



PROPOSED RULE MAKING

CR-102 (December 2017) (Implements RCW 34.05.320)

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DATE: March 02, 2020

TIME: 3:04 PM

WSR 20-06-053

Agency: Fish and Wildlife

Original Notice

Supplemental Notice to WSR 19-24-081

Continuance of WSR _____

Preproposal Statement of Inquiry was filed as WSR 19-19-056 ; or

Expedited Rule Making--Proposed notice was filed as WSR _____; or

Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or

Proposal is exempt under RCW _____.

Title of rule and other identifying information: (describe subject) HPA Rule Making Implementing 2SHB 1579 amending sections WAC 220-660-050 (Procedures—Hydraulic project approvals), WAC 220-660-370 (Bank protection in saltwater areas), WAC 220-660-460 (Informal appeal of administrative actions), WAC 220-660-370 (Formal appeal of administrative actions), and WAC 220-660-480 (Compliance with HPA provisions) of Hydraulic Code Rules in chapter 220-660 WAC.

Hearing location(s):

Date:	Time:	Location: (be specific)	Comment:
April 10 -11, 2020	8:00 am	Natural Resources Building, 1111 Washington St. SE, Olympia, WA 98501.	

Date of intended adoption: April 24, 2020 (Note: This is **NOT** the effective date)

Submit written comments to:

Name: Randi Thurston

Address: P.O. Box 43200, Olympia, WA 98504-3200

Email: HPARules@dfw.wa.gov

Fax: (360) 902-2946

Other: Web site: <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking>

By (date) 5pm April 10, 2020

Assistance for persons with disabilities:

Contact Delores Noyes

Phone: (360) 902-2349

Fax: (360) 902-2946 attn: Randi Thurston

TTY: (360) 902-2207

Email: adaprogram@dfw.wa.gov

Other:

By (date) 5pm April 10, 2020

Purpose of the proposal and its anticipated effects, including any changes in existing rules: Rule amendments are proposed as necessary to implement elements of Second Substitute House Bill 1579 (2SHB 1579)¹ - a bill passed by the legislature during the 2019 legislative session. This bill implements recommendations of the Southern Resident Orca Task Force (task force) related to increasing chinook abundance. The bill adds a procedure for potential applicants to request a preapplication determination of whether a project proposed landward of the ordinary high

¹ Laws of 2019, chapter 290; Codified as RCWs 77.55.400 through 77.55.470.

water line (OHWL) requires a Hydraulic Project Approval (HPA). The bill also enhanced authority for the department's civil compliance program and repealed a statute relating to marine beach front protective bulkheads or rockwalls for single-family residences.

The CR-101 (WSR 19-19-056) was filed September 16, 2019 and published in the Washington State Register 19-19 on October 2, 2019; and the CR-102 (WSR 19-24-081) was filed December 3, 2019, and published in the Washington State Register 19-24 on December 18, 2019.

The public comment period for this rule making was open from December 3, 2019 through 5:00 p.m. on January 2, 2020. The Washington Fish and Wildlife Commission held a public hearing on January 17, 2020, at 12:30 p.m. in Olympia, Washington. A total of 9 written comments were received during the comment period, and four comments were presented orally at the public hearing.

Program staff recommend nine changes to the proposed rules in response to the comments. Eight of these are minor and don't change the effect of the rules. These proposed changes are in the Table below. One recommended change resulted in a substantial modification to the civil penalty schedule.

Table 1 Proposed change from CR-102

WAC Section	Proposed change from CR-102	Reason for change
220-660-050(9)(c)(iii)(D)	A description of the measures that will be implemented for the protection of fish life, including any reports assessing impacts from the hydraulic project to fish life and their habitat (and habitat that supports fish life), and plans to mitigate those impacts to ensure the project results in no net loss;	This change is needed to reinforce that habitat that supports fish life must be protected as well.
220-660-370	Appropriate methods to assess the need for marine bank protection and, if needed, to design marine bank protection are available in the department's <i>Marine Shoreline Design Guidelines</i> , as well as other published manuals and guidelines.	A change is needed to clarify that the <i>Marine Shoreline Design Guidelines</i> is also an assessment tool.
220-660-370(3)(d)	An HPA application for ((a)) new ((bulkhead or other)) bank protection, ((work)) or the replacement or rehabilitation of ((a bulkhead or other)) bank protection ((structure)) that extends waterward of ((the)) <u>an existing bank protection structure</u> must include a site assessment, alternatives analysis and design rationale for the proposed method prepared by a qualified professional ((such as a)) e.g., coastal geologist, geomorphologist ((, etc.)) for the proposed ((project and selected technique)) method . The department may grant an exemption depending on the scale and nature of the project. ((In addition, this requirement does not apply to projects processed under RCW 77.55.141. This report must include)) <u>The applicant must submit a the qualified professional's report to the</u>	To eliminate confusion about who is a qualified professional the examples are removed. Qualified professional is already defined in WAC 220-660-030(121).

	<u>department as part of a complete application for an HPA that includes:</u>	
220-660-370(5)(a)	The department (may require a person to establish) <u>requires that plans submitted as part of a complete application show the horizontal distances of the structure(s) from ((a)) permanent <u>local</u> benchmark(s) (fixed objects) ((before starting work on the project)).</u>	Proposed change is needed to clarify these are local benchmarks so a survey with designated vertical or horizontal datum is not required.
220-660-480	<u>Added “The department is responsible to help the regulated community understand how to comply. The department achieves voluntary compliance through education and technical assistance when the department advises and consults on permits, conducts compliance checks, performs on-site technical visits, or provides guidance materials written in easily understood language.</u> <u>When the department cannot get voluntary compliance by issuing a correction request, the department may use a range of increasingly strict enforcement tools. This ranges from issuing notices of correction and stop work orders to penalties and, when appropriate, criminal prosecution.”</u>	Proposed change is needed to clarify the compliance sequence in the compliance section introduction.
220-660-480	This section does not apply to a project, or to that portion of a project, that has received a forest practices HPA <u>hydraulic project (FHP) permit</u> from the department of natural resources under chapter <u>76.09</u> RCW.	A change is needed to avoid confusion because the Department of Natural Resources calls their permit a Forest Practices Hydraulic Project (FHP).
220-660-480(6)(e)	<u>Signature authority for a notice to comply: A notice to comply must be authorized by a regional habitat program manager, regional director, habitat program division manager, habitat program director, habitat program deputy director, or department director.</u>	The change is needed to clarify who is authorized to issue a notice to comply.
220-660-480(7)(a)	<u>The department may levy civil penalties of up to ten thousand dollars for each and every violation of chapter 77.55 RCW, this chapter, or provisions of an HPA.</u>	The change is needed to clarify the civil penalty is per violation and not per violation per day.
220-660-480(8)(d)(iii)	<u>Where more than one person has committed or contributed to a violation, and the department issues a civil penalty for that violation, the department may allocate penalty amounts to</u>	A change is needed to clarify how a penalty amount could be divided among multiple violators.

	<p><u>each person having committed or contributed to the violation.</u></p> <p><u>The department will determine whether all or a portion of a penalty should be assessed against a landowner, lessee, contractor or another project proponent. The department should consider the responsible party, the degree of control, the sophistication of the party, and whether different parties conducted different violations.</u></p>		
220-660-480(8)(c)	<p>The department amended the penalty schedule to include a base penalty and numeric penalty values for the considerations listed in RCW 77.55.440(6); previous violation history, severity and reparability of the impacts, intent, and cooperation. The sum of the base civil penalty and penalty amount calculated for the considerations will determine the total civil penalty amount not to exceed \$10,000 for each violation. Please refer to the proposed rule language.</p>	<p>A change is needed to provide more transparency and clarity about how a manager will calculate the total penalty amount for each violation.</p>	

Reasons supporting proposal: The regulated community wants more certainty in how authorized WDFW staff will determine civil penalty amounts. In response, staff recommend that we amend the penalty schedule to include a base penalty and numeric penalty values for the considerations specific to the incident and site stated in the civil penalty statute, RCW 77.55.440. The department is filing a supplemental CR-102 with the Office of the Code Reviser and will reopen the period for the public to comment on the proposed change. This will delay the adoption of the proposed rules originally scheduled for February 21, 2020. We anticipate the second public hearing will occur at the April 10 – 11, 2020, commission meeting, and staff would request adoption of the proposed rules, including those described in WDFW’s supplemental CR-102, during the April 24, 2020, commission conference call.

Statutory authority for adoption: RCWs 77.04.012, 77.12.047, and 77.55.021; 2SHB 1579 (Laws of 2019, chapter 290 PV).

Statute being implemented: Chapter 77.55 RCW Construction projects in state waters; RCW 77.55.400 (Determination as to whether construction is a hydraulic project - Preapplication determination - Review and comment period - Written determination); RCW 77.55.410 (Violation of chapter); RCW 77.55.420 (Stop work order - Notice - Appeal); RCW 77.55.430 (Notice to comply - Notice - Appeal); RCW 77.55.440 (Penalties - Notice - Appeal - Authority of attorney general to recover penalty - Penalty schedule); RCW 77.55.450 (Administrative inspection warrant); RCW 77.55.460 (Disapproval of an application - Notice - Review); RCW 77.55.470 (Remedies under chapter not exclusive).

Is rule necessary because of a:

Federal Law?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Federal Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
State Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

If yes, CITATION:

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters: None at this time.

Name of proponent: (person or organization) Washington Department of Fish and Wildlife, Habitat Program, Protection Division Private Public Governmental

Name of agency personnel responsible for:

	Name	Office Location	Phone
Drafting:	Randi Thurston	1111 Washington St. SE Olympia, WA 98501	(360) 902-2602
Implementation:	Randi Thurston	1111 Washington St. SE Olympia, WA 98501	(360) 902-2602
Enforcement:	Chief Steve Bear	1111 Washington St. SE Olympia, WA 98501	(360) 902-2373

Is a school district fiscal impact statement required under RCW 28A.305.135? Yes No

If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

- Name:
- Address:
- Phone:
- Fax:
- TTY:
- Email:
- Other:

Is a cost-benefit analysis required under RCW 34.05.328?

- Yes: A preliminary cost-benefit analysis may be obtained by contacting:
 - Name: Randi Thurston
 - Address: P.O. Box 43200 Olympia, WA 98504-3200
 - Phone: (360) 902-2602
 - Fax: (360) 902-2946
 - TTY: (360) 902-2207
 - Email: HPARules@dfw.wa.gov
 - Other: Web site: <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking>
- No: Please explain:

Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement:

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see chapter 19.85 RCW). Please check the box for any applicable exemption(s):

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.

Citation and description:

This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule.

This rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(3). Check all that apply:

- | | |
|----------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input checked="" type="checkbox"/> RCW 34.05.310 (4)(b)
(Internal government operations) | <input checked="" type="checkbox"/> RCW 34.05.310 (4)(e)
(Dictated by statute) |
| <input type="checkbox"/> RCW 34.05.310 (4)(c)
(Incorporation by reference) | <input type="checkbox"/> RCW 34.05.310 (4)(f)
(Set or adjust fees) |
| <input checked="" type="checkbox"/> RCW 34.05.310 (4)(d)
(Correct or clarify language) | <input type="checkbox"/> RCW 34.05.310 (4)(g)
(i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit) |

This rule proposal, or portions of the proposal, is exempt under RCW _____.

Explanation of exemptions, if necessary: Please see discussion under section 1 of the Small Business Economic Impact Statement included below.

COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES

If the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

- No Briefly summarize the agency’s analysis showing how costs were calculated. See below
- Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses, and a small business economic impact statement is required. Insert statement here:

Small Business Economic Impact Statement

1: Describe rule and compliance requirements

1.1: Background

Background on topic of this rule making activity is provided in Section 2 of *Regulatory Analyses for Incorporating Elements of 2SHB 1579 into HPA rules*. A timeline and actions initiating rule making are provided in subsection 2.3 of this document. Those sections provide detail about the history of and need for the proposal. Section 5 of this document discusses how the proposed rule meets the general goals and specific objectives of the statutes. The *Regulatory Analyses for Incorporating Elements of 2SHB 1579 into HPA rules* document is available at <https://wdfw.wa.gov/licensing/hpa/rulemaking/>.

1.2: Compliance requirements of the proposed rule

Most of these rules do not create additional compliance requirements (Table 2). Three proposals, the “civil penalty amount,” “civil penalty schedule,” and “benchmark” rules can impose additional costs on small businesses. The department has determined that the proposed rule requiring “a report to demonstrate the least impacting technically feasible alternative bank protection design is proposed” will not impose additional costs on small businesses because this proposed change **affects** single-family saltwater shoreline property owners only.

Table 2 Rule groups and their status relative to APA and RFA analysis

Rule Group	Content	WAC	APA Citation (RCW)	RFA citation (RCW)
“Provisions of 2SHB 1579”	New tools and requirements copied nearly verbatim from statute into rule.	220-660-050 220-660-370 (except subsection 5) 220-660-460, 470, 480 [except subsections 480(5), 480(7), 480(8)]	34.05.310(c) Rules adopting or incorporating by reference without material change ... Washington state statutes	19.85.025(3) rule described in RCW 34.05.310(4)
“Signature authority”	Specifies which department staff have authority to issue which compliance tools	220-660-480(5) 220-660-480(7)	34.05.310(4)(b) Rules relating only to internal governmental operations that are not subject to violation by a nongovernment party	19.85.025(3) rule described in RCW 34.05.310(4); 19.85.025(4) Does not affect small businesses
“Civil penalty amount”	Specifies the department may levy civil penalties of up to \$10,000 for every violation	220-660-480(7)	Analysis required	
“Civil penalty schedule”	Schedule for determining civil penalties,	220-660-480(8)	Analysis required	

	developed by the department		
“Benchmark”	Requires benchmarks to be shown in the plans submitted as part of a complete application	220-660-370(5)	Analysis required
“Report”	Least impacting feasible alternative analysis report	220-660-370(3)(d)	Analysis required for APA because the proposed change affects single-family residences and properties. No analysis is required for the RFA because the change does not affect businesses.

2: Small Business Economic Impact Analysis – Civil Penalty Amount and Civil Penalty Schedule

2.1: Costs associated with compliance

The department presumes that a person who seeks to or does undertake a hydraulic project will comply with the laws and regulations set forth in Chapter 77.55 RCW and Chapter 220-660 WAC. Thus, the department has determined that its proposed rules in WAC 220-660-480 do not pose costs upon businesses that comply with these laws and regulations. The department does not have enough data to calculate costs to businesses for noncompliance with Chapter 77.55 RCW, Chapter 220-660 WAC and the provisions of the HPA, nor to calculate any disproportionate impacts that noncompliance may have on small businesses. To the extent the department’s proposed rules in WAC 220-660-480 impose more than minor costs to businesses that do not comply with Chapter 77.55 RCW, Chapter 220-660 WAC and the provisions of an HPA, the department will mitigate costs to small businesses where doing so is legal and feasible pursuant to RCW 19.85.030, which includes using non-monetary civil enforcement tools made available under Laws of 2019, chapter 290.

2.2: Steps to reduce costs to individuals and small businesses

When costs to comply exceed the minor cost threshold and costs are disproportionate for small businesses, RCW 19.85.030 compels the agency to reduce costs imposed by the rule on small businesses where it is legal and feasible to do so. The agency must consider, without limitation, each of the methods listed on Table 3.

Table 3: Methods of reducing costs to businesses for noncompliance

Sub-section	Method	WDFW response
a)	Reducing, modifying, or eliminating substantive regulatory requirements	The substantive civil compliance and enforcement requirements are specified in the statute.
b)	Simplifying, reducing, or eliminating recordkeeping and reporting requirements	Recordkeeping and recording requirements set forth in the proposed rules are the minimum necessary to ensure compliance with the permit conditions.
c)	Reducing the frequency of inspections	Follow-up compliance inspections are limited to those required to confirm that a noncompliant condition has been corrected.
d)	Delaying compliance timetables	The department must provide a reasonable time to achieve compliance. A violator can request an extension of a deadline for achieving compliance.
e)	Reducing or modifying fine schedules for noncompliance; or	The civil penalty schedule reflects factors statutorily required to be considered.

f)	Any other mitigation techniques, including those suggested by small businesses or small business advocates.	The department supports providing an opportunity for voluntary compliance prior to imposing any monetary civil penalty. This was suggested by a business advocate and is required under 2 SHB 1579, as enacted. Small businesses or business advocates have suggested eliminating the Notice of Civil Penalty, but the statute requires the department to do rulemaking to adopt a civil penalty schedule. Thus, it does not have authority to eliminate the Notice of Civil Penalty as suggested.
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2.3 Additional steps the department has taken or will take to lessen impacts

Additional steps the department has taken or will take to reduce costs to businesses for noncompliance

1. Access to technical assistance

The department provides technical assistance to ensure that permitting requirements are understood by proponents of hydraulic projects when we advise and consult on permits, conduct inspections, perform on-site technical visits, and provide regulatory guidance materials. The department also has a technical assistance webpage. A person may request additional technical assistance from the department any time during their project.

2. Opportunity for voluntary compliance

Most people the department works with are not experts in environmental permitting. The department acknowledges that it has a responsibility to help the regulated community understand how to comply with the Hydraulic Code Statute and Rule requirements. When violations or potential violations are observed in the field, the department will issue a Correction Request that describes the measures the project proponent may take to voluntarily address them. The department will use a range of increasingly strict enforcement tools, which could ultimately include monetary civil penalties, but typically only when voluntary compliance cannot be achieved with or without the department’s assistance. The department will provide an opportunity to correct and compensate for damage that results from a violation before issuing a Notice of Civil Penalty.

3. Waiver for first-time paperwork violations

Under RCW 34.05.110, a small business may be eligible for a waiver of first-time paperwork violations. The small business is given an opportunity to correct the violation(s). This applies to Administrative Orders, Notices and Civil Penalties. First time paperwork violations are defined in proposed WAC 220-660-480(12).

4. Staff training

The department’s administrative (civil) enforcement actions must be based in fact and law, well-documented, appropriate to the violation, and issued professionally and fairly. Staff authorized to conduct inspections will receive specialized training to ensure they are professional, knowledgeable, and capable of carrying out their duties.

5. Policy and guidelines

The department will develop implementation guidelines for the civil enforcement program. The guidelines will provide direction to staff on how to appropriately respond to incidents of non-compliance.

3: Small Business Economic Impact Analysis – Benchmarks

3.1: Costs associated with compliance

Applicants might need technical assistance to establish project benchmarks. The department can aid applicants by directing them to technical businesses that can establish the benchmarks and by providing guidance and training for how applicants and contractors can establish adequate benchmarks. As time allows, the department biologists can also offer technical assistance by establishing the benchmarks at no cost to the applicant. When benchmark measurements are needed, they are frequently done by civil engineers, civil engineer technicians,

surveyors, or surveyor technicians. The person establishing the benchmarks will need a tape measure and a compass.

3.2: Identify businesses - minor cost threshold

WDFW analyzed HPA permits issued in 2018 to determine businesses who received an HPA for saltwater bank protection construction, maintenance, or replacement. Fourteen percent (13 HPAs) of the permittees for marine bank protection projects could be identified as businesses. Seventy-two percent (67 HPA) of permittees were individuals or landowners, and fourteen percent (13 HPAs) were governmental entities or nonprofit businesses.

WDFW does not require applicants to identify the person or business that will construct their project. Businesses applying for HPAs to construct projects for landowners can identify as such on the HPA application, and this is how we identified businesses for this analysis. WDFW acknowledges that the rules for bank protection in saltwater areas apply to anyone (or any business) applying for this type of HPA, so the business types identified here are not exclusive.

Once businesses were identified, we used the Washington Department of Revenue Business Lookup tool² to obtain their industry code. When no industry code could be found, we identified the applicant as an individual.

Table 4 provides information about the businesses we identified using this method. We are not able to determine whether businesses are small businesses using this method. This list is not exclusive - anyone who applies for an HPA for bank protection in saltwater areas is subject to the proposed rule. In subsequent analyses we identified additional businesses under the 237990 NAICS code (“Other heavy and civil engineering construction”) that might apply or construct marine bank protection projects.

Table 4 NAICS Codes for 2018 Marine Bank Protection Business Applicants

Number of permits in 2018	NAICS code	Industry description
1	236115	New single-family housing construction
0	237990	Other heavy and civil engineering construction
3	238140	Masonry contractors
2	238910	Site preparation contractors
3	238990	All other specialty trade contractors
3	531310	Offices of real estate agents and brokers (& property managers)
1	713930	Marinas

3.3: Minor cost threshold

Industry data for determining minor cost thresholds are provided on Table 5. We used a spreadsheet provided by the Washington State Auditor’s Office to determine these values³.

² Available at: https://secure.dor.wa.gov/gteunauth/_/#1

³ *Minor Cost Threshold Calculator July 2019.xlsx* provided through the Governor’s Office of Regulatory Innovation and Assistance at: https://www.oria.wa.gov/Portals/_oria/VersionedDocuments/RFA/Regulatory_Fairness_Act/Minor%20Cost%20Threshold%20Calculator%20July%202019.xlsx . ORIA RFA support website is: https://www.oria.wa.gov/site/alias_oria/934/Regulatory-Fairness-Act-Support.aspx .

Table 5 Washington businesses data for businesses identified under industry classification codes identified for analysis

Industry 4-digit or 6-digit 2012 NAICS Code	Number of Establishments in WA.	TOTAL Annual Payroll in WA.	TOTAL Annual Revenue in WA.	AVG Annual Payroll in WA.	AVG Annual Revenue in WA.	1% of Annual Payroll	<0.3% of annual revenue or income or \$100
236115	1,261	\$186,272,000	D	\$147,718	D	\$1,477	D
237990	61	\$174,198,000	\$948,293,000	\$2,855,705	\$15,545,787	\$28,557	\$46,637
238140	293	\$74,067,000	\$215,274,000	\$252,788	\$734,724	\$2,528	\$2,204
238910	1,208	\$490,492,000	\$2,047,639,000	\$406,036	\$1,695,065	\$4,060	\$5,085
238990	547	\$182,710,000	\$573,308,000	\$334,022	\$1,048,095	\$3,340	\$3,144
5313	2,852	\$705,915,000	\$1,626,984,000	\$247,516	\$570,471	\$2,475	\$1,711
713930	102	\$17,667,000	\$79,013,000	\$173,206	\$774,637	\$1,732	\$2,324

Source: Washington State Auditor *Minor Cost Threshold Calculator July 2019.xlsx*, which uses data from the 2012 Economic Census of the United States.

Code "D" means the U.S. Census Bureau data are withheld to avoid disclosing data for individual companies.

3.4: Identify the minor cost thresholds for each industry

We chose the minimum of the two indicator figures from Table 5 as the minor cost thresholds for these industries (Table 6) and identified \$100 as the minor cost threshold for individuals/landowners and nonprofit businesses. Any costs imposed on a small business that are over these thresholds would be considered for this analysis to be more than minor and potentially disproportionate.

Table 6 Small Business Industry Classification and Minor Cost Thresholds

NAICS code	Industry description	Minor Cost Threshold
236115	Residential building construction	\$1,477
237990	Other heavy and civil engineering construction	\$28,557
238140	Masonry contractors	\$2,204
238910	Site preparation contractors	\$4,060
238990	All other specialty trade contractors	\$3,144
531310	Offices of real estate agents and brokers (& property managers)	\$1,711
713930	Marinas	\$1,732
n/a	Individuals/Landowners and nonprofit businesses	\$100

3.5: Costs of compliance

Both the department's biologists and a bulkhead business spokesperson indicated that establishing permanent benchmarks takes approximately 10 minutes once a person is on the project site^{4 5}. We assume for this analysis that it takes a person an hour to travel to/from the site. Our business contact suggested that they would hire a civil engineer or a surveyor to conduct the work if they did not already have staff on-board who could establish benchmarks. The benchmarks must be shown on the plans submitted as part of a complete application. We assume for this analysis that it takes a person 10 -15 minutes to include the benchmarks on the plans. We think that the smallest period of billable hours for a civil engineer or surveyor consultant would be one-half hour. Combined with travel, the total time billed would be 1.5 hours.

Next, we looked at U.S. Census data from Bureau of Labor Statistics to determine the average hourly wages for these occupations. We looked at wages for these occupations in the Professional, Scientific, and Technical Services industry groups in Washington. Wages range from \$32.20 per hour for a civil engineering technician to \$46.47 for a civil engineer⁶. We chose the civil engineer wages as providing a worst-case view for this analysis. We also analyzed the \$100.00 billable hourly amount suggested by a civil engineer who commented on the proposed rules.

We anticipate the cost of equipment and supplies to be minimal. Table 7 shows the costs to comply with this proposal.

Table 7 Costs to comply with the benchmark requirement

Who performs work	Time spent	Cost per hour	Total Cost to Comply per project
Civil engineer in the Professional, Scientific, or Technical Consulting Services business industry group	1.5 hours	\$46.47 to \$100.00	\$69.71 to \$150.00

3.6: Lost sales or revenues

Income or revenue for each HPA proponent is reduced by between \$69.71 and \$150.00 to comply with this new requirement. If the department can provide technical assistance to the applicant, then there is no loss in revenue.

3.7: Summary of costs to comply

Based on the methods used to estimate costs to comply with the rule proposals, the total cost for each project is estimated at between \$69.71 and \$150.00, as shown on Table 7.

3.8: More than minor costs

Based on the costs of compliance estimated in Table 7, the estimated costs for an individual or a nonprofit business to comply with the proposal are more than the minor cost thresholds shown on Table 6.

3.9: Disproportionate impact on small businesses

The department used employment data from Bureau of Labor Statistics⁷ to analyze employment by size of company. We used the industry codes identified on Table 8, except that data for the 6-digit code 236115 are not available so we used the 4-digit code 2361 instead. We compared the cost-to-comply (\$69.71 - \$150.00) to the numbers of employees in three different groups of establishments: businesses having 1-49 employees (“small businesses”), businesses having 50 or more employees (“large businesses”), and the best available estimate of the number of employees in the 10% largest businesses.

⁴ A. Cook. Pers. Comm. July 29, 2019

⁵ J. Rotsten, Sea Level Bulkhead Builders. Pers. Comm. October 9, 2019.

⁶ May 2018 OES Research Estimates, Occupational Employment Statistics (OES) Survey, Bureau of Labor Statistics, Department of Labor, website: <https://www.bls.gov/oes>. Table of OES estimates for the State of Washington downloaded from https://www.bls.gov/oes/2018/may/oes_research_estimates.htm on 10/9/2019.

⁷ We downloaded data for Washington State for each of the identified industries at U.S. Census Bureau “American FactFinder” available at: <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t>

Table 8 Compare cost/employee for small businesses versus larger businesses

NAICS	Industry	Compliance-cost per Employee			Amount higher costs for Small v. Largest 10%
		Small Businesses	Large Businesses	Largest 10% of businesses	
2361	Residential building construction	\$0.003 - \$0.006	\$0.02 - \$0.04	\$0.01 - \$0.02	-\$0.01 - \$0.02
237990	Other heavy and civil engineering construction	\$0.10 - \$0.20	\$0.05 - \$0.11	\$0.05 - \$0.11	\$0.05 - \$0.09
238140	Masonry contractors	\$0.04 - \$0.09	\$0.08 - \$0.17	\$0.03 - \$0.06	-\$0.01 - \$0.03
238910	Site preparation contractors	\$0.01 - \$0.02	\$0.02 - \$0.04	\$0.01 - \$0.02	-\$0.00 - \$0.00
238990	All other specialty trade contractors	\$0.02 - \$0.04	\$0.07 - \$0.15	\$0.01 - \$0.02	-\$0.01 - \$0.02
53131	Real estate property managers	\$0.01 - \$0.02	\$0.02 - \$0.04	\$0.01 - \$0.02	-\$0.00 - \$0.00
713930	Marinas	\$0.18- \$0.39	n/a	\$0.70 - \$1.51	-\$0.52 - \$1.12*

Of these computations, the cost per employee for the largest 10% of businesses is the least straightforward because, in most cases for these industries, the largest 10% of businesses in an industry included businesses with fewer than 50 employees. We did not use this datum except for the Marinas industry* where data for “Large Businesses” are withheld to avoid disclosing data for individual companies.

The smallest cost/employee is three-tenths to sixth-tenths of a cent, and the largest is 18 to 39 cents (70 cents to one dollar and fifty-one cents using the “largest 10%” figure for the Marinas industry). Costs per employee are smaller for small businesses than for large businesses (or for the largest 10% of businesses for Marinas) except for “Other heavy and civil engineering construction” businesses, for which the cost is five to nine cents higher per employee for small businesses. We conclude there is not a disproportionate impact for small businesses in most cases. In the case where small businesses pay more per employee, that difference represents ten to twenty cents per employee for small businesses versus five to eleven cents per employee for large businesses.

3.10. Methods to reduce costs

When costs to comply exceed the minor cost threshold and costs are disproportionate for small businesses, RCW 19.85.030 compels the agency to reduce costs imposed by the rule on small businesses where it is legal and feasible to do so. The agency must consider, without limitation, each of the methods listed on Table 9.

3.11 Required methods to reduce costs

Table 9 RCW 19.85.030 (2) required methods of reducing costs imposed by the rule on small businesses

RCW 19.85.030 (2) Requirements		WDFW response
Sub-section	Method	
a)	Reducing, modifying, or eliminating substantive regulatory requirements	Eliminating the requirement for adequate benchmarks makes it impossible for the department to determine whether a project is compliant with provisions of the HPA. This does not meet the objectives of the statute.
b)	Simplifying, reducing, or eliminating recordkeeping and reporting requirements	Once benchmarks are established and recorded on the plans, there are no additional recordkeeping or reporting costs.
c)	Reducing the frequency of inspections	Not applicable to this proposal. The requirement must be met prior to an HPA being issued.
d)	Delaying compliance timetables	This provision is being required currently in most saltwater bank protection project HPAs. Delaying the compliance timetable would not have an effect on businesses.
e)	Reducing or modifying fine schedules for noncompliance; or	Not applicable to this proposal.
f)	Any other mitigation techniques, including those suggested by small businesses or small business advocates.	No other mitigation techniques have been suggested by small businesses or business advocates.

3.12: Additional steps the department has taken to lessen impacts

Additional steps the department plans to take to minimize costs to those who must comply with the new rules:

1. The department will provide training to saltwater bank protection permitting biologists on how to establish adequate benchmarks and how to help the applicant record the benchmarks in their application materials.
2. The HPA Technical Assistance webpage has example engineering drawings that show how to establish and document benchmarks on the plans.
3. The department will provide outreach and guidance materials to individuals and businesses for how to establish adequate project benchmarks.

3.13: Involving stakeholders in rule development

Stakeholder outreach is described in Section 6 of the *Regulatory Analyses for HPA Rule Making implementing 2SHB 1579*, and events are summarized on Table 3. One small saltwater bank protection construction business was consulted about this requirement. That business indicated benchmarks are established while they are on-site to take measurements for the structure plans. No additional trips or costs are needed to comply with the new requirement because establishing benchmarks has been a standard practice (the department has been requiring them consistently in HPAs) for the past three-or-more years.

3.14: Number of jobs created or lost

There will likely be no jobs created or lost as a result of this proposal. The time involved to establish benchmarks is small relative to the time required to prepare application materials and structure/site plans. The expertise to establish benchmarks is common to most saltwater bank protection construction businesses.

3.15: Summarize results of small business analysis

Costs to comply are less than the minor cost thresholds for businesses required to comply. Small businesses generally pay less per employee to comply than large businesses, with one exception. For that exception, the cost is five cents more per employee.

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

Name: Randi Thurston

Address: P.O. Box 43200 Olympia, WA 98504-3200

Phone: (360) 902-2602

Fax: (360) 902-2946

TTY: (360) 902-2207

Email: HPARules@dfw.wa.gov

Other: Web site: <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking>

Current rule making web site: <https://wdfw.wa.gov/about/regulations/development>

Date: March 2, 2020

Name: Michele K Culver

Title: Agency Rules Coordinator

Signature:



AMENDATORY SECTION (Amending WSR 18-10-054, filed 4/27/18, effective 6/1/18)

WAC 220-660-050 Procedures—Hydraulic project approvals. (1)

Description:

(a) There are six categories of HPAs: Standard, emergency, imminent danger, chronic danger, expedited, and pamphlet. These categories are discussed in more detail throughout this section. Most HPAs issued by the department are standard HPAs. Guidance for applying for an HPA is provided on the department's website.

(b) HPAs do not exempt a person from obtaining other necessary permits and following the rules and regulations of local, federal, and other Washington state agencies.

(2) **Fish life concerns:** Construction and other work activities in or near water bodies can kill or injure fish life directly and can damage or destroy habitat that supports fish life. Damaged or destroyed habitat can continue to cause lost fish life production for as long as the habitat remains altered. HPAs help ensure construction and other work is done in a manner that protects fish life.

(3) **Standard HPA:**

(a) The department issues a standard HPA when a hydraulic project does not qualify for an emergency, imminent danger, chronic danger, expedited or pamphlet HPA. An individual standard HPA is limited to a single project site. Some special types of standard HPAs may cover multiple project sites.

(b) Special types of standard HPAs:

(i) Fish habitat enhancement project (FHEP) HPA.

(A) Projects must satisfy the requirements in RCW 77.55.181(1) to be processed as a fish habitat enhancement project.

(B) Projects that are compensatory mitigation for a development or other impacting project are not eligible. This includes proposals for mitigation banks or in-lieu fee mitigation proposals. The sole purpose of the project must be for fish habitat enhancement.

(C) The department may reject an FHEP proposed under RCW 77.55.181 if the local government raises concerns during the comment period that impacts from the project cannot be mitigated by conditioning the HPA. The department will reject an FHEP if the department determines that the size and the scale of the project raises public health or safety concerns. If the department rejects a project for streamlined processing, the department must provide

written notice to the applicant and local government within forty-five days of receiving the application.

(D) An applicant whose fish habitat enhancement project is rejected may submit a new complete written application with project modifications or additional information required for streamlined processing. An applicant may request that the department consider the project under standard HPA processing procedures by submitting a new complete written application for standard processing.

(ii) Multisite HPA.

(A) A standard HPA may authorize work at multiple project sites if:

(I) All project sites are within the same water resource inventory area (WRIA) or tidal reference area;

(II) The primary hydraulic project is the same at each site so there is little variability in HPA provisions across all sites; and

(III) Work will be conducted at no more than five project sites to ensure department staff has sufficient time to conduct site reviews.

(B) The department may make an exception for projects the department has scoped prior to application submittal or when no prepermit issuance site visits are needed.

(iii) General HPA.

(A) The department may issue general HPAs to government agencies, organizations, or companies to perform the same work in multiple water bodies across a large geographic area.

(B) To qualify for a general HPA, projects must protect fish life:

(I) Technical provisions in the HPA must fully mitigate impacts to fish life;

(II) The projects must be relatively simple so that the HPA provisions are the same across all sites, and can therefore be permitted without site-specific provisions; and

(III) The projects must have little or no variability over time in site conditions or work performed.

(C) The general HPA will include a requirement that notice be given to the department when activities utilizing heavy equipment begin. The department may waive this requirement if the permittee and department meet annually to review scheduled activities for the upcoming year.

(D) The department and the applicant may negotiate the scope and scale of the project types covered. The department and the applicant

must agree on the fish protection provisions required before the application is submitted.

(E) The department may reject applications for a general HPA if:

(I) The proposed project does not meet the eligibility requirements described in subsection (3) (b) (iii) (B) of this section;
or

(II) The department and the applicant cannot agree on the fish protection provisions.

(F) The department must provide written notice of rejection of a general HPA application to the applicant. The applicant may submit a new complete written application with project modifications or additional information required for department consideration under standard HPA processing procedures.

(iv) "Model" HPA.

(A) The department will establish a "model" HPA application and permitting process for qualifying hydraulic projects. To qualify, an individual project must comply with the technical provisions established in the application. Hydraulic projects that qualify for the model process must:

(I) Fully mitigate impacts to fish life in the technical provisions of the HPA;

(II) Be a low complexity project that minimizes misinterpretation of the HPA provisions allowing the HPA to be permitted without site-specific provisions; and

(III) Meet all of the eligibility requirements described in the model application.

(B) If needed to confirm project eligibility, the department may conduct a site visit before approving or rejecting a model application.

(C) The department may reject applications for model HPAs if:

(I) The plans and specifications for the project are insufficient to show that fish life will be protected; or

(II) The applicant or authorized agent does not fill out the application completely or correctly.

(D) The department must provide written notice of rejection of an application to the applicant. The applicant may submit a new complete written application with project modifications or additional information required for department consideration under standard HPA processing procedures under this section, or may submit a new model application if the department rejected the application because the person did not fill out the original application correctly.

(4) **Emergency HPA:**

(a) Declaring an emergency.

(i) Authority to declare an emergency, or continue an existing declaration of emergency, is conveyed to the governor, the department, or to a county legislative authority by statute. An emergency declaration may be made when there is an immediate threat to life, the public, property, or of environmental degradation;

(ii) The county legislative authority must notify the department, in writing, if it declares an emergency;

(iii) Emergency declarations made by the department must be documented in writing;

(iv) When an emergency is declared, the department must immediately grant verbal approval upon request for work to protect life or property threatened by waters of the state because of the emergency, including repairing or replacing a stream crossing, removing obstructions, or protecting stream banks. The department may also grant written approval if the applicant agrees.

(b) If the department issues a verbal HPA, the department must follow up with a written HPA documenting the exact provisions of the verbal HPA within thirty days of issuing the verbal HPA.

(c) Compliance with the provisions of chapter 43.21C RCW (State Environmental Policy Act) is not required for emergency HPAs.

(d) The department may require a person to submit an as-built drawing within thirty days after the hydraulic project authorized in the emergency HPA is completed.

(e) Within ninety days after a hydraulic project authorized in an emergency HPA is completed, any remaining impacts must be mitigated or a mitigation plan must be submitted to the department for approval.

(5) **Imminent danger HPA:**

(a) Authority to declare imminent danger is conveyed to the department or county legislative authority by statute. The county legislative authority must notify the department in writing if it determines that an imminent danger exists.

(b) Imminent danger declarations made by the department must be documented in writing.

(c) When imminent danger exists, the department must issue an expedited HPA upon request for work to remove obstructions, repair existing structures, restore banks, and to protect fish life or property.

(d) When imminent danger exists, and before starting work, a person must submit a complete written application to the department to obtain an imminent danger HPA. Compliance with the provisions of

chapter 43.21C RCW (State Environmental Policy Act) is not required for imminent danger HPAs.

(e) Imminent danger HPAs must be issued by the department within fifteen calendar days after receiving a complete written application. Work under an imminent danger HPA must be completed within sixty calendar days of the date the HPA is issued.

(f) Within ninety days after a hydraulic project authorized in an imminent danger HPA is completed, any remaining impacts must be mitigated or a mitigation plan must be submitted to the department for approval.

(6) Chronic danger HPA:

(a) The department must issue a chronic danger HPA upon request for work required to abate the chronic danger. This work may include removing obstructions, repairing existing structures, restoring banks, restoring road or highway access, protecting fish life, or protecting property.

(b) Authority to declare when a chronic danger exists is conveyed to a county legislative authority by statute. A chronic danger is a condition in which any property, except for property located on a marine shoreline, has experienced at least two consecutive years of flooding or erosion that has damaged or has threatened to damage a

major structure, water supply system, septic system, or access to any road or highway.

(c) The county legislative authority must notify the department in writing when it determines a chronic danger exists.

(d) When chronic danger is declared, and before starting work, a person must submit a complete written application to the department to obtain a chronic danger HPA. Unless the project also satisfies the requirements for fish habitat enhancement projects identified in RCW 77.55.181 (1) (a) (ii), compliance with the provisions of chapter 43.21C RCW (State Environmental Policy Act) is required. Projects that meet the requirements in RCW 77.55.181 (1) (a) (ii), will be processed under RCW 77.55.181(3), and the provisions of chapter 43.21C RCW will not be required.

(7) **Expedited HPA:**

(a) The department may issue an expedited HPA when normal processing would result in significant hardship for the applicant or unacceptable environmental damage would occur.

(b) Before starting work, a person must submit a complete written application to the department to obtain an HPA.

(c) Compliance with the provisions of chapter 43.21C RCW (State Environmental Policy Act) is not required for expedited HPAs. The

department must issue expedited HPAs within fifteen calendar days after receipt of a complete written application. Work under an expedited HPA must be completed within sixty calendar days of the date the HPA is issued.

(d) Within ninety days after a hydraulic project authorized in an expedited HPA is completed, any remaining impacts must be mitigated or a mitigation plan must be submitted to the department for approval.

(8) **Pamphlet HPA:**

(a) There are two pamphlet HPAs, *Gold and Fish* and *Aquatic Plants and Fish*, that cover the most common types of mineral prospecting and removing or controlling aquatic plants, respectively. A person must follow the provisions in the pamphlet. If a person cannot follow the provisions, or disagrees with any provision, the permittee must apply for a standard HPA before starting the hydraulic project.

(b) A person must review a pamphlet HPA before conducting the authorized hydraulic project.

(c) When a pamphlet HPA is used, the permittee must have the pamphlet HPA on the job site when conducting work and the pamphlet must be immediately available for inspection by the department upon request.

(d) All persons conducting the project must follow all provisions of the pamphlet HPA.

(e) The department may grant exceptions to a pamphlet HPA only if a person applies for a standard individual HPA for the project.

(f) Pamphlet HPAs do not exempt a person from obtaining other appropriate permits and following the rules and regulations of local, federal, and other Washington state agencies.

(9) **How to get an HPA:**

(a) How to get a pamphlet HPA: A person can download and save or print a pamphlet HPA from the department's website. A person may also request a pamphlet HPA from the department either verbally or in writing.

(b) How to get an emergency HPA: Upon an emergency declaration, and before starting emergency work, a person must obtain a verbal or written HPA from the department. A complete written application is not required. However, a person must provide adequate information describing the proposed action. Compliance with the provisions of chapter 43.21C RCW (State Environmental Policy Act), is not required for emergency HPAs. A person may request a verbal or written emergency HPA from the biologist who issues HPAs for the geographic area where the emergency is located Monday through Friday from 8:00 a.m. to 5:00

p.m. If the biologist cannot be contacted or it is after business hours, a person must contact the emergency hotline at 360-902-2537 to request an emergency HPA.

(c) How to get a standard, expedited, or chronic danger HPA:

(i) A person must submit a complete written application to the department to obtain an HPA unless the project qualifies for one of the following:

(A) A pamphlet HPA, subsection (3) of this section; or

(B) An emergency HPA, subsection (5) of this section.

(ii) When applying for an HPA, a person must submit one of the following application forms to the department:

(A) The electronic online application developed by the department;

(B) The current version of the JARPA;

(C) The current version of the JARPA including the most recent version of the application for streamlined processing of fish habitat enhancement projects when applying for streamlined processing under RCW 77.55.181. These may be submitted to the department as attachments to the online application form;

(D) The most recent version of the model HPA application or other department-approved alternative applications available from the department's public website; or

(E) The current version of the JARPA if applying for approval of a watershed restoration project under RCW 77.55.171. This may be submitted to the department as an attachment to the online application form.

(iii) A complete application package for an HPA must contain:

(A) A completed application form signed and dated by the applicant, landowner(s) or landowner representative(s) of any project site or off-site mitigation location, and the authorized agent, if any. Completing and submitting the application forms through the department's online permitting system is the same as providing signature and date, if all documents required during the online application process are submitted to the department. The property owner, if different than the applicant, or easement holder must consent to the department staff entering the property where the project is located to inspect the project site or any work;

(B) Plans for the overall project;

(C) Complete plans and specifications for all aspects of the proposed construction or work waterward of the mean higher high water

line in salt water, or waterward of the ordinary high water line in fresh water;

(D) A description of the measures that will be implemented for the protection of fish life, including any reports assessing impacts from the hydraulic project to fish life and their habitat (~~that supports fish life~~), and plans to mitigate those impacts to ensure the project results in no net loss;

(E) For a standard or chronic danger HPA application, a copy of the written notice from the lead agency demonstrating compliance with any applicable requirements of the State Environmental Policy Act under chapter 43.21C RCW, unless otherwise provided for in chapter 77.55 RCW; or the project qualifies for a specific categorical exemption under chapter 197-11 WAC;

(F) Written approval by one of the entities specified in RCW 77.55.181 if the applicant is proposing a fish enhancement project;

(G) For an expedited application, an explanation of why normal processing would result in significant hardship for the applicant or unacceptable environmental damage.

(iv) HPA application submission:

(A) A person must submit the complete application package:

(I) Using the department's online permitting system;

(II) Sending the package via mail to:

Department of Fish and Wildlife

P.O. Box 43234

Olympia, WA 98504-3234;

(III) Email: HPAapplications@dfw.wa.gov;

(IV) Fax: 360-902-2946;

(V) Uploading to a file transfer protocol site acceptable to the department; or

(VI) Hand delivering to the department at 1111 Washington Street S.E., Olympia, WA 98504, Habitat Program, Fifth Floor. The department will not accept applications submitted elsewhere or by other than the applicant or authorized agent.

(B) Dimensions of printed documents submitted with the application package may not be larger than eleven inches by seventeen inches. Pages of documents submitted may not be bound except by paper clips or other temporary fastening.

(C) A person must submit applications and supporting documents with a combined total of thirty or more pages as digital files rather than printed documents. All digital files must be in formats compatible with Microsoft Word, Microsoft Excel, or Microsoft Access programs or in PDF, TIFF, JPEG, or GIF formats.

(D) Applications submitted to the habitat program during normal business hours are deemed received on the date the habitat program receives the application. The department may declare applications received by the habitat program after normal business hours as received on the next business day.

(10) **Incomplete applications:**

(a) Within ten days of receipt of the application, the department must determine whether an application meets the requirements of this section. If the department determines the application does not meet the requirements, the department will provide written or emailed notification of an incomplete application to the applicant or authorized agent. This written or emailed notification must include a description of information needed to make the application complete. The department may return the incomplete application to the applicant or authorized agent or hold the application on file until it receives the missing information. The department will not begin to process the application until it receives all information needed to complete the application.

(b) The applicant or authorized agent must submit additional information in response to a written notification of incomplete application through the department's online permitting system or to

the department's habitat program, Olympia headquarters office. The department will not accept additional information submitted elsewhere or by other than the applicant or authorized agent.

(c) The department may close any application that has been incomplete for more than twelve months. The department must provide the applicant or authorized agent with written notification at least one week before closing the application and must provide the option for the applicant or authorized agent to postpone the closure for up to one year. The department must provide the applicant with written notification at the time it closes the application. After an application is closed, the applicant or authorized agent must submit a new complete application to receive further consideration of the project.

(11) **Application review period:**

(a) Once the department determines an application is complete, the department will provide to tribes and local, state, and federal permitting or authorizing agencies a seven-calendar-day review and comment period. The department will not issue the HPA ((~~permit~~)) before the end of the review period to allow all interested tribes and agencies to provide comments to the department. The department may consider all written comments received when issuing or provisioning

the HPA. The review period is concurrent with the department's overall review period. Emergency, imminent danger, expedited, and modified HPAs are exempt from the review period requirement.

(b) Except for emergency, imminent danger, and expedited HPAs, the department will grant or deny approval within forty-five calendar days of the receipt of a complete written application. The department will grant approval of imminent danger and expedited HPAs within fifteen days of the receipt of a complete written application. The department will grant approval of emergency HPAs immediately upon request if an emergency declaration has been made.

(c) If the department declares an imminent danger, applicant hardship, or immediate threat regarding an application for expedited or emergency HPA, the department must place written documentation of that declaration and justification for it in the application record within three days of issuing the written HPA.

(12) Suspending the review period:

(a) An applicant or authorized agent may request a delay in processing a standard HPA. The applicant or authorized agent must submit a written request for the delay through the department's online permitting system or to the habitat program's Olympia headquarters

office. The department may not accept delay requests submitted elsewhere or by a person other than the applicant or authorized agent.

(b) If the department suspends the review period, the department must immediately notify the applicant in writing of the reasons for the delay. The department may suspend the review period (with or without the applicant's concurrence) if:

(i) The site is physically inaccessible for inspection or not in a condition to be evaluated (i.e., snow cover, frozen);

(ii) The applicant or authorized agent remains unavailable or unable to arrange for a field evaluation of the proposed project within ten working days of the department's receipt of the application;

(iii) The applicant or authorized agent submits a written request for a delay;

(iv) The department is issuing (~~a permit~~) an HPA for a stormwater discharge and is complying with the requirements of RCW 77.55.161 (3) (b); or

(v) The department is reviewing the application as part of a multiagency permit streamlining effort, and all participating permitting and authorizing agencies and the permit applicant agree to an extended timeline longer than forty-five calendar days.

(c) The department may close any application if the application has been delayed for processing more than twelve months for any of the reasons identified in subsection (12) (a) or (b) of this section. The department must provide the applicant or authorized agent with written notification at least one week before closing the application and must provide the option for the applicant or authorized agent to postpone the closure for up to one year. The department must provide the applicant with written notification at the time it closes the application. After an application is closed, the applicant or authorized agent must submit a new complete application to receive further consideration of the project.

(13) Issuing or denying a hydraulic project approval:

(a) Protection of fish life is the only grounds upon which the department may deny or provision an HPA, as provided in RCW 77.55.021. The department may not unreasonably withhold or condition approval of (~~a permit~~) an HPA. The HPA provisions must reasonably relate to the project and must ensure that the project provides proper protection for fish life. The department may not impose provisions that attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project.

(b) The department may not deny an emergency, imminent danger, chronic danger, or an expedited HPA, as provided in RCW 77.55.021. (~~(In addition, the department may not deny an HPA for a project that complies with the conditions of RCW 77.55.141.)~~) However, these projects must (~~(meet the mitigation)~~) comply with the provisions in (~~(WAC 220-660-080 and the provisions in WAC 220-660-100 through 220-660-450)~~) this chapter that are included in an HPA. The department will deny any other type of HPA or request to change an existing HPA when the project will not protect fish life, unless enough mitigation can be assured by provisioning the HPA or modifying the proposal. If the department denies approval, the department must provide the applicant with a written statement of the specific reasons why and how the proposed project would adversely affect fish life, as provided in RCW 77.55.021.

(c) The department may place specific time limitations on project activities in an HPA to protect fish life.

(d) The department may require a person to notify the department before construction or other work starts, upon project completion, or at other times that the department deems necessary while the (~~(permit)~~) HPA is in effect. The department may also require a person

to provide periodic written reports to assess ((~~permit~~)) HPA compliance.

(e) The HPA must contain provisions that allow for minor modifications to the work timing, plans, and specifications of the project without requiring the reissuance of the ((~~permit~~)) HPA, as long as the modifications do not adversely affect fish life or the habitat that supports fish life. The permittee should contact the habitat program's Olympia headquarters office through email or the department's online permit application system to request a minor modification.

(f) A person may propose or conduct a hydraulic project under an environmental excellence program agreement authorized under chapter 43.21K RCW. These projects must be applied for and permitted under the requirements of chapter 43.21K RCW.

(14) Hydraulic project approval expiration time periods:

(a) Except for emergency, imminent danger, expedited, and pamphlet HPAs, the department may grant standard HPAs that are valid for up to five years. The permittee must demonstrate substantial progress on construction of the portion of the project authorized in the HPA within two years of the date of issuance.

(b) Imminent danger and expedited HPAs are valid for up to sixty days, and emergency HPAs are valid for the expected duration of the emergency hydraulic project.

(c) Pamphlet HPAs remain in effect indefinitely until modified or rescinded by the department.

(d) The following types of agricultural hydraulic project HPAs remain in effect without the need for periodic renewal; however, a person must notify the department before starting work each year:

(i) Seasonal work that diverts water for irrigation or stock watering; and

(ii) Stream bank stabilization projects to protect farm and agricultural land if the applicant can show that the problem causing the erosion occurs annually or more frequently. Evidence of erosion may include history of permit application, approval, or photographs. Periodic floodwaters alone do not constitute a problem that requires an HPA.

(15) Requesting a time extension, renewal, modification, or transfer of a hydraulic project approval:

(a) The permittee may request a time extension, renewal, modification, or transfer of an active HPA. Before the HPA expires, the permittee or authorized agent must submit a written request

through the department's online permitting system or to the habitat program's Olympia headquarters office. The department may not accept requests for delay, renewal, modification, or transfer of an HPA submitted elsewhere or by a person other than the permittee or authorized agent. Written requests must include the name of the applicant, the name of the authorized agent if one is acting for the applicant, the permit number or application identification number of the HPA, the date issued, the permitting biologist, the requested changes to the HPA if requesting a time extension, renewal, or modification, the reason for the requested change, the date of the request, and the requestor's signature. Requests for transfer of an HPA to a new permittee or authorized agent must additionally include a signed, written statement that the new permittee or authorized agent agrees to the conditions of the HPA, that they agree to allow the department access to the project location to inspect the project site, mitigation site, or any work related to the project, and that they will not conduct any project activities until the department has issued approval.

(b) Requests for time extensions, renewals, or modifications of HPAs are deemed received on the date received by the department. The

department may declare applications submitted to habitat program after normal business hours as received on the next business day.

(c) Within forty-five days of the requested change, the department must approve or deny the request for a time extension, renewal, modification, or transfer of an approved HPA.

(d) Unless the new permittee or authorized agent requests a time extension, renewal, or modification of an approved HPA, the department may change only the name and contact information of the permittee or authorized agent and must not alter any provisions of the HPA except the project or location start dates when granting a transfer.

(e) A permittee may request a modification or renewal of an emergency HPA until the emergency declaration expires or is rescinded. Requests for changes to emergency HPAs may be verbal, but must contain all of the information in (a) of this subsection.

(f) The department must not modify or renew an HPA beyond the applicable five-year or sixty-day periods. A person must submit a new complete application for a project needing further authorization beyond these time periods.

(g) The department will issue a letter documenting an approved minor modification(s) and a written HPA documenting an approved major modification(s) or transfer.

(16) **Modifications of a hydraulic project approval initiated by the department:**

(a) After consulting with the permittee, the department may modify an HPA because of changed conditions. The modification becomes effective immediately upon issuance of a new HPA.

(b) For hydraulic projects that divert water for agricultural irrigation or stock watering, or when the hydraulic project or other work is associated with stream bank stabilization to protect farm and agricultural land as defined in RCW 84.34.020, the department must show that changed conditions warrant the modification in order to protect fish life.

(17) **Revoking an HPA.**

(a) The department may revoke an HPA under the following conditions:

- (i) At the written request of the permittee or authorized agent;
- (ii) As the result of an informal or formal appeal decision;
- (iii) As the result of a court ruling finding that the department issued the HPA in error;
- (iv) Following change of a determination of nonsignificance or mitigated determination of nonsignificance to a determination of

significance by a lead agency under chapter 43.21C RCW that applies to the hydraulic project approved by the HPA;

(v) The applicant did not correctly identify compliance with the requirements of chapter 43.21C RCW in the HPA application (~~for an HPA~~) and the department was unaware of the error until after the (~~permit~~) HPA was issued;

(vi) Changed physical or biological conditions at the site of the hydraulic project have occurred before project initiation such that fish life cannot be protected if the project proceeds under the requirements of the existing HPA;

(vii) The permittee has not demonstrated substantial progress on construction of the hydraulic project within two years of the date of issuance as required in RCW 77.55.021 (9) (a). Substantial progress means initiation of work at any of the project locations identified in the HPA;

(viii) Duplicate HPAs have been issued for the same hydraulic project.

(b) The department must provide the permittee or authorized agent with written notification before revoking the HPA.

(c) The department must notify the permittee or authorized agent in writing immediately upon revoking the HPA.

(18) Requesting a preapplication determination:

(a) A person may request information or a technical assistance site visit from the department prior to submitting an HPA application or at any other time. The department will provide the requested information either verbally or in writing.

(b) If a person is unsure about whether proposed construction or other work landward of (above) the ordinary high water line requires an HPA, they may request a preapplication determination from the department under RCW 77.55.400. The department must evaluate the proposed project and determine if it is a hydraulic project and, if so, whether an HPA from the department is required to ensure proper protection of fish life.

(c) The preapplication determination request must be submitted through the department's online permitting system and must contain:

(i) A description of the proposed project, which must include the location of the ordinary high water line;

(ii) A map showing the location of the project site, which must include the location of the ordinary high water line; and

(iii) Preliminary plans and specifications of the proposed project, if available, which include the location of the ordinary high water line.

(d) The department must provide tribes and local governments a seven calendar day review and comment period. The department must consider all applicable written comments that it receives before it issues a determination as described in this subsection.

(e) The department must issue a written determination, including its rationale for the decision, within twenty-one calendar days of receiving the request.

(f) Chapter 43.21C RCW (state environmental policy) does not apply to preapplication determinations issued under this subsection.

(g) The department's preapplication determination decision may be appealed as provided in WAC 220-660-460 (Informal appeal of administrative action) or WAC 220-660-470 (Formal appeal of administrative action).

(19) Notice of intent to disapprove HPA applications:

(a) The department may disapprove HPA applications submitted by a project proponent who has failed to comply with a stop work order or notice to comply issued under WAC 220-660-480, or who has failed to pay civil penalties issued under WAC 220-660-480. The term "project proponent" has the same definition as in RCW 77.55.410.

(b) The department may disapprove HPA applications submitted by such project proponents for up to one year after the date on which the

department issues a notice of intent to disapprove HPA applications, or until such project proponent pays all outstanding civil penalties and complies with all notices to comply and stop work orders issued under WAC 220-660-480, whichever is longer (disapproval period).

(c) The department must provide written notice of its intent to disapprove HPA applications to the project proponent and to any authorized agent or landowner identified in the application, in person or via United States mail, to the mailing address(es) listed on the project proponent's HPA application.

(d) The disapproval period begins on the date the department's notice of intent to disapprove HPA applications becomes final. The notice of intent to disapprove HPA applications becomes final thirty calendar days after the department issues it, or upon exhaustion of all applicable administrative and/or judicial remedies.

(e) Any project proponent issued a notice of intent to disapprove HPA applications may, within thirty days of the date of the notice, initiate a formal appeal of the notice as provided in WAC 220-660-470 (Formal appeal of administrative actions).

(f) The department will provide notice and waiver of fines, civil penalties, and administrative sanctions consistent with RCW 34.05.110 and WAC 220-660-480(12).

[Statutory Authority: RCW 77.04.012, 77.04.020, 77.12.047, 77.55.021, 77.55.091, 77.55.051, 77.55.081, 34.05.328, and 34.05.350. WSR 18-10-054, § 220-660-050, filed 4/27/18, effective 6/1/18. Statutory Authority: RCW 77.04.012, 77.04.020, and 77.12.047. WSR 15-02-029 (Order 14-353), § 220-660-050, filed 12/30/14, effective 7/1/15.]

AMENDATORY SECTION (Amending WSR 15-02-029, filed 12/30/14, effective 7/1/15)

WAC 220-660-370 Bank protection in saltwater areas. ((RCW

~~77.55.141 applies to single-family residence bank protection that will not result in a permanent loss of critical food fish and shellfish habitat. RCW 77.55.021 applies to nonsingle-family residence bank protection and single-family residence bank protection that does not comply with the criteria in RCW 77.55.141. The department may deny bank protection applications processed under RCW 77.55.021 that do not provide proper protection of fish life.)) Appropriate methods to assess the need for marine bank protection and, if needed, to design marine bank protection are available in the department's *Marine Shoreline Design Guidelines*, as well as other published manuals and guidelines.~~

(1) **Description:** (~~(A bank protection structure is a permanent or temporary structure constructed to protect or stabilize the bank. Bank protection methods are either hard or soft techniques. Soft approaches attempt to mimic natural processes by using biotechnical methods such as live plantings, rootwads and large woody material (LWM), and beach nourishment. Usually, soft approaches are designed to be less impacting to fish life. Hard approaches armor the bank with material such as rock, concrete, or wood intended to prevent erosion of the bank. Some projects use both hard and soft approaches. To be considered soft, at least eighty five percent of the total project area must be constructed with naturally occurring materials in a manner that mimics the natural shore processes taking place in the vicinity of the project. In addition, the remaining fifteen percent of the total project area must not interrupt sediment delivery to the beach (e.g., must not bulkhead a feeder bluff). The total project area extends cross-shore from MLLW to the OHWL, and long shore from a line perpendicular to the shoreline at the beginning of one end of construction to the other end.)~~) A broad spectrum of bank protection techniques can be applied to protect property. These range from natural techniques that require minimal or no engineering to engineered soft shore protection to hard shore armor. Natural

techniques include planting native vegetation, improving drainage, and relocating structures. Natural techniques typically preserve the natural condition of the shore and have few to no negative impacts on fish life. Soft shore techniques include log placement, beach nourishment, resloping the bank, and revegetation can provide erosion protection using strategically placed natural materials while allowing beach processes and fish habitat to remain intact. Conventional hard techniques include bulkheads, seawalls, revetments and retaining walls, which are designed to preclude shoreline migration and bank erosion. Each type of approach has varying degrees of impact. In general, natural techniques result in the fewest impacts to fish life and hard armor have the most impacts.

(2) **Fish life concerns:** (~~(Bank protection structures)~~)

Conventional hard techniques as well as some soft shore techniques can physically alter the beach and disrupt (~~(nearshore ecosystem)~~) beach processes (~~(and physical conditions)~~). This alteration can cause a loss of the beach spawning habitat for Pacific sand lance and surf smelt (~~(and a loss of migration, feeding, and rearing habitat for juvenile salmon)~~). These forage fish species are a primary food source for some adult salmon species. This alteration can also reduce beach complexity, the presence of marine riparian vegetation including

overhanging vegetation alongshore that produces terrestrial insects that are eaten by juvenile salmon. To protect fish life, the department protects ~~((the))~~ both beaches where ~~((critical food fish or shellfish habitat))~~ saltwater habitats of special concern occur and the ~~((nearshore zone geomorphie))~~ beach processes that form and maintain this ~~((critical))~~ habitat.

(3) ~~((Bulkheads and other))~~ **Bank protection design:**

(a) If the ordinary high water line (OHWL) ~~((is))~~ has changed since an existing hard bank protection structure was built, and OHWL reestablishes landward of ~~((a bulkhead protection))~~ the structure, the department will consider this reestablished OHWL to be the existing OHWL for permitting purposes. If an HPA application ~~((for an HPA))~~ is submitted for repairs within three years of the breach, the bank protection structure may be repaired or replaced in the original footprint.

(b) A person must use the least impacting technically feasible bank protection alternative. A person should propose a hard armor technique only after considering site characteristics such as the threat to major improvements, wave energy, and other factors in an alternatives analysis. The common alternatives below are in order from most preferred to least preferred:

- (i) Remove the bank protection structure;
- (ii) (~~No action~~) Control upland drainage;
- (iii) Protect, enhance, and replace native vegetation;
- (iv) Relocate improvements or structures;
- (v) Construct a soft structure (~~(by placing beach nourishment and large woody material)~~);
- (vi) Construct upland retaining walls;
- (vii) Construct ((a)) hard structure (~~(such as bulkhead and rock revetment)~~) landward of the OHWL; and
- (viii) Construct ((a)) hard structure (~~(such as a bulkhead and rock revetments)~~) at the OHWL.

(c) (~~Upon receipt of a complete application, the department will determine the applicable RCW under which to process the application.~~

~~(i) A new, replacement, or repaired single-family residence bulkhead in saltwater areas must not result in the permanent loss of critical food fish or shellfish habitat to be processed under RCW 77.55.141.~~

~~(ii) If construction of a new single-family residence bulkhead or other bank protection project, or replacement or repair of an existing single-family residence bulkhead or other bank protection project waterward of the existing structure will result in the permanent loss~~

~~of critical food fish or shellfish habitat, the department must instead process the application under RCW 77.55.021. However,~~) The construction of all ((bulkheads or other)) bank protection must not result in a permanent loss of surf smelt or Pacific sand lance spawning beds.

(d) An HPA application for ((a)) new ((~~bulkhead or other~~)) bank protection ((~~work~~)), or the replacement or rehabilitation of ((a ~~bulkhead or other~~) bank protection ((structure)) that extends waterward of ((the)) an existing bank protection structure must include a site assessment, alternatives analysis and design rationale for the proposed method prepared by a qualified professional ((~~such as a coastal geologist, geomorphologist, etc.~~) for the proposed project and selected technique)). The department may grant an exemption depending on the scale and nature of the project. ((~~In addition, this requirement does not apply to projects processed under RCW 77.55.141. This report must include~~)) The applicant must submit the qualified professional's report to the department as part of a complete application for an HPA that includes:

(i) An assessment of the level of risk to existing buildings, roads, or services being threatened by the erosion;

(ii) Evidence of erosion and/or slope instability to warrant the stabilization work;

(iii) Alternatives considered and the technical rationale specific to the ((design-developed)) bank protection technique proposed;

(iv) An analysis of the benefits and impacts associated with the chosen protection ((~~technique~~)) method; and

(v) An explanation of the ((~~technique~~)) method chosen, design parameters, types of materials, quantities, staging, and site rehabilitation.

(e) The department may require the design of hard bank protection ((~~projects~~)) structures to incorporate beach nourishment, large woody material or native vegetation as mitigation.

(4) ((~~Single-family residence bulkhead projects processed under RCW 77.55.141:~~

~~(a) Locate the waterward face of a new bulkhead at or above the OHWL. Where this is not feasible because of geological, engineering, or safety concerns, the bulkhead may extend waterward of the OHWL the least distance needed to excavate for footings or place base rock, but no more than six feet waterward of the OHWL.~~

~~(b) Do not locate the waterward face of a replacement or repaired bulkhead further waterward than the structure it is replacing. Where removing the existing bulkhead will result in environmental degradation such as releasing deleterious material or problems due to geological, engineering, or safety concerns, the department will authorize the replacement bulkhead to extend waterward of, but directly abutting, the existing structure. In these instances, the design must use the least impacting type of structure and construction method.~~

~~(5)) Bank protection ((~~projects processed under RCW 77.55.021~~))~~

location:

(a) Locate the waterward face of a new ((~~bulkhead~~)) hard bank protection structure at or above the OHWL. Where this is not feasible because of geological, engineering, or safety concerns, the ((~~bulkhead~~)) hard bank protection structure may extend waterward of the OHWL the least distance needed to excavate for footings or place base rock, but no greater than six feet. Soft shoreline ((~~stabilization techniques that provide restoration of shoreline ecological functions may be permitted~~)) methods that allow beach processes and habitat to remain intact may extend waterward of the OHWL.

(b) Do not locate the waterward face of a replacement or repaired ~~((bulkhead))~~ hard bank protection further waterward than the structure it is replacing. Where removing the existing ~~((bulkhead))~~ hard bank protection will result in environmental degradation such as releasing deleterious material or problems due to geological, engineering, or safety concerns, the department will authorize the replacement ~~((bulkhead))~~ bank protection to extend waterward of, but directly abutting, the existing structure. In these instances, ~~((the design))~~ a person must use the least-impacting type of structure and construction method.

~~((6) Bulkhead and other))~~ (5) Bank protection construction:

(a) The department ~~((may require a person to establish))~~ requires that plans submitted as part of a complete application show the horizontal distances of the structure(s) from ((a)) permanent local benchmark(s) (fixed objects) ((before starting work on the project)). Each horizontal distance shown must include the length and compass bearing from the benchmark to the waterward face of the structure(s). The benchmark(s) must be located, marked, and protected to serve as a post-project reference for at least ten years from the date the HPA application is submitted to the department.

(b) A person must not conduct project activities when tidal waters cover the work area including the work corridor, except the area occupied by a grounded barge.

(c) No stockpiling of excavated materials containing silt, clay, or fine-grained soil is approved waterward of the OHWL.

(d) The department may allow stockpiling of sand, gravel, and other coarse material waterward of the OHWL. Place this material within the designated work corridor (~~waterward of the bulkhead footing or base rock~~). Remove all excavated or stockpiled material from the beach within seventy-two hours of construction.

(e) Backfill all trenches, depressions, or holes created during construction that are waterward of the OHWL before they are filled by tidal waters.

[Statutory Authority: RCW 77.04.012, 77.04.020, and 77.12.047. WSR 15-02-029 (Order 14-353), § 220-660-370, filed 12/30/14, effective 7/1/15.]

AMENDATORY SECTION (Amending WSR 18-10-054, filed 4/27/18, effective 6/1/18)

WAC 220-660-460 Informal appeal of administrative actions. An

informal appeal is an ~~((appeal to the department pursuant to))~~
internal department review of a department HPA decision and is
conducted under chapter 34.05 RCW (Administrative Procedure Act).

(1) The department recommends that a person aggrieved by ~~((the issuance, denial, provisioning, or modification of an HPA))~~ a department HPA decision contact the department employee responsible for making the decision ~~((on the HPA))~~ before initiating an informal appeal. Discussion of concerns with the department employee often results in a resolution ~~((of the problem))~~ without the need for an informal appeal.

(2) The department encourages ~~((aggrieved persons))~~ a person aggrieved by a department HPA decision to take advantage of the informal appeal process before initiating a formal appeal. However, ~~((the informal appeal process is not mandatory, and))~~ a person may ~~((proceed directly to))~~ pursue a formal appeal under WAC 220-660-470 without first obtaining informal review under this section.

This rule does not apply to ~~((any provisions in))~~ pamphlet HPAs. A person who disagrees with a provision in a pamphlet HPA may apply for an individual, written HPA.

This rule does not apply to correction requests issued following a technical assistance visit or compliance inspection under WAC 220-660-480.

(3) Requesting an informal appeal.

(a) Any person with legal standing may request an informal appeal of ~~((the following department actions:~~

~~(a))~~ the issuance, denial, provisioning, or modification of an HPA ~~((or)),~~ the rejection of a fish habitat enhancement project application, or a preapplication determination.

~~(b) ((An order imposing civil penalties.))~~ Issuance of a stop work order or notice to comply may be informally appealed only by the project proponent who received the notice or order or by the owner of the land on which the hydraulic project is located.

(c) Issuance of a notice of civil penalty may be informally appealed only by the person incurring the penalty.

(4) A request for an informal appeal must be in writing and must be received by the department within thirty days from the date of receipt of the decision ~~((or)),~~ order, or notice. "Date of receipt" means:

(a) Five business days after the date of mailing; or

(b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence, up to forty-five days from the date of mailing. A person's sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the department, must constitute enough evidence of actual receipt. (~~The date of actual receipt; however, may not exceed forty-five days from the date of mailing.~~)

(5) A request for informal appeal must be submitted in one of the following ways:

(a) Mailed to the:

HPA Appeals Coordinator

Department of Fish and Wildlife

Habitat Program

P.O. Box 43234

Olympia, WA 98504-3234;

(b) Email: HPAapplications@dfw.wa.gov;

(c) Fax: 360-902-2946; or

(d) Hand delivered to the Natural Resources Building, 1111

Washington Street S.E., Habitat Program, Fifth Floor.

(6) The request must be plainly labeled as "Request for Informal Appeal" and must include the following:

(a) The appellant's name, address, email address (if available), and phone number;

(b) The specific department action that the appellant contests;

(c) The date of the specific department (~~((issued, denied, provisioned, or modified an HPA, or the date the department issued the order imposing civil penalties))~~) action being contested;

(d) The log number or a copy of the HPA, or a copy of the (~~order imposing civil penalties~~) specific department action that the appellant contests;

(e) A short and plain statement explaining why the appellant considers the department action or order to provide inadequate protection of fish life or to be otherwise unlawful;

(f) A clear and concise statement of facts to explain the appellant's grounds for appeal;

(g) Whether the appellant is the permittee, HPA applicant, landowner, resident, or another person with an interest in the department action in question;

(h) The specific relief requested;

(i) The attorney's name, address, email address (if available), and phone number, if the appellant is represented by legal counsel;
and

(j) The signature of the appellant or his or her attorney.

(7) Upon receipt of a valid request for an informal appeal, the department may initiate a review of the department action.

(8) Informal conference. If the appellant agrees, and the appellant applied for the HPA, resolution of the appeal may be facilitated through an informal conference. The informal conference is an optional part of the informal appeal and is normally a discussion between the appellant, the department employee responsible for the decision, and a supervisor. The time period for the department to issue a decision on an informal appeal is suspended during the informal conference process.

(9) Informal appeal hearing. If the appeal is received from a person who is not the permittee, or if the appeal involves an order imposing civil penalties, or if a resolution is not reached through the informal conference process, then the HPA appeals coordinator or designee may conduct an informal appeal hearing or review. Upon completion of the informal appeal hearing or review, the HPA appeals coordinator or designee must recommend a decision to the director or designee. The director or designee must approve or decline to approve the recommended decision within sixty days of the date the department received the request for informal appeal, unless the appellant agrees

to an extension of time. The department must notify the appellant in writing of the decision of the director or designee.

(10) If the department declines to initiate an informal review of its action after receipt of a valid request, or the appellant still wishes to contest the department action following completion of the informal appeal process, the appellant may initiate a formal appeal under WAC 220-660-470. Formal review must be requested within the time periods specified in WAC 220-660-470.

[Statutory Authority: RCW 77.04.012, 77.04.020, 77.12.047, 77.55.021, 77.55.091, 77.55.051, 77.55.081, 34.05.328, and 34.05.350. WSR 18-10-054, § 220-660-460, filed 4/27/18, effective 6/1/18. Statutory Authority: RCW 77.04.012, 77.04.020, and 77.12.047. WSR 15-02-029 (Order 14-353), § 220-660-460, filed 12/30/14, effective 7/1/15.]

AMENDATORY SECTION (Amending WSR 18-10-054, filed 4/27/18, effective 6/1/18)

WAC 220-660-470 Formal appeal of administrative actions. A formal appeal is an appeal to the pollution control hearings board (~~(pursuant to)~~) (board) under chapters 34.05 RCW and 371-08 WAC.

(1) The department recommends that a person aggrieved by ~~((the issuance, denial, provisioning, or modification of an))~~ a department HPA decision contact the department employee responsible for making the decision on the HPA before initiating a formal appeal. Discussion of concerns with the department employee often results in a resolution ~~((of the problem))~~ without the need for a formal appeal.

(2) The department encourages ~~((aggrieved persons))~~ a person aggrieved by a department HPA decision to take advantage of the informal appeal process under WAC 220-660-460 before initiating a formal appeal. However, ~~((the informal appeal process is not mandatory, and))~~ a person may ~~((proceed directly to))~~ pursue a formal appeal under this section without first completing the informal appeal process under WAC 220-660-460.

This rule does not apply to ~~((any provisions in))~~ pamphlet HPAs. A person who disagrees with a provision in a pamphlet HPA may apply for an individual, written HPA.

This rule does not apply to correction requests issued following a technical assistance visit or compliance inspection, under WAC 220-660-480.

(3) Requesting a formal appeal.

(a) Any person with standing may request a formal appeal of the
~~((following department actions:~~

~~(a) The)) issuance, denial, provisioning, or modification of an~~
HPA; ~~((or~~

~~(b) An order imposing civil penalties.~~

~~(4) As required by the Administrative Procedure Act, chapter~~
~~34.05 RCW, the department must inform the HPA permittee or applicant,~~
~~or person subject to civil penalty order of the department, of the~~
~~opportunity for appeal, the time within which to file a written~~
~~request for an appeal, and the place to file it.)) the rejection of a~~
fish habitat enhancement project application for streamlined
processing; a notice of intent to disapprove HPA applications; or a
preapplication determination.

(b) Issuance of a stop work order, notice to comply, or notice of
intent to disapprove HPA applications, may be formally appealed only
by a person who received the order or notice from the department or by
the owner of the land on which the hydraulic project is located.

(c) Issuance of a notice of civil penalty may be formally
appealed only by the person incurring the penalty.

(4) The recipient of a stop work order must comply with the order
immediately upon receipt. However, the board may stay, modify, or

discontinue the order upon motion, under such conditions as the board may impose.

(5) A request for formal appeal must be in writing and must be filed with the clerk of the (~~(pollution control hearings)~~) board (~~((PCHB))~~) and served on the department within thirty days from the date of receipt of the decision (~~((or))~~), order, or notice. "Date of receipt" means:

(a) Five business days after the date of mailing; or

(b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence (~~((The recipient's))~~), up to forty-five days from the date of mailing. A person's sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the department, must constitute enough evidence of actual receipt. (~~((The date of actual receipt; however, may not exceed forty-five days from the date of mailing.))~~)

(6) The request must be plainly labeled as "Request for Formal Appeal" and, (~~((pursuant to))~~) under WAC 371-08-340, must include the following:

(a) The appellant's name, mailing address, email address (if available), and phone number; and if represented by another, the

representative's name, mailing address, email address, and phone number;

(b) The specific department action that the appellant contests;

(c) The date of the specific department (~~(issued, denied, provisioned, or modified an HPA, or the date the department issued the order imposing civil penalties)~~) action being contested;

(d) A copy of the decision, notice, order, or (~~(permit)~~) HPA you are appealing, and if appealing a permit decision, a copy of the (~~(permit)~~) HPA application;

(e) A short and plain statement explaining why the appellant considers the department action, notice, or order to provide inadequate protection of fish life or to be otherwise unjust or unlawful;

(f) A clear and concise statement of facts to explain the appellant's grounds for appeal;

(g) Whether the appellant is the permittee, HPA applicant, landowner, resident, or another person with an interest in the department action in question;

(h) The specific relief requested;

(i) The signature of the appellant or his or her representative.

(7) Service on the department must be submitted in one of the following ways:

(a) Mailed to:

HPA Appeals Coordinator

Department of Fish and Wildlife

Habitat Program

P.O. Box 43234

Olympia, WA 98504-3234;

(b) Email: HPAapplications@dfw.wa.gov;

(c) Fax: 360-902-2946; or

(d) Hand delivered to the Natural Resources Building, 1111 Washington Street S.E., Habitat Program, Fifth Floor.

(8) The time period for requesting a formal appeal is suspended during consideration of a timely informal appeal. If there has been an informal appeal, the deadline for requesting a formal appeal must be within thirty days from the date of receipt of the department's written decision in response to the informal appeal.

(9) The department at its discretion may stay the effectiveness of any decision or order that has been appealed to the ((PCHB)) board. The department will use the standards in WAC 371-08-415(4) to make a decision on any stay request. At any time during the appeal ((to the

~~PCHB~~)), the appellant may apply to the ((~~PCHB~~) board for a stay of the decision or order, or removal of a stay imposed by the department.

(10) If there is no timely request for an appeal, the department action will be final and nonappealable.

[Statutory Authority: RCW 77.04.012, 77.04.020, 77.12.047, 77.55.021, 77.55.091, 77.55.051, 77.55.081, 34.05.328, and 34.05.350. WSR 18-10-054, § 220-660-470, filed 4/27/18, effective 6/1/18. Statutory Authority: RCW 77.04.012, 77.04.020, and 77.12.047. WSR 15-02-029 (Order 14-353), § 220-660-470, filed 12/30/14, effective 7/1/15.]

AMENDATORY SECTION (Amending WSR 15-02-029, filed 12/30/14, effective 7/1/15)

WAC 220-660-480 Compliance with HPA provisions. A project proponent must comply with all provisions of chapter 77.55 RCW, this chapter, and the HPA. If a project proponent violates chapter 77.55 RCW or this chapter or deviates from any provision of an HPA issued by the department, the department may issue a correction request, a stop work order, a notice to comply, or a notice of civil penalty. The term "project proponent" has the same definition as in RCW 77.55.410. This section does not apply to a project, or to that portion of a project,

that has received a forest practices hydraulic project (FPHP) permit from the department of natural resources under chapter 76.09 RCW.

The department is responsible to help the regulated community understand how to comply. The department achieves voluntary compliance through education and technical assistance when the department advises and consults on permits, conducts compliance checks, performs on-site technical visits, or provides guidance materials written in easily understood language.

When the department cannot get voluntary compliance by issuing a correction request, the department may use a range of increasingly strict enforcement tools. This ranges from issuing notices of correction and stop work orders to penalties and, when appropriate, criminal prosecution.

(1) **Technical assistance program:** ~~((Pursuant to))~~ Under chapter 43.05 RCW, the department will continue to develop programs to encourage voluntary compliance ~~((with HPA provisions))~~ by providing technical assistance consistent with chapter 43.05 RCW. The programs include technical assistance visits, printed information, information and assistance by telephone, training meetings, and other appropriate methods for the delivery of technical assistance. In addition, ~~((provisions of chapter 43.05 RCW require))~~ the department ~~((to))~~ must

provide, upon request, a list of organizations (~~(, including private companies,)~~) that provide technical assistance. This list (~~(must be)~~) is compiled by the department from information submitted by the organizations and does not constitute an endorsement by the department of any organization.

(a) Technical assistance is defined in chapter 43.05 RCW as including:

(i) Information on the laws, rules, and compliance methods and technologies applicable to the department's programs;

(ii) Information on methods to avoid compliance problems;

(iii) Assistance in applying for permits; and

(iv) Information on the mission, goals, and objectives of the program.

(b) "Technical assistance documents" means documents prepared to provide information specified in (a) of this subsection that is labeled a technical assistance document by the department. Technical assistance documents do not include (~~(notices of correction, violation,)~~) correction requests or civil or criminal enforcement actions. "Correction request" means a notice of violation or a notice of correction as defined in chapter 43.05 RCW. Technical assistance

documents do not impose mandatory obligations or serve as the basis for a citation.

(2) **Technical assistance visit:**

(a) ~~((Pursuant to))~~ Under RCW 43.05.030, a technical assistance visit is defined as a visit by the department to a project site or other location that:

(i) Has been requested or is voluntarily accepted; and

(ii) The department declares to be a technical assistance visit at the start of the visit.

(b) ~~((Notice of violation.))~~ During a technical assistance visit, or within a reasonable time thereafter, the department must prepare a ~~((notice of violation))~~ correction request to inform the ~~((person))~~ project proponent of any violations of law or department rules identified by the department ~~((as follows:~~

~~((i) A description of what is not in compliance and the text of the specific section or subsection of the applicable state law or rule;~~

~~((ii) A statement of what is required to achieve compliance;~~

~~((iii) The date by which the project must achieve compliance;~~

~~((iv) Notice of the means to obtain any technical assistance services provided by the department or others; and~~

~~(v) Notice of when, where, and to whom a request to extend the time to achieve compliance for good cause may be filed with the department.~~

~~(c) A notice of violation is not a formal enforcement action and is not subject to appeal.~~

~~(3) **Notice of correction:**~~

~~(a) Procedures for correction of violations)). "Correction request" means a notice of violation or a notice of correction as defined in chapter 43.05 RCW.~~

(c) As provided in RCW 43.05.050, the department may issue a civil penalty under this section without first issuing a correction request when a violation is observed during a technical assistance visit only if:

(i) The project proponent has previously been subject to an enforcement action for the same or similar type of HPA violation, or has been given previous notice for the same or similar type of HPA violation; or

(ii) The violation has a probability of causing more than minor harm to fish life.

(3) **Compliance inspection:**

(a) If, during any inspection or visit that is not a technical assistance visit, the department becomes aware of conditions that do not comply with applicable laws and rules enforced by the department and are not subject to penalties as provided for in ~~((subsection (4) of))~~ this section, the department may issue a ~~((notice of))~~ correction request to the ~~((responsible party that must include:~~

~~(i) A description of what is not in compliance and the text of the specific section or subsection of the applicable state law or rule;~~

~~(ii) A statement of what is required to achieve compliance;~~

~~(iii) The date by which the department requires compliance to be achieved;~~

~~(iv) Notice of the means to contact any technical assistance services provided by the department or others; and~~

~~(v) Notice of when, where, and to who in the department a person may file a request to extend the time to achieve compliance for good cause.~~

~~(b) A notice of correction is not a formal enforcement action, is not subject to appeal, and is a public record.~~

~~(e))~~ project proponent.

(b) If the department issues a ~~((notice of))~~ correction request, it must not issue a civil penalty for the violations identified in the ~~((notice of))~~ correction request unless the ~~((responsible party))~~ project proponent fails to comply with the notice(~~(-~~

~~(4) **Civil penalties:**~~

~~(a) The department may impose a civil penalty of up to one hundred dollars per day for a violation of any provisions of chapter 77.55 RCW or this chapter. The department must impose the civil penalty with an order in writing delivered by certified mail or personal service to the person who is penalized. The notice must describe the violation, identify the amount of the penalty, identify how to pay the penalty, and identify the process for informal and formal appeals of the penalty. If the violation is an ongoing violation, the penalty may accrue for each additional day of violation.~~

~~(b) The department may issue a civil penalty without first issuing a notice of correction, as provided in RCW 43.05.110))~~
request.

(c) As provided in RCW 43.05.050, the department may issue a civil penalty under this section without first issuing a correction

request when a violation is observed during a compliance inspection

only if:

(i) The ~~((person))~~ project proponent has previously been subject to an enforcement action for the same or similar type of HPA violation, or has been given previous notice of the same or similar type of HPA violation; or

(ii) Compliance for the current violation is not achieved by the date set or modified by the department in a ~~((previously issued notice of))~~ previous correction ~~((, if the department has responded to any request for review of such date by reaffirming the original date or establishing a new date))~~ request for the current violation; or

(iii) The violation has ~~((a probability of placing a person in danger of death or bodily harm, has))~~ a probability of causing more than minor ~~((environmental harm, or has a probability of causing physical damage to the property of another in an amount exceeding one thousand dollars; or~~

~~(iv) The violation was committed by a business that employed fifty or more employees on at least one day in each of the preceding twelve months.~~

~~(c) Appeal of a civil penalty. If a civil penalty order is not appealed in a timely manner under WAC 220-660-460 or 220-660-470, the~~

~~civil penalty order is final and nonappealable. If appealed, the civil penalty becomes final upon issuance of a final order not subject to any further administrative appeal. When a civil penalty order becomes final, it is due and payable.~~

~~(d) Payment of a civil penalty. The penalty imposed is due and payable thirty days after receipt of a notice imposing the penalty unless an appeal is filed. Whenever an appeal of any penalty incurred under this chapter is filed, the penalty is due and payable only upon completion of all review proceedings and the issuance of a final order confirming the penalty in whole or in part. If the civil penalty is not paid within thirty days after it becomes due and payable, the department may seek enforcement of the order under RCW 77.55.291 and 34.05.578.~~

~~(e) Unpaid civil penalty. If the amount of any penalty is not paid within thirty days after it is due and payable, the attorney general, upon the request of the director, must bring an action in the name of the state of Washington in the superior court of Thurston County or of any county in which such violator may do business, to recover such penalty. In all such actions, the procedure and rules of evidence must be the same as an ordinary civil action. All penalties~~

~~recovered under this section must be paid into the state's general fund.~~

~~(f) The department must comply with the requirements of RCW 34.05.110 before issuing a civil penalty to a small business as defined in that statute.~~

~~(5) **Time for compliance:** The department must provide for a reasonable time to achieve compliance. Any person receiving a notice of correction under subsection (3) or (4) of this section may request an extension of time for good cause to achieve compliance. The person must request an extension from the department in writing and follow the procedures specified by the department in the notice. The department must respond in writing within ten calendar days.~~

~~(6)) harm to fish life.~~

(4) Correction request:

(a) "Correction request" means a notice of violation or a notice of correction as defined in chapter 43.05 RCW. A correction request is not a formal enforcement action and is not subject to appeal under state law or WAC 220-660-460 Informal appeal of administrative actions or WAC 220-660-470 Formal appeal of administrative actions.

(b) If during a technical assistance visit or compliance inspection, the department discovers a violation of any provisions

within chapter 77.55 RCW, this chapter, or an HPA issued by the department, it must, during the visit or within a reasonable time thereafter, issue a correction request to the project proponent detailing steps needed to bring the project into compliance.

(c) Contents of a correction request: A correction request must indicate whether it originates from a technical assistance visit or a compliance inspection. A correction request must include:

(i) A description of what is not in compliance with chapter 77.55 RCW, this chapter, or the HPA;

(ii) The text of the specific section(s) or subsection(s) of chapter 77.55 RCW, this chapter, or the HPA provision(s) for that violation;

(iii) A statement of what is required to achieve compliance;

(iv) The date by which the project proponent must achieve compliance;

(v) Notice of the means to obtain technical assistance services provided by the department or others; and

(vi) Notice of when, where, and to whom a request may be submitted to the department to extend, for good cause, the deadline for achieving compliance with the correction request.

(d) The department must provide for a reasonable time to achieve compliance.

(e) Time extension to comply: A request for an extension of the deadline for achieving compliance with the correction request must be submitted to the department in writing within ten calendar days of receiving the correction request. "Date of receipt" is defined in WAC 220-660-460 (4) (b) and 220-660-470 (5) (b). The department must respond in writing to a request for extension of the deadline.

(5) **Stop work order:**

(a) The department may issue a stop work order if:

(i) A violation of chapter 77.55 RCW or this chapter occurs or a deviation from any provisions of an HPA occurs. To qualify for a stop work order, the violation must be serious enough that it could cause significant harm to fish life; and

(ii) Immediate action is necessary to prevent continuation of harm, or to avoid more than minor harm, to fish life.

(b) Stop work orders are effective immediately upon issuance.

Project proponents must therefore comply with stop work orders immediately upon receipt.

(c) Scope of a stop work order: A stop work order may require that any person stop all work connected with the project until

corrective action is taken, and the department has indicated that work may resume. A stop work order may also require that the project proponent take corrective action to prevent, correct, or compensate for adverse impacts to fish life caused by the violation.

(d) Contents of a stop work order. The stop work order must include:

(i) A description of the condition that is not in compliance with chapter 77.55 RCW, this chapter, or the HPA;

(ii) The text of the specific section(s) or subsection(s) of chapter 77.55 RCW, this chapter, or the HPA provision(s) for that violation;

(iii) A statement of what is required to achieve compliance;

(iv) The date by which the department requires compliance with the corrective actions identified in the order;

(v) Notice of the means to contact any technical assistance services provided by the department or others;

(vi) Notice of when, where, and to whom a request may be submitted to the department to extend, for good cause, the deadline for achieving compliance with the order;

(vii) Means for contacting the department to schedule an inspection to assess compliance; and

(viii) The right to appeal the order.

(e) Signature authority for a stop work order: A stop work order for hydraulic projects conducted without an HPA must be authorized by a regional habitat program manager, regional director, habitat program division manager, habitat program director, habitat program deputy director, or department director. A stop work order for permitted hydraulic projects must be authorized by the regional director, habitat program division manager, habitat program director, habitat program deputy director, or department director.

(f) Providing notice of a stop work order: A stop work order may be issued and provided directly and immediately to the person whose actions are in violation of chapter 77.55 RCW, this chapter, or the HPA, regardless of whether that person is the project proponent. Upon receipt of the stop work order, that person must immediately comply with it. Within five business days of issuing a stop work order, the department must mail a copy of the order to the last known address of any project proponent, to the last known address of the owner of the land on which the hydraulic project is located, and to the local jurisdiction in which the hydraulic project is located. The department must take all reasonable measures to ensure that the project proponent actually receives notice of the stop work order.

(g) Consequences of noncompliance: Failure to comply with a stop work order can result in subsequent civil or criminal enforcement actions, and can also cause the project proponent to be disapproved for future HPA applications as set forth in WAC 220-660-050.

(h) Appealing a stop work order: A stop work order may be appealed within thirty days from receipt of the order by a person who received a copy of the order or by the owner of the land on which the hydraulic project is located. Informal appeals must be filed in the form and manner provided in WAC 220-660-460, and formal appeals must be filed in the form and manner provided in WAC 220-660-470.

(6) Notice to comply:

(a) The department may issue a notice to comply if a violation of chapter 77.55 RCW or this chapter occurs, a deviation from any provisions of an HPA occurs, or damage or potential damage to fish life occurs, and the department determines that a stop work order is not necessary to prevent continuation of or avoid more than minor harm to fish life.

(b) Scope of a notice to comply: A notice to comply must specify the corrective action to be taken, and may also require additional action to prevent, correct, or compensate for adverse impacts to fish life caused by the violation.

(c) Contents of a notice to comply. A notice to comply must

include:

(i) A description of the condition that is not in compliance;

(ii) The text of the specific section(s) or subsection(s) of chapter 77.55 RCW, this chapter, or the HPA provision(s) for that violation;

(iii) A statement of what is required to achieve compliance;

(iv) The date by which the department requires compliance to be achieved;

(v) Notice of the means to contact any technical assistance services provided by the department or others;

(vi) Notice of when, where, and to whom a request may be submitted to the department to extend, for good cause, the deadline for achieving compliance with the order; and

(vii) The right to appeal the notice.

(d) The department must provide for a reasonable time to achieve compliance.

(e) Signature authority for a notice to comply: A notice to comply must be authorized by a regional habitat program manager, regional director, habitat program division manager, habitat program director, habitat program deputy director, or department director.

(f) Providing notice: Within five business days of issuing a notice to comply, the department must mail a copy of the notice to the last known address of any project proponent, to the last known address of the owner of the land on which the hydraulic project is located, and to the local jurisdiction in which the hydraulic project is located. The department must take all reasonable measures to ensure that the project proponent actually receives the notice.

(g) Consequences of noncompliance: Failure to comply with a notice to comply can result in subsequent civil or criminal enforcement actions, and can also cause the project proponent to be subject to disapproval of future HPA applications as set forth in WAC 220-660-050.

(h) Appealing a notice to comply: A notice to comply may be appealed within thirty days from the date of receipt of the notice by a person who received the notice or by the owner of the land on which the hydraulic project is located. Informal appeals must be filed in the form and manner provided in WAC 220-660-460 and formal appeals must be filed in the form and manner provided in WAC 220-660-470.

(7) Civil penalties:

(a) The department may levy civil penalties of up to ten thousand dollars for each and every violation of chapter 77.55 RCW, this

chapter, or provisions of an HPA. Each and every violation is a separate and distinct civil offense. Penalties are issued in accordance with the penalty schedule provided in subsection (8) of this section.

(b) Notice of civil penalty: The department must issue written notice of any civil penalty imposed under this section. At a minimum, the notice must include:

(i) The factual and legal basis for the penalty, including a description of the violation(s) for which the penalty is imposed and the text of the specific section(s) or subsection(s) of chapter 77.55 RCW, this chapter, or the HPA provision(s) for those violation(s);

(ii) The amount of the penalty; and

(iii) The right of the person incurring the civil penalty to appeal it.

(c) Signature authority for a notice of civil penalty: Civil penalties must be authorized by the regional habitat program manager, regional director, habitat program division manager, habitat program director, habitat program deputy director, or department director. Civil penalties of two thousand five hundred dollars or more must be authorized by the habitat program director, habitat program deputy director, or department director.

(d) Service of notice: The department must serve a notice of civil penalty as follows:

(i) By certified mail to:

(A) The last known address of the person incurring the penalty;

and

(B) The local jurisdiction in which the hydraulic project is located; or

(ii) By personal service to:

(A) The person incurring the penalty; and

(B) The local jurisdiction in which the hydraulic project is located.

Within five business days of issuing a penalty, the department must mail a copy of the notice of civil penalty to the last known address of any project proponent and the owner of the land on which the hydraulic project is located. The department must take all reasonable measures to ensure that the project proponent actually receives notice of the penalty.

(e) Effective date of penalty: The penalty imposed becomes due and payable thirty days after receipt of a penalty notice unless an appeal is filed. Whenever an appeal is filed, the penalty becomes due and payable only upon completion of all review proceedings and the

issuance of a final notice or order confirming the penalty in whole or in part.

Failure to pay a civil penalty can result in disapproval of future HPA applications as set forth in WAC 220-660-050. When a penalty becomes past due, it is also subject to interest at the rate allowed by RCW 43.17.240 for debts owed to the state.

Unpaid penalties may also be subject to enforcement under RCW 77.55.440 and other applicable laws and regulations under RCW 77.55.470.

(f) Right to appeal civil penalty: Any person incurring a civil penalty issued under RCW 77.55.440 and this section may appeal the civil penalty informally or formally within thirty days of receiving the notice of civil penalty. Informal appeals are conducted under WAC 220-660-460, and formal appeals are conducted under WAC 220-660-470.

(g) Civil penalties received or recovered under RCW 77.55.440 must be deposited into the state's general fund, except that the department is authorized to retain any attorneys' fees and costs it may be awarded in connection with an action brought under RCW 77.55.440 to recover a civil penalty.

(8) Civil penalty schedule:

(a) The department may levy a civil penalty, as defined in this section, in any of the following circumstances:

(i) The project proponent fails to complete actions required to be completed in a correction request, stop work order or notice to comply within the time period required for completion contained in the request or notice. Unless the project proponent has previously been subject to an HPA enforcement action or the violation has a probability of more than minor harm to fish life, the department will make a reasonable attempt to achieve voluntary compliance before issuing a civil penalty.

(ii) A project proponent is conducting or has conducted a hydraulic project without having an active HPA or without first obtaining an HPA for the project.

(b) The department's decision to issue a civil penalty under RCW 77.55.440 is based upon consideration of the following:

(i) Previous violation history of the person who will be incurring the penalty;

(ii) Severity and repairability of the impact of the violation(s) on fish life;

(iii) Whether the violation(s) was intentional;

(iv) The extent, if any, to which the person who would be incurring the penalty has cooperated or is cooperating with the department in addressing the violation(s) and its impact on fish life; and

(v) If the penalty will be imposed on a person for a violation committed by another, the extent to which the person incurring the penalty was unaware of the violation, and whether that person received a substantial economic benefit from the violation.

(c) Determining civil penalty amounts: When a penalty is assessed it will be calculated by the department using the following process:

(i) Determine the base civil penalty:

(A) The following violations have a base civil penalty amount of two thousand dollars: Conducting a hydraulic project without a valid HPA; willful misrepresentation of information on the HPA application; or a significant, in the opinion of the department, deviation from the valid HPA that adversely impacts fish life.

(B) All other violations not specifically mentioned have a base penalty of five hundred dollars.

(ii) Calculate the civil penalty amount from the considerations specific to the incident and the site. The following considerations will be independently evaluated for each violation and added to the

base civil penalty to calculate the total civil penalty for each violation:

(A) Previous violation history of the person who will be incurring the penalty, including the frequency and similarity of any previous violations within five years preceding the violation leading to the issuance of the penalty. A history of violations that, under a preponderance of the evidence, shows a pattern of disregard for specific HPA provisions, chapter 77.55 RCW, or this chapter will likely result in a higher penalty amount. In reviewing a person's violation history for purposes of this section, the department may consider previously issued correction requests, stop work orders, notices to comply, notices of civil penalty imposed under chapter 77.55 RCW, criminal convictions imposed under RCW 77.15.300, and any other relevant information that may be available. Points are assessed to determine the penalty amount imposed under (d) of this subsection according to the following criteria:

0 points = The violator has no documented violations within five years preceding the violation leading to the issuance of the penalty.

2 points = The violator has one documented violation within five years preceding the violation leading to the issuance of the penalty.

4 points = The violator has more than one documented violation within five years preceding the violation leading to the issuance of the penalty.

(B) Severity and repairability of impacts, which the department assesses based on harm to fish life caused by the violation(s).

Violations that injure or kill fish life, decrease habitat function, value, or quantity, or cause long term or irreparable damage will likely result in a higher penalty amount. Points are assessed to determine the penalty amount imposed under (d) of this subsection according to the following criteria:

0 points = There is no adverse impact to fish life.

2 points = There is adverse impact to fish life, but it is minor, and no impacts will last beyond the duration of the construction activity.

4 points = There is extensive and/or significant adverse impact to fish life and impacts will last beyond the duration of the construction activity.

(C) Whether the violation(s) was intentional, which the department determines by considering whether the person knew or should have known the action was a violation, whether and to what extent the violation was foreseeable, whether the person to incur the penalty

took precautions to avoid committing the violation, and whether the person to incur the penalty had an economic incentive for committing the violation. Violations that are intentional, foreseeable, where economic incentives are clear, or when precautions were not taken to avoid the impact likely result in a larger penalty amount. Points are assessed to determine the penalty amount imposed under (d) of this subsection according to the following criteria:

0 points = The violation was not foreseeable.

1 point = The violation was foreseeable, and no precaution was taken to avoid it.

3 points = The violation occurred after consultation, a technical or compliance site visit, or an enforcement action; or there was a clear economic incentive.

(D) The extent, if any, to which the person who would be incurring the penalty has cooperated or is cooperating with the department in addressing the violation(s) and its impact on fish life. The department assesses the level of a person's cooperation by examining whether the person reported the violation voluntarily, the time lapse, if any, between when the person discovered the violation and when the person reported it, and how responsive the person to incur the penalty was toward department staff. Evidence of a person's

poor or inconsistent cooperation with department staff will likely result in a higher penalty amount. Points are assessed to determine the penalty amount imposed under (d) of this subsection according to the following criteria:

0 points = The violator reported the violation in a timely manner and cooperated with department staff to correct the violation.

1 point = The violator did not report the violation in a timely manner, or they did not cooperate with department staff to correct the violation.

3 points = The violator ignored or evaded department contacts or refused to allow department staff to enter the job site where the violation occurred.

(d) The department will calculate a penalty for each violation by adding the points assessed under (c) (ii) of this subsection and applying those corresponding amounts listed in the table below to the base penalty assessed under (c) (i) of this subsection. The base penalty plus the additional amount assessed using the department's point system will determine the total penalty for each violation not to exceed \$10,000.

<u>Points</u>	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>
<u>Penalty</u>	<u>\$1,000</u>	<u>\$2,000</u>	<u>\$3,000</u>	<u>\$4,000</u>	<u>\$5,000</u>
<u>Points</u>	<u>6</u>	<u>7</u>	<u>8</u>	<u>9</u>	<u>10 or greater</u>
<u>Penalty</u>	<u>\$6,000</u>	<u>\$7,000</u>	<u>\$8,000</u>	<u>\$9,000</u>	<u>\$10,000</u>

Adjusting civil penalty amounts:

(i) A penalty for a violation committed by another may be adjusted downward based on the extent, if any, to which a person incurring the penalty was unaware of the violation and did not receive a substantial economic benefit from the violation.

(ii) The department senior or executive level staff person with signature authority for the notice of civil penalty may adjust penalty amounts based on circumstances not listed under (c) of this subsection.

(iii) The department will determine whether all or a portion of a penalty should be assessed against a landowner, lessee, contractor or another project proponent. The department should consider the responsible party, the degree of control, the sophistication of the party, and whether different parties conducted different violations.

(e) Nothing in this section prevents the department from:

(i) Choosing not to issue a civil penalty;

(ii) Issuing a stop work order or notice to comply in lieu of a civil penalty; or

(iii) Referring a violation to any local, state, tribal, or federal agency with jurisdiction.

(f) Penalties determined under this subsection are administered in accordance with procedures in subsection (7) of this section.

(9) **Criminal penalty:** Under RCW 77.15.300, it is a gross misdemeanor to (~~construct~~) conduct any form of hydraulic project or perform other work on a hydraulic project without having first obtained an HPA from the department, or to violate any requirements or conditions of the HPA for such construction or work.

(10) **Remedies not exclusive:** The remedies under this chapter are not exclusive and do not limit or abrogate any other civil or criminal penalty, remedy, or right available in law, equity, or statute.

(11) **Permission to enter property denied - Administrative inspection warrant:** If the department is denied entry to a project site for the purpose of ensuring compliance or it has probable cause to believe a violation of chapter 77.55 RCW, this chapter, or the HPA provision(s) has occurred it must obtain landowner consent or an administrative inspection warrant under RCW 77.55.450 before entering the property for this purpose.

(12) **First time paperwork violations by small businesses:**

(a) The department will provide notice and waiver of fines, civil penalties, and administrative sanctions for first time paperwork violations by a small business, consistent with RCW 34.05.110.

(b) A paperwork violation is limited to:

(i) Failure to have a copy of the HPA, plans, and specifications for a permitted project on-site during construction of, or work on, the project;

(ii) Failure to submit to the department photos or survey results required as a provision in the HPA;

(iii) Failure to notify the department when such notification described in WAC 220-660-050 (13) (d) is required as a provision of the HPA; and

(iv) Failure to submit reports required in the HPA.

(c) A small business may request the waiver by contacting the department and submitting a copy of the business's most recent federal income tax return or most recent return filed with the Washington state department of revenue.

[Statutory Authority: RCW 77.04.012, 77.04.020, and 77.12.047. WSR 15-02-029 (Order 14-353), § 220-660-480, filed 12/30/14, effective 7/1/15.]