



Washington
Department of
**FISH and
WILDLIFE**

Hydraulic Code Rules Chapter 220-660 WAC Incorporating Elements of SSB 5273 into HPA Rules

WAC 220-660-370 Bank protection in saltwater areas [Renamed]

Regulatory Analysis

Incorporating:

Least Burdensome Alternatives Analysis

Administrative Procedure Act Determinations

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

November 14, 2022

Mission
of the
Washington Department of Fish and Wildlife

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

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SECTION 1: INTRODUCTION

The state Legislature gave the Washington Department of Fish and Wildlife (department) the responsibility to preserve, protect, and perpetuate all fish and shellfish resources of the state. To help achieve this mandate, the Legislature passed a state law in 1943 called “Protection of Fish Life.” Now titled “Construction Projects in State Waters” and codified as Chapter 77.55 Revised Code of Washington (RCW), the entire text of the statute can be found at:

<http://app.leg.wa.gov/RCW/default.aspx?cite=77.55> .

Under the authority of Chapter 77.55 RCW, the department issues a construction permit called a Hydraulic Project Approval (HPA). The sole purpose of the HPA is to protect fish life from construction and other work that uses, diverts, obstructs, or changes the natural flow or bed of state waters. HPAs are site-specific, meaning that provisions are tailored to the site conditions and fish species that might be affected by each project. The HPA contains provisions that a permittee must follow in order to mitigate¹ impacts to fish life caused by the project.

The department adopts rules to implement Chapter 77.55 RCW under Chapter 220-660 Washington Administrative Code (WAC) - *Hydraulic Code Rules*. This WAC Chapter establishes regulations for administration of the HPA program. The Hydraulic Code Rules set forth definitions, administrative procedures for obtaining an HPA, steps for HPA appeals and civil compliance, and criteria generally used by the department to review and condition hydraulic projects to protect fish life.

This report presents analyses and determinations pursuant to Chapter 34.05 RCW - Administrative Procedure Act (APA), and Chapter 19.85 RCW - Regulatory Fairness Act (RFA), for proposed amendments to Hydraulic Code Rules in Chapter 220-660 WAC. This document is organized as follows:

SECTION 1: Introduction

SECTION 2: Describe the proposed rule and its history

SECTION 3: Significant Legislative Rule Analysis Required

SECTION 4: Goals and Objectives of the Statute that the Rule Implements

SECTION 5: How the Rule Meets the Objectives of the Statute

SECTION 6: Involving stakeholders in rule development

SECTION 7: Least Burdensome Alternative

SECTION 8: Remaining APA Determinations

SECTION 9: Sources of Information Used

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

Documents relating to this rule-making activity are available on the department’s rule-making web page at <https://wdfw.wa.gov/about/regulations>.

SECTION 2: Describe the proposed rule and its history

Rule amendments are proposed as necessary to implement Substitute Senate Bill 5273 (SSB 5273)² - a bill passed by the legislature during the 2021 legislative session. SSB 5273 is codified in RCW [77.55.231](#) and applies to the issuance of HPA permits.

SSB 5273 requires that anyone desiring to replace residential marine shoreline stabilization or armoring must use the least impacting technically feasible bank protection alternative for the protection of fish life. The requirement must be met by preparing a site assessment and alternatives analysis report (report) before proposing a hard armoring technique.

2.1 Specific Objectives for this Rule Making

In order to implement SSB 5273, the department’s objectives in this rule making include the following:

- ✓ Specify that replacement of residential marine shoreline stabilization must utilize the least impacting technically feasible alternative for the protection of fish life;
- ✓ Incorporate the most-to-least-preferred alternatives list from SSB 5273;
- ✓ Specify that a site assessment and alternatives analysis report prepared by a qualified professional is required as part of an application for a Hydraulic Project Approval (HPA) permit for this type of project;
- ✓ Identify mandatory report elements; and
- ✓ Establish procedures for certain emergency and expedited shoreline stabilization permits.

2.2 Describe the proposed rule

Table 1 presents the proposed SSB 5273 Rule Change Proposals (Proposals). The table lists changes in sequential order by change number and WAC subsection number.

Table 1 SSB 5273 Rule Change Proposals presented by subsection number

| WAC 220-660-370 Bank protection in saltwater areas (renamed “Shoreline stabilization in saltwater areas”) | | |
|--|-----------------------|--|
| Change # | WAC Subsection | Description |
| Change 1 | 220-660-370 | Rename section title from “Bank protection in saltwater areas” to “Shoreline stabilization in saltwater areas” |

² Laws of 2021, Chapter 279; Codified in RCWs 77.55.231

| Change # | WAC Subsection | Description |
|-----------------|-----------------------|--|
| Change 2 | 220-660-370 | Various changes to terminology throughout the section for improved accuracy or clarity. Particularly: “shoreline stabilization” has replaced “bank protection” and other inconsistently used terms; “passive techniques” has replaced “natural techniques” for accuracy. |
| Change 3 | 220-660-370(1) | Replace “structures” with “buildings, roads and improvements” for clarity. |
| Change 4 | 220-660-370(1) | Remove inaccurate term “retaining walls” and replace with “related structures”. |
| Change 5 | 220-660-370(3) | Renamed subsection “Alternative selection”. |
| Change 6 | 220-660-370(3)(a) | Moved language up from WAC 220-660-370(3)(b). |
| Change 7 | 220-660-370(3)(a) | Add “To ensure the protection of fish life” as specified in SSB 5273. |
| Change 8 | 220-660-370(3)(a) | Insert the definition of “feasible” directly from SSB 5273. |
| Change 9 | 220-660-370(3)(b) | Specify the project types this subsection applies to. |
| Change 10 | 220-660-370(3)(b)(i) | Added “and restore the beach” for consistency with SSB 5273. |
| Change 11 | 220-660-370(3)(b)(iv) | Replaced “structures” with “buildings and improvements” for clarity. |
| Change 12 | 220-660-370(3)(c) | This subsection is introduced from SSB 5273 with no substantive changes. |
| Change 13 | 220-660-370(3)(d) | This subsection is restructured to apply report requirements to residential replacement projects. |
| Change 14 | 220-660-370(3)(e) | Adapted from the former (3)(d) subsection. No substantive changes. |
| Change 15 | 220-660-370(3)(f) | Adapted from the former (3)(d) subsection and SSB 5273. Retains exemptions “based on the scale and nature of the project”. |
| Change 16 | 220-660-370(3)(f)(i) | Provides a specific report exemption for removal of shoreline stabilization and restoration of the beach. |
| Change 17 | 220-660-370(3)(f)(ii) | Provides a specific report exemption for employing passive shoreline stabilization techniques. |
| Change 18 | 220-660-370(3)(g) | New procedures for emergency and expedited shoreline stabilization HPA applications. |
| Change 19 | 220-660-370(4) | Renamed subsection “Shoreline stabilization design”. |
| Change 20 | 220-660-370(4)(a) | Rephrased for clarity. |
| Change 21 | 220-660-370(5) | Renamed subsection “Shoreline stabilization location”. |
| Change 22 | 220-660-370(6) | Renamed subsection “Shoreline stabilization construction”. |

2.3 History of this Rule Making Action

| | |
|----------------|--|
| July 25, 2021 | SSB 5273 went into effect |
| May 18, 2022 | WDFW commenced rule making by filing a CR-101 Preproposal Statement of Inquiry with the Washington State Code Reviser |
| Sept. 20, 2022 | WDFW filed CR-102 with the Washington State Code Reviser for rule making to incorporate SSB 5273 |
| Oct. 5, 2022 | Draft SEPA determination of nonsignificance (DNS) released and comment period began for SEPA #22044 |
| Oct. 5, 2022 | Rule making public comment period and SEPA comment period began. Rule making materials available online at https://wdfw.wa.gov/about/regulations/development/shoreline-stabilization-hpa-rule |
| Oct. 28, 2022 | The Washington Fish and Wildlife Commission conducted a public hearing on the rule proposals |
| Oct. 31, 2022 | Rule making comment period and SEPA comment period ended |
| Nov. 1, 2022 | SEPA finalized. Final SEPA documents are available at https://wdfw.wa.gov/licenses/environmental/sepa/closed-final |

For information relating to stakeholder outreach refer to Section 6, which provides a timeline of outreach milestones related to this rule making activity.

2.3.1 History of regulating shoreline stabilization

Permitting for bank stabilization dates back to the creation of the hydraulic program. The modern version of the rules for shoreline stabilization permitting was established in 2014, when the department completed a major overhaul of the Hydraulic Code Rules. The rules had not previously seen major changes since 1994. This effort culminated in moving the entire body of the updated rules (Chapter 220-110 WAC) into the new Chapter 220-660 WAC. The 2014 overhaul included the creation of WAC 220-660-370 Bank Protection in Saltwater Areas. The purpose of the project was to:

- Incorporate up-to-date fish science and technology;
- Align the rules with statutory changes;
- Simplify permitting for certain types of projects;
- Update application and processing procedures; and
- Establish a baseline for adaptive management to protect fish life.

Since 2014, WAC 220-660-370 has been modified once. In 2020, amendments were adopted to implement elements of Second Substitute House Bill 1579 (2SHB 1579)² - a bill passed by the legislature during the 2019 legislative session. This bill implemented recommendations of the

Southern Resident Orca Task Force (task force) related to increasing chinook abundance. Specific changes to WAC 220-660-370 included:

- Striking language from rule that referenced the repealed marine single-family residence protective bulkheads or rockwalls statute (RCW 77.55.141); and
- Adding a requirement that saltwater bank protection location benchmarks be recorded on plans as part of a complete HPA application.

In addition, introductory and baseline language in WAC 220-660-370(1) and (2) was updated but did not result in any changes to permitting requirements.

SECTION 3: Significant Legislative Rule Analysis Required

RCW 34.05.328(5)(a) states, “Except as provided in (b) of this subsection, this section applies to: (i) ... the legislative rules of the department of fish and wildlife implementing chapter 77.55 RCW;...”

Hydraulic code rules in chapter 220-660 WAC are significant legislative rules as specified in RCW 34.05.328(5)(a)(i). Analyses pursuant to RCW 34.05.328 are provided for this rule proposal.

SECTION 4: Goals and Objectives of the Statute that the Rule Implements

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

4.1 Chapter 77.55 RCW - the Hydraulic Code - Goals and Objectives

The state Legislature gave WDFW the responsibility to preserve, protect, and perpetuate all fish and shellfish resources of the state, and to

“...authorize the taking of wildlife, food fish, game fish, and shellfish only at times or places, or in manners or quantities, as in the judgment of the commission does not impair the supply of these resources.” RCW 77.04.012

The Legislature also granted the Commission very broad authority to adopt rules to protect fish life for a wide variety of activities in Washington waters:

The commission may adopt, amend, or repeal rules: specifying the times when the taking of wildlife, fish, or shellfish is lawful or unlawful; specifying the areas and waters in which the taking and possession of wildlife, fish, or shellfish is lawful or unlawful; specifying and defining the gear, appliances, or other equipment and methods that may be used to take wildlife, fish, or shellfish, and specifying the times, places, and manner in which the equipment may be used or possessed. RCW 77.12.047.

To help achieve the agency’s mandate, the Legislature passed a state law in 1943 called *Protection of Fish Life*, now recorded as [Chapter 77.55 RCW](#) - Construction projects in state waters. The entire text of the statute can be found at: <http://app.leg.wa.gov/RCW/default.aspx?cite=77.55> .

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

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

[RCW 77.55.021](#)(1) states

“...In the event that any person³ or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval from the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.”

The Legislature limited WDFW's regulatory authority: WDFW cannot unreasonably withhold or unreasonably condition the HPA [[RCW 77.55.021](#)(7)(a)], nor can WDFW impose conditions that optimize fish life:

“Conditions imposed upon a permit must be reasonably related to the project. The permit conditions must ensure that the project provides proper protection for fish life, but the department may not impose conditions that attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project.” [RCW 77.55.231](#)(1)

The Hydraulic Code is intended to ensure that hydraulic projects adequately protect fish life.

SECTION 5: How the Rule Meets the Objectives of the Statute

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

5.1 Why is the Proposed Rule Needed?

Rule amendments are proposed to implement SSB 5273.

SSB 5273 amended Chapter 77.55 RCW. It requires that anyone desiring to replace residential marine shoreline stabilization or armoring must use the least impacting technically feasible bank protection alternative for the protection of fish life. The requirement must be met by conducting a site assessment and alternatives analysis report (report) before proposing a hard armoring technique.

WDFW proposes changes to WAC 220-660 to align it with changes to RCW implemented via SSB 5273. Some of the changes come directly from statute. These include utilizing the least impacting technically feasible alternative, requiring a report, and listing alternatives from most to least preferred. Other changes, such as describing how emergency and expedited marine shoreline stabilization HPA applications are processed, are not directly spelled out in statute but are necessary to administer the rules in accordance with the statute and existing rule. The current

³ A “person” is defined in WAC 220-660-030(112) as meaning “an applicant, authorized agent, permittee, or contractor. The term person includes an individual, a public or private entity, or organization.” This term is used throughout this document to refer to individuals, organizations, and businesses.

requirement in rule that the site assessment and alternatives analysis report be prepared *by a qualified professional* is expanded to include residential shoreline stabilization replacement and rehabilitation. While not specified in statute, that change aligns the requirements for residential shoreline stabilization replacement or rehabilitation projects with the requirements for new and waterward replacement of shoreline stabilization. It also increases the likelihood that submitted reports are complete, technically accurate, and when prepared by a third party, have an element of impartiality.

Both SSB 5273 and WAC 220-660-370 currently allow the department to issue report exemptions based on the scale and nature of a particular project. The rule proposal also exempts HPA applications for the removal of stabilization and restoration of the beach, or that utilize passive techniques such as vegetation planting. These projects employ the most highly preferred, least impacting alternatives. This new language provides clarity about application requirements for those projects.

5.2 Alternatives to rule making?

Following is a discussion of alternatives to rule making that we considered before filing a preproposal notice of inquiry.

5.2.1: Alternative 1: No action - do not adopt the new statutes into rule

Under this alternative, WDFW does not have a nexus in rule for requiring the least impacting technically feasible alternative for residential marine shoreline stabilization replacement and rehabilitation. The rule would also be missing the preferred alternatives list for such projects, the report requirement, and any indication of what elements are required in the report.

- The existing rule requires all of the above components for new shoreline stabilization and the waterward replacement of shoreline stabilization but is silent on residential marine shoreline stabilization replacement and rehabilitation.
- The existing rule does not contain any procedures for processing emergency and expedited shoreline stabilization HPA applications. These procedures provide direction for how to comply with statute during urgent situations.

Without the changes, the rules would be inconsistent with statute and potentially misleading. The “no action” alternative is not a viable alternative.

5.2.2: Alternative 2: Adopt the new statute into rule but do not address emergency and expedited application processing

Upon implementing SSB 5273 in 2021, it quickly became clear to the department that emergency and expedited permit applications posed a challenge for meeting the “least impacting technically feasible alternative” requirement. These applications are unlikely to include a site assessment and alternatives analysis report and do not necessarily propose the least impacting technically feasible alternative. In other words, they do not comply with statute and/or rule. The rule proposal allows for timely actions as described in WAC 220-660-050 (Procedures) to address an urgent situation, such as storm damage to a bulkhead that results in risk to a house, while also establishing a

process for complying with WAC 220-660-370 and SSB 5273. This approach is similar to procedures for other project types already in Chapter 220-660 WAC. It also provides clarity for both the department and the regulated community. Without this addition, reaching compliance with statute and rule is difficult or impossible.

5.3 Consequences of not adopting the rule

Declining to adopt the proposed rules would be inconsistent with amendments to RCW 77.55 implemented via SSB 5273. Omitting a particular project type (residential marine shoreline stabilization projects) from rule when requirements for other project types are included, creates the impression that there are no specific requirements for it. Members of the regulated community would have to know to look for the residential marine shoreline stabilization requirements in Chapter 77.55 RCW. Additionally, the absence of procedures for emergency and expedited HPA applications creates a situation where neither the department nor HPA applicants have clear roles for achieving compliance with RCW 77.55.231 or WAC 220-660-370.

SECTION 6 Involving stakeholders in rule development

Because SSB 5273 has been in effect for more than a year already, WDFW took advantage of opportunities to explain the new statute while communicating the objectives of rule making to those affected. We also worked to obtain information from affected persons about how the rules would impact them. Those events are summarized in Table 2.

WDFW also maintains a web page⁴ with information on rule making and a way for people to track rule making progress. An email address⁵ is available for people to submit preproposal comments and formal public comments.

Table 2 Stakeholder contact events

| Date(s) | Person(s) | Activity |
|------------|--|---|
| 12/16/2021 | Hydraulic Code Implementation Citizen Advisory Group | Presentation and discussion on implementation of SSB 5273 |
| 1/27/2022 | Consultant and contractor businesses; Sea Grant Shoreline and Coastal Planners group | Information regarding implementation of SSB 5273 |
| 3/10/2022 | Sea Grant Shoreline Local Government Working Group | Presentation and discussion on SSB 5273 and rule making |

⁴ <https://wdfw.wa.gov/about/regulations>

⁵ ShorelineStabilizationRule@PublicInput.com

| Date(s) | Person(s) | Activity |
|----------------|---|---|
| 5/12/2022 | Sea Grant Shoreline Local Government Working Group | Further discussion on rule making to implement SSB 5273 |
| 5/24/2022 | Tribal partners | Email notification of rulemaking initiation and overview |
| 6/22/2022 | Stakeholders and Agencies; Sea Grant Shoreline and Coastal Planners group | Email notification regarding publication of CR-101 |
| 8/3/2022 | Tribal partners | Rule proposal distributed for review |
| 8/4/2022 | Fish and Wildlife Commission Habitat Committee | Introduction to rule making in response to SSB 5273 |
| 8/12/2022 | Tribal partners | Webinar to review the rule proposal and take comments |
| 8/17/2022 | Hydraulic Code Implementation Citizen Advisory Group | Draft rule distributed for review |
| 8/18/2022 | Selected stakeholders and government agencies | Rule proposal distributed for preliminary review |
| 9/1/2022 | Hydraulic Code Implementation Citizen Advisory Group | Draft rule discussion and feedback |
| 10/4/2022 | Stakeholders and government agencies | Webinar and comment period announcement |
| 10/5/2022 | News outlets | News release announcing webinar and comment period |
| 10/5/2022 | SEPA stakeholders | Announcement of SEPA Determination of Nonsignificance and start of comment period |
| 10/11/2022 | Any interested party | Informational webinar |
| 10/19/2022 | Shore Friendly Program regional leads | Informational webinar |
| 10/28/2022 | Any interested party | The Washington Fish and Wildlife Commission hosted a public hearing |

6.1 Gathering data to inform the Small Business Economic Impact Statement and Cost-Benefit Analysis

Data used in the Small Business Economic Impact Statement (SBEIS) and Cost-Benefit Analysis includes the results of surveys of local governments (cities and counties) as well as shoreline consultants and contractors. The department contracted with Industrial Economics, Inc (IEc) to develop those analyses. Please refer to those documents for more information about the surveys.

SECTION 7: Least Burdensome Alternative

RCW 34.05.328 (1)(e) Determine, after considering alternative versions of the rule and the analysis required under (b) [Section 4 of this document], (c) [Notification in CR-102], and (d) [Section 6 of this document] of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection [i.e. for the statute being implemented];

7.1 Introduction

In order to propose and adopt significant legislative rules, WDFW must evaluate alternative versions of the rule. Once this analysis is complete WDFW must determine that the rule proposed for adoption is the least burdensome version of the rule that will achieve the goals and objectives of the authorizing statute(s) as discussed in section 4. Alternatives to rule making are addressed in section 5.2 and consequences of not adopting the proposal are included in section 5.3.

7.2 Alternatives considered

Two alternatives to rule making are presented and discussed in Section 5.2 and summarized on Table 3.

The term “*least burdensome alternative,*” when used within this table and subsequently, means “*least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under Chapter 77.55 [RCW].*”

Table 3 Least Burdensome analysis of alternative rule language

| Alternative/ Comment | Proposed Rule Change | WDFW Response | Least Burdensome Alternative |
|-------------------------|---|--|------------------------------|
| Alternative 1: | No action - do not adopt the new statutes into rule | <ul style="list-style-type: none"> • Fails to adopt language needed to comply with statute change. • The rule would be left with requirements for some projects, but not others. This is a misleading situation. | Proposed rule |

| Alternative/ Comment | Proposed Rule Change | WDFW Response | Least Burdensome Alternative |
|-------------------------|---|--|------------------------------|
| Alternative 2: | Adopt the new statute into rule but do not address emergency and expedited application procedures | <ul style="list-style-type: none"> • These procedures provide direction for how to comply with statute during urgent situations. • Proposal is consistent with established procedures for other project types such as water crossings. | Proposed rule |

7.3 Determination: Least Burdensome

After considering alternative versions of the rule in context with the goals and objectives of the authorizing statute, **WDFW determines that the proposed rule represents the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under chapter 77.55 RCW.**

SECTION 8: Remaining APA Determinations

The remaining narrative in this document addresses determinations pursuant to RCW 34.05.328(1)(f) through (1)(i) relating to state and federal laws, equal requirements for public and private applicants, and coordination with state, federal, tribal, and local entities.

8.1 Violation of other state or federal laws

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

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

We make this determination because the HPA permit does not compel persons to take an action.

Consistent with other state authorities, the Hydraulic Code Rules regulate the time, place, and manner in which an action can occur to adequately protect fish life. The HPA also does not convey permission to use public or private property to conduct the project. Applicants must seek permission to use property from the landowner. Authorization by WDFW to conduct any hydraulic project does not exempt anyone from the requirements of other regulatory agencies or landowners. Every HPA issued in Washington carries the notice that the permit

“... [the HPA permit] pertains only to requirements of the Washington State Hydraulic Code, specifically Chapter 77.55 RCW. Additional authorization from other public agencies may be necessary for this project. The person(s) to whom this Hydraulic Project Approval is issued is responsible for applying for and obtaining any additional authorization from other public agencies (local, state and/or federal) that may be necessary for this project.”

Hydraulic Code rules do not supersede existing federal and state requirements.

WDFW has determined that the proposed rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.

8.2 Equal Requirements for Public and Private

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

The hydraulic code rules generally apply equally to all HPA applicants whether public or private. Requirements are the same for public and private entities. **WDFW has determined that the rule does not impose more stringent performance requirements on private entities than on public entities.**

8.3 Difference from other state and federal rules

RCW 34.05.328 (1)(h) states, “Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by the following:” [(i) explicit state statute..., (ii) substantial evidence that the difference is necessary...].

8.3.1 Other federal, state, or local agencies with authority to regulate this subject

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

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

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

The Hydraulic Code regulates hydraulic projects for the protection of fish life. Hydraulic projects are construction projects and other work that effects the natural flow or bed of state waters. Federal protections under the Rivers and Harbors Act, Clean Water Act (U.S. Army Corps of Engineers and Washington Department of Ecology), and Endangered Species Act (U.S. Fish and Wildlife Service and National Marine Fisheries Service) may regulate hydraulic projects, however the purposes for these federal acts are very different from the state Hydraulic Code and rules.

Indeed, local, state, and federal agencies may have jurisdiction over the same project. Table 4 provides an overview of the characteristics of some aquatic permits at the federal, state, and local levels. At each jurisdictional level, priorities and legal mandates determine the resources or interests that are protected and the extent of the protection that is applied. Mitigation requirements also vary according to the agencies' protection priorities and legal mandates. As a result, regulatory efforts may share intentions or could have entirely different animal or habitat protection objectives.

The federal Endangered Species Act (ESA) comes closest to regulating the same subject matter - the protection of fish life. But while the state hydraulic code regulates the way a project is constructed (so that the project is protective of fish life), the federal ESA regulates the "take" or kill of species listed as threatened or endangered under the Act. Federal ESA jurisdiction relates only to animals or plants listed as threatened or endangered under the Act. The state hydraulic code applies to all fish species.

The HPA fills a unique niche because it is the only permit issued solely to protect (all) fish life. The HPA may be the only permit required when all the criteria below apply:

- Hydraulic projects in streams too small to be considered a shoreline of the state (relevant to the state Shorelines Management Act) or navigable waters (relevant to Corps of Engineers permitting);
- Hydraulic projects not regulated under the Clean Water Act;
- Hydraulic projects not subject to state or federal landowner notification or permit requirements;
- Hydraulic projects exempt from state or national Environmental Policy Act review (refer to SEPA statute and rules for criteria for SEPA exemption); or
- Hydraulic projects exempt from local permits.

8.3.3 Determination: Difference is necessary

Differences between state HPA authority (and the current rule proposal) and federal authorities are necessary because there are no federal laws or rule protecting all fish life from the effects of construction projects. **WDFW has determined that the rule differs from any federal regulation or statute applicable to the same activity or subject matter and that the difference is necessary to meet the objectives of the hydraulic code statute.**

8.4 Coordination with state, federal and local laws

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

8.4.1 Coordination with local governments

Government-to-government coordination for this rule focused on counties and cities with marine shorelines. Marine shorelines are subject to regulation under local Shoreline Master Programs (SMPs) as required by the state Shoreline Management Act (SMA) in Chapter 90.58 RCW. The

department reached out prior to drafting the rule in order to understand permitting requirements under local SMPs. Specifically, we were interested in how their permit requirements compared to those in SSB 5273 regarding site assessments and alternatives analysis reports. Our goals were:

- Develop a better understanding of local shoreline permitting requirements;
- Understand what types of project information are most useful for local government permitting decisions;
- Ensure that project proponents are able to prepare a single project report that satisfies both state and local regulations; and
- Make sure that rule requirements for HPA permits do not conflict with local requirements.

Outreach began several months before rule development. WDFW utilized the Washington Sea Grant program to communicate with the largest relevant audience possible. Specifically, we interacted with their Shoreline and Coastal Planners group. Within that group, we conducted two discussions with the Sea Grant Shoreline Local Government Working Group. Comments and input from the group helped to inform rule development. In addition to the work through Sea Grant, we invited a number of local planners to provide feedback on the preliminary rule before finalizing it for publication in the State Register.

8.4.2 Coordination with state and federal agencies

The Washington Department of Ecology (Ecology) partners with local governments to administer the SMA. We engaged with Ecology directly to improve understanding of the SMA and its requirements. We also incorporated feedback from an early draft of the rule.

WDFW provided notification of this rule making effort to other state and federal agencies. However, we did not approach those agencies for assistance with developing the rule proposal. The main objective of the proposal is to align the Hydraulic Code Rules with changes to state laws which have already been enacted, that govern hydraulic permitting authority. We turned to internal expertise to achieve this objective, forming a WDFW Hydraulic Code Rulemaking Workgroup to provide input during rule development.

In the long term, ongoing coordination with federal, state, and local agencies occurs because, while the objectives of regulation are different, projects being reviewed under the HPA program are potentially reviewed by these other jurisdictions as well. WDFW coordinates mitigation requirements with federal agencies so that mitigation required for construction project impacts can satisfy mitigation required for impacts to other authorities; this coordination prevents imposing double the mitigation for the same project impact.

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

Table 4 Comparison of some common aquatic permits

| Permit | Agency | Purpose | Trigger activity | Action | Limitations |
|---|----------------------------|---|--|---|---|
| Hydraulic Project Approval | WDFW | Protect fish/shellfish and their habitats | Projects that use, divert, obstruct, or change the natural flow or bed of salt or fresh state waters. | Construction permit issued with conditions that mitigate impacts | May not optimize conditions for fish or unreasonably restrict a project. |
| ESA Incidental Take Permit | USFWS, NMFS | Ensure activities are not likely to jeopardize the continued existence of listed species, or destroy or adversely modify their critical habitat | Anyone whose otherwise-lawful activities will result in the “incidental take” of a listed species needs an incidental take permit. | Incidental take permit and terms and conditions | Applies only to ESA-listed species; “take” includes harm to designated critical habitat |
| Shoreline Substantial Development Permit | Local governments, Ecology | Encourages water-dependent uses, protects shoreline natural resources, and promotes public access. | Any project, permanent or temporary, which interferes with public use of shorelands. Projects in or within 200 feet of marine waters, streams, lakes, and associated wetlands and floodplains. | Development permit issued by local government | Conditional Use and Variance require review by Ecology. |
| NPDES construction stormwater or general permit | Ecology | Protects and maintains water quality and prevents or minimizes sediment, chemicals, and other pollutants from entering surface water and groundwater. | Construction activities that disturb 1 or more acres of land and have potential stormwater or storm drain discharge to surface water. | Construction permit or general permit with conditions to minimize discharge and/or report | Apply to projects disturbing 1 or more acres of land |

| Permit | Agency | Purpose | Trigger activity | Action | Limitations |
|---|------------------------------|---|--|--|--|
| Aquatic Use Authorization | DNR | Allows use of state- owned aquatic lands. Washington State Department of Natural Resources (DNR) determines if aquatic land is state- owned, if it is available for use, and if the use is appropriate. | Project located on, over, through, under, or otherwise impacts state- owned aquatic lands. Aquatic lands are defined as tidelands, shorelands, harbor areas, and the beds of navigable waters. | Use authorization permit or lease | Only for state-owned aquatic lands |
| Section 404 Permit (Regional, Nationwide, or Individual) for Discharge of Dredge or Fill Material | U.S. Army Corps of Engineers | Restores and maintains chemical, physical, and biological integrity of national waters. Authorized under Section 404 of the Clean Water Act. | Excavating, land clearing, or discharging dredged or fill material into wetlands or other U.S. waters. | Permit to discharge dredged or fill material | Concurrent consultation on 401 Certification, CZM, National Historic Preservation Act, Endangered Species Act, Tribal Trust Issues, and National Environmental Policy Act. |

Source: Excerpted from Governor’s Office of Regulatory Innovation and Assistance detailed [comparison of aquatic permits](#) by local, state, and federal agencies.

8.4.3 Permittee Responsibilities

Permittees are notified in standard HPA permits that it is the permittee’s responsibility to meet legal requirements of other state, federal, and local agencies in order to conduct shoreline stabilization projects. Permits from and notifications to other regulatory agencies may be required and applicable landowners must be consulted before conducting any activity. These responsibilities are independent from permitting under the Hydraulic Code.

8.4.4 Determination: Coordinated with other federal, state, and local laws

WDFW has demonstrated that the rule has been coordinated, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

SECTION 9: Sources of Information Used

RCW 34.05.271(1)(a) states, “Before taking a significant agency action, the department of fish and wildlife must identify the sources of information reviewed and relied upon by the agency in the course of preparing to take significant agency action. Peer-reviewed literature, if applicable, must be identified, as well as any scientific literature or other sources of information used. The department of fish and wildlife shall make available on the agency’s web site the index of records required under RCW 42.56.070 that are relied upon, or invoked, in support of a proposal for significant agency action.”

Following are references for material reviewed and relied upon by WDFW in the course of preparing to take this rule making action (Table 5), which is a significant legislative rule pursuant to RCW 34.05.328(5)(a). Each reference is categorized for its level of peer review pursuant to RCW 34.05.271. A key to the review categories under RCW 34.05.271 is provided on Table 5A.

Table 5 References for material reviewed in preparation for rule making

| Reference Citation | Category |
|---|----------|
| Certificate of Enrollment, Substitute Senate Bill 5273. Chapter 279, Laws of 2021. | v |
| Dethier, M., W. Raymond, A. McBride, J. Toft, J. Cordell, A. Ogston, S. Heerhartz, and H. Berry, <i>Multiscale impacts of armoring on Salish Sea shorelines: Evidence for cumulative and threshold effects</i> . ESTUARINE, COASTAL AND SHELF SCIENCE vol. 175, p. 106. | i |
| Johannessen, J., A. MacLennan, A. Blue, J. Waggoner, S. Williams, W. Gerstel, R. Barnard, R. Carman, and H. Shipman, 2014. Marine Shoreline Design Guidelines. Washington Department of Fish and Wildlife, Olympia, Washington. 419 pp. | iii |
| Miller, I., Faghin, N., and Fishman, S. 2022. Sea Level Rise and Management Options for Washington’s Shorelines. A collaboration of Washington Sea Grant and the Washington Department of Ecology. Prepared for the Washington Coastal Resilience Project. 28 pp. | viii |
| Raymond, C.L, Faghin, N., Morgan, H., and Roop, H, 2020. How to Choose: A Primer for Selecting Sea Level Rise Projections for Washington State. A collaboration of Washington | viii |

| Reference Citation | Category |
|--|----------|
| Sea Grant and University of Washington Climate Impacts Group. Prepared for the Washington Coastal Resilience Project. 25 pp. | |
| Washington Department of Fish and Wildlife. 2021. CR-102 form WSR 20-24-121 (for HPA Rulemaking Implementing WSHB 1261). 124 pp. | viii |
| Washington Department of Fish and Wildlife. 2020. CR-102 form WSR 20-06-053 (for HPA Rulemaking Implementing 2SHB 1579). 95 pp. | viii |
| Washington Department of Fish and Wildlife. CR-102 form WSR 19-24-081 (for HPA Rulemaking Implementing 2SHB 1579). 2019. 43 pp. | viii |
| Washington Department of Fish and Wildlife. 2021. Regulatory Analysis of Hydraulic Code Rules Chapter 220-660 WAC Incorporating Elements of ESHB 1261 Into HPA Rules. 36 pp. | viii |
| Washington Department of Fish and Wildlife. 2020. Regulatory Analysis for Hydraulic Code Rules Chapter 220-660 WAC Incorporating Elements of 2SHB 1579 Into HPA Rules. 63 pp. | viii |
| Washington Department of Fish and Wildlife. 2019. Small Business Economic Impact Statement for Hydraulic Code Rules Chapter 220-660 WAC 2019 HPA Suction Dredge Rule Making. 20 pp. | viii |
| Washington Department of Fish and Wildlife. 2021. Small Business Economic Impact Statement for Hydraulic Code Rules Chapter 220-660 WAC Incorporating Elements of ESHB 1261 Into HPA Rules. 19 pp. | viii |
| Washington Department of Fish and Wildlife. 2014. Hydraulic Code Rulemaking (Chapter 220.660 WAC)-Cost/Benefit Analysis & Small Business Economic Impact Statement. 15 pp. | viii |
| Washington Department of Fish and Wildlife. 2019. Suction Dredge Rulemaking 2019 SEPA Checklist, SEPA #19018. 18 pp. | viii |
| Washington Department of Fish and Wildlife. 2014. Hydraulic Code Rulemaking (Chapter 220.660 WAC) Concise Explanatory Statement. 116 pp. | viii |

Table 5A Key to RCW 34.05.271 Categories Relating to Level of Peer Review

| Category Code | RCW 34.05.271 Section 1(c) |
|---------------|---|
| i | Independent peer review: Review is overseen by an independent third party |
| ii | Internal peer review: Review by staff internal to the department of fish and wildlife; |
| iii | External peer review: Review by persons that are external to and selected by the department of fish and wildlife; |
| iv | Open review: Documented open public review process that is not limited to invited organizations or individuals; |
| v | Legal and policy document: Documents related to the legal framework for the significant agency action including but not limited to: (A) Federal and state statutes; (B) Court and hearings board decisions; (C) Federal and state administrative rules and regulations; and (D) Policy and regulatory documents adopted by local governments; |

| | |
|------|--|
| vi | Data from primary research, monitoring activities, or other sources, but that has not been incorporated as part of documents reviewed under the processes described in (c)(i), (ii), (iii), and (iv) of this subsection; |
| vii | Records of the best professional judgment of department of fish and wildlife employees or other individuals; or |
| viii | Other: Sources of information that do not fit into one of the categories identified in this subsection (1)(c). |

SECTION 10: For Further Information

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