(b) Determine that the rule is needed to achieve the general goals and specific objectives stated under (a) of this subsection, and analyze alternatives to rule making and the consequences of not adopting the rule

WDFW's primary objective for initiating rule making at this time is to adopt emergency rule (WSR 17-20-109) modifying authorized work times under WAC 220-660-300(7) for the Sultan River as a permanent rule in order to protect fish life.

Other subjects WDFW has identified for rule making include:

- Consistency with Title 77.55 RCW with respect to the curtailment of application fees (WAC 220-660-050);
- Incorporate new science on Authorized Work Times in WAC 220-660-300(7);
- Update WDFW's mailing address published in WACs 220-660-460 and -470; and
- Make other essential changes to sections 050 and 300 that clarify language or accommodate administrative changes.

Most change proposals in this rule-making round are administrative in nature or involve improvements in the permitting process that have been suggested by permittees or recommended by staff. Substantive changes in authorized work times in the Similkameen and Sultan River result from new science available that contributes to the protection of fish life

while maintaining or enhancing mineral prospecting authorized work times.

Alternatives to rule making are detailed in Section 3.3. Consequences are summarized in Section 3.5 and detailed on Table 7. Consequences of not adopting the rule are increased impacts to fish life, impaired accountability and transparency of administrative rules, and confusion for applicants.

RCW 34.05.328 (1)(c) Provide notification in the notice of proposed rulemaking under RCW 34.05.320 that a preliminary cost-benefit analysis is available. The preliminary cost-benefit analysis must fulfill the requirements of the cost-benefit analysis under (d) of this subsection. If the agency files a supplemental notice under RCW 34.05.340, the supplemental notice must include notification that a revised preliminary cost-benefit analysis is available.

The cost-benefit analysis is provided in Section 2 and summarized on Table 6. It fulfills the requirements of the cost-benefit analysis under (1)(d). Notice of availability is provided in the proposed rule-making notice (CR-102 form) WSR 18-03-145 filed under RCW 34.05.320.

RCW 34.05.328 (1)(d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented

WDFW determined that the probable benefits of the HPA Proposed Rule Change outweigh the probable costs. Discussion regarding costs and benefits appears in Section 2 of the document, with the details summarized on Table 6.

RCW 34.05.328 (1)(e) Determine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection

The proposed version of the rules is the least burdensome alternative. These rules offer the combination of fish protection, ease of obtaining approval to conduct work, regulatory certainty, and transparency that meet the goals and objectives of the statutes being implemented. The Least Burdensome Analysis is presented in Section 3 of this document. Refer to Table 7 for a summary of these findings.

RCW 34.05.328 (1)(f) Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law

There are no provisions in the Hydraulic Code Rules requiring those to whom they apply to take an action that violates requirements of another federal or state law.

Explain how this determination was made.

We make this determination because the HPA permit does not compel people to take an action. Also, authorization by WDFW to conduct any hydraulic project does not exempt anyone from the requirements of other regulatory agencies or landowners. Every HPA issued in Washington carries the notice that the permit

“... pertains only to requirements of the Washington State Hydraulic Code, specifically Chapter 77.55 RCW. Additional authorization from other public agencies may be necessary for this project. The person(s) to whom this Hydraulic Project Approval is issued is responsible for applying for and

obtaining any additional authorization from other public agencies (local, state and/or federal) that may be necessary for this project.”

Consistent with other state authorities, the Hydraulic Code Rules do not regulate whether an action can occur, only the time, place, and manner in which that action can occur in order to adequately protect fish life.

RCW 34.05.328 (1)(g) Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law

This rule applies equally to all HPA applicants whether public or private.

Do other federal, state, or local agencies have the authority to regulate this subject?

WDFW has authority to implement the Hydraulic Code Rules (chapter 220-660 WAC) under chapter 77.55 RCW (Construction Projects in State Waters). Pursuant to 77.55.361, Department of Natural Resources has authority to carry out the requirements of the Hydraulic Code for forest practices hydraulic projects regulated under Chapter 76.09 RCW. WDFW and DNR have a process for concurrent review of such projects.

Local and state government regulations pertaining to land use and development, shoreline use, and clean water appear to have overlapping authorities, but have different fundamental purposes. Washington Department of Ecology regulates water diversions, discharges, and stormwater outfalls, features that could occur concurrently with a project that is regulated under the hydraulic code. Local governments have regulations for the location (such as under the Shoreline Management Act) and methods (building codes) for construction projects. These aspects of a construction project also can co-occur with hydraulic project requirements, but none of these other authorities duplicates or supersedes the hydraulic code authority.

Additional discussion about federal jurisdictions follows under section RCW 34.05.328(1)(h).

RCW 34.05.328 (1)(h) Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by the following:

- (i) A state statute that explicitly allows the agency to differ from federal standards; or**
- (ii) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives stated under (a) of this subsection; and**

The rule differs from federal regulations or statutes applicable to the same activity.

The Hydraulic Code regulates construction projects in state waters for the protection of fish life. Federal protections under the Rivers and Harbors Act, Clean Water Act (U.S. Army Corps of Engineers), and Endangered Species Act (U.S. Fish and Wildlife Service and National Marine Fisheries Service) might appear to have overlapping jurisdiction and provisions, however the purposes for these federal acts are very different from the state Hydraulic Code and rules.

Indeed, local, state, and federal agencies may have jurisdiction over the same project. At each jurisdictional level, priorities and legal mandates determine the resources or interests that are 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 could have entirely different habitat protection objectives.

The HPA fills a unique niche because it is the only permit issued solely to protect (all) 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 might not undergo a federal Corps of Engineers or local Critical Area Ordinance review because a shoreline or other land use application or project notification is not required by the federal or local government.

RCW 34.05.328 (1)(i) Coordinate the rule, to the maximum extent practicable, with other federal, state, and local agencies, laws, and rules applicable to the same activity or subject matter

WDFW regularly coordinates with federal, state, and local agencies because, while the objectives of regulation are different, projects being reviewed under the HPA program are potentially reviewed by all these other jurisdictions as well.

WDFW also regularly solicits input from federal, state, and local agencies on ways to improve HPA program implementation, including both the regulation of projects and with the technical assistance that WDFW provides to other agencies and to project proponents.

Finally, permittees are notified in individual HPA permits and in the Gold and Fish pamphlet that other legal requirements must be met in order to conduct the project. This language makes it clear that permits from and notifications to other regulatory agencies may be required and that applicable landowners or claim holders must be consulted before conducting any activity.