

Concise Explanatory Statement

Black bear timber damage depredation permitting rulemaking

Rules amended as part of this rulemaking:

WAC 220-440-210 Black bear timber damage depredation permits.

Rules repealed as part of this rulemaking:

NA, existing rule number is retained.

Rules created as part of this rulemaking:

NA, new text is inserted to replace the former text in WAC 220-440-210.

1. Background/Summary of Project:

The amendments to WAC 220-440-210 Black bear timber damage depredation permits fully replace the existing rule's text. A new rule provides a permitting process, issuing permits to persons to lethally remove black bears for the purpose of reducing damage to commercial timber.

Peeling and consuming commercial timber by black bears can result in permanent damage or death to the timber. Damage inflicted by bears to commercial timber damage results in a financial loss to the timber owner. A black bear timber damage permit issued under the rule allows a person to remove one or more black bears as conditioned on the removal permit.

The amended rule identifies how permits are applied for, applications are reviewed and issued or denied, conditioned, and administered. The rule will not apply to federal employees and agents while acting in their official capacities for the purpose of protecting private property. The rule includes a prohibition on the harvest of females with offspring to minimize the potential of orphaning cubs.

2. Reasons for adopting the rule:

A CR-101 was filed on February 28, 2019, when Washington Department of Fish and Wildlife (WDFW) began considering revisions to WAC 220-440-210 when it was challenged in a lawsuit. The court of appeals eventually concluded that current text in WAC 220-440-210 exceeded WDFW's statutory authority.

On March 18, 2023, the Fish and Wildlife Commission voted in response to a rule making petition to initiate rulemaking to amend WAC 220-440-210 Black bear timber damage. On October 27, 2023, the Fish and Wildlife Commission received a briefing on the draft rule proposal and held a public hearing. On December 15, 2023, the Fish and Wildlife Commission received a final briefing from department staff, discussed the proposal, and voted 6-3 to adopt the proposed rule amendments with minor adjustments recommended by department staff.

Black bear timber damage removal permits are a tool to assist landowners with removal of bears causing timber damage in the spring of the year. For several years, WDFW was issuing permits to address black bear timber damage under RCW 77.12.240 on a case-by-case basis. The adopted rule includes a process for application for permits and for review and issuance of permits. Washington State black bear population is robust and an annual spring permitting process for bear removals is sustainable. Before any bear removal permit is issued, the department will consider the status of the bear population and management objectives for the species and the implications of the permitted removals to those objectives.

3. Differences between the text of the proposed rule and the rule as adopted:

Department staff recommended the following adjustments to the proposed rule from the text published with the CR-102 based on oral and written public comments:

Subsection (1) **Purpose**, adjustment: The purpose statement was amended to clarify the text to clearly identify that the permit applicant is an owner of private commercial timber, or their designee, experiencing timber damage as originally intended by the department.

Rationale:

This permitting process is intended for private commercial timber owners to have a process to address damage to their timber. However, public commenting overwhelmingly indicated a misunderstanding of who the permit applicant was intended to be. Licensed bear hunters seemingly believed they could directly apply to the department for a bear depredation permit. The intent is for permits to be issued to timber owners experiencing damage. These permits are not intended to address timber damage on public commercial timber lands.

Many operations of a commercial nature assign the task requesting a permit to a family member or employee. This change removes any confusion about the ability to “designate” such a person to act as the owner’s agent. This is consistent with how agricultural damage permits are handled already.

Subsection (3) Permit conditions, adjustment: Subsection (3)(a)(xii) was edited by deletion of the second sentence.

Rationale:

The line was duplicative of the sentence immediately above it.

Subsection (4) Applying for a black bear timber damage permit, *three* adjustments (1-3):

- 1) Subsection (4)(a) was edited for clarification that only timber owners or designee may apply for a permit, consistent with the edited purpose statement.

Rationale:

Adjusted for consistency with the adjusted purpose statement. Many operations of a commercial nature assign the task requesting a permit to a family member or employee. This change removes any confusion about the ability to “designate” such a person to act as the owner’s agent. This is consistent with how agricultural damage permits are handled already.

- 2) Subsection (4)(b)(viii) was adjusted by placement here from (6)(c) of the permit denial provision from below.

Rationale:

Formerly the proposed rule had no application process to certify the applicant had in the prior season allowed general bear season hunting access. Instead, it was only listed below as a reason for denial without prior mention.

It is now edited and placed here as an additional permit application “*attestation*” requirement to certify the applicant allowed public general bear hunting season access during the immediately prior general bear season. It will be a required submission within the permit application.

- 3) Subsection (4)(b)(viii) was further adjusted from the former language by defining the required hunting access location as clarification.

Rationale:

The requirement in the original proposal to require bear hunting season public access was potentially overly broad and lacked a tie to the area of the damage. The adjusted text clarifies the prior general bear hunting season access needed to have been allowed in the same area where the damage permit is being requested. Some landowners own, or lease vast areas not near where the bear timber damage is occurring. Requiring an applicant to allow bear hunting access in other locations is not directly related to the bear damage permit issue, and so additional clarity was needed.

Note: The adjusted rule is consistent with other existing big game damage permitting requirements, such as for removal of deer and elk. Crop damage depredation permit applicants are currently required to allow general hunting season access as a tool to help regulate wildlife populations causing damage before receiving a damage removal permit.

Subsection (5) **WDFW required determinations**, adjustment: Subsection (5)(a) is adjusted to remove “permittee” and replace it with “applicant.”

Rationale:

At this point in the process, no “permittee” exists. They are an applicant requesting a permit.

Subsection (6) **Permit denials**, adjustment: Subsection (6)(c) is stricken here as already stated above.

Rationale:

A revised version of the deleted text was moved up above to become an attestation in subsection (4)(b)(viii). Further explanation for this change is provided above on page 3.

Note: Though the proposed subsection’s location was moved to become an application requirement, however in the remaining Subsection (6)(b) it continues to state the department may refuse to issue a permit if, *“The application fails to meet any of the above application requirements for a permit;”*.

Subsection (7) **Permittee-requested permit amendments**, adjustment: Subsection (7) is adjusted to a “designee” as applicant.

Rationale:

Many operations of a commercial nature assign the task of requesting a permit to a family member or employee. This change removes any confusion about the ability to “designate” such a person to act as their owner’s agent. This is consistent with how agricultural damage permits are handled already.

Subsection (8) **Permittee-requested permit renewal**, adjustment: Subsection (8) is adjusted to a “designee” as applicant.

Rationale:

Many operations of a commercial nature assign the task of requesting a permit to a family member or employee. This change removes any confusion about the ability to “designate” such a person to act as their owner’s agent. This is consistent with how agricultural damage permits are handled already.

4. Public comments, response to comments, and consideration of comments

Written public commenting under the SEPA and CR102 processes closed on October 27, 2023 (after commenting was extended 30 additional days when a commission scheduling conflict allowed for additional time before the public hearing).

SEPA commenting:

Comments specific to the preliminary *Determination of Non-Significance* (DNS):

Only two comments were received. Both clearly stated they supported the DNS.

WDFW Response:

The department issued a FINAL Determination of Non-Significance on October 30, 2023.

CR102 rule making comments summary with responses:

The department received over 2,700 written comments about the draft rule proposal. Over 1,500 of those were received via email and the balance through the online commenting portal. Most of the email comments took the form of multiple versions of “form letter” style emails in support of the rule. There were dozens of versions of these forms that were used repeatedly by multiple commenters. And many individual commenters also provided multiple such comments within those over 1,500 comments. Many of these same persons also commented on the proposal through the online portal, so establishing the exact number of individuals commenting is difficult to determine.

Numerous comments supported the proposal, but also requested edits to text in certain subsections. Several of the commenters’ suggested edits, but not all, were incorporated into the changes from proposal to final that department staff recommended, and the Fish and Wildlife Commission adopted, as explained in further detail above. There are a myriad of reasons why other suggestions were not incorporated, including but not limited to, being outside of the scope of the proposal, or beyond the agency’s authority to adopt, or inconsistent with the objectives of the proposal to reduce current and ongoing timber damage.

Approximately 200 written comments were received in clear opposition to the proposal, as a general position. Most of those took two basic forms.

One was from those who were identified as hunters but wanted a general spring bear hunting season to be adopted in lieu of these permits or had other “fairness” issues about how the permits would be issued.

The other form was from those who were in opposition to either any bear hunting at all, or against bear hunting in the spring. These parties often stated that the risks to orphaning

cubs was a concern, or that the “right bear” would not be removed, or that the department lacks information as to “whether the permits actually reduce damage,” and some questioned whether the department has sufficient information as to impacts to bear populations and sustainability.

The Fish and Wildlife Commission also received oral comments at a public hearing on October 27, 2023. Those comments are in the commission meeting record. The majority of commenters at the hearing opposed adoption of the proposal. The comments primarily centered upon the following: A lack of science to support that bear removals reduce damage in both short and long terms, a lack of science to support the bear population would not be harmed by permit issuance, no procedure to ensure the bear causing the damage is the bear that is removed, and that timber damage losses were insufficient to justify the taking of any bears. These comments were similar to the written comments received.

Comment:

The department received numerous comments that were against any removal of bears in response to timber damage and/or were against having a rule to allow for bear removals in response to commercial timber damage.

WDFW Response:

WDFW is authorized by statute and existing rules to work with landowners experiencing commercial property damage caused by wildlife. Through the framework established in this rule, commercial timber owners experiencing bear cause damage are required to first use available prevention and department assistance resources to address their damage before taking lethal removal action themselves. The rule directs how removal permits are issued by the department, and under what terms and conditions they are implemented by timber owners to reduce bear-caused private property damage.

Absent a rule proposal being adopted, the department would still issue permits for removals as we did in 2022 and 2023 but would not have a formal rule in place to provide a uniformly applied structure and process for administration of the program.

Comment:

The department received several comments that the department lacks the data to ensure bear populations will not be harmed by this proposal.

WDFW Response:

The department appreciates the commenters’ concerns about maintaining a healthy black bear population. The department has population estimate data and annual status and trend reports that indicate the population of black bears in the state is robust and healthy and can sustain the level of removals* from the population commensurate with the rule. Furthermore, if new data demonstrates a concern about the robustness of Washington State’s black bear population, the rule provides for the department to condition, or deny

removal permits based upon local, population level, or other emerging conservation concerns.

***NOTE:** The department used a very similar process as the framework in this rule under the Director's general authority in RCW 77.12.240 to issue bear timber damage permits for 2022 and 2023 timber damage seasons. But that was without a WAC rule *specific* to this issue. Under those permits, less than ten bears were removed under the entire WDFW damage permit program in each of those years, which is about a 10% removal rate compared to number of permits issued. The department is not expecting a significant increase in the number of permits or removal success ratio under the rule. The current estimated population of black bears in Washington State is above population objectives in nearly all Bear Management Units (BMU). Removal of approximately ten bears on an annual basis from a population of this size has a negligible effect on the state's black bear population. The department will closely evaluate any removal permit request that is within a BMU that is below the population objective before a permit is issued or denied.

Comment:

WDFW received multiple comments, both for and against the proposal, which seemed to indicate that both hunters and bear conservation-interested parties thought this proposal was a "hunting season" and that any licensed hunter could apply for permits to hunt under the rule.

WDFW Response:

It was apparent from these comments that the proposal's "purpose statement" and application process subsection lacked clarity about who the permits were intended to be issued to and used by, that being commercial timber owners experiencing damage.

In response to this discovery from the comments, the purpose statement section and the application process subsection were both edited to address this issue, i.e., to clearly identify who may apply for these permits, and who the permit applicant is. Recreational licensed hunters may be designated and used by the permittee, but only after the permit is issued to the timber owner at their request, and not through an unaffiliated licensed hunter.

Comment:

WDFW received multiple comments about having a random drawing, or a lottery to issue removal permits to hunters.

WDFW Response:

These permits are intended to be issued to timber owners in response to ongoing damage to their timber. It is not intended to be a recreational hunting opportunity. The process required for putting in place a lottery drawing for recreational hunter participants to remove the bears would be time consuming and labor intensive for both the timber owner and the department. It is not practical when time is of the essence with damage continuing to occur. Hunters are free to reach out to timber owners and ask to be called if

the owners are looking for someone to exercise their depredation permit. The rule allows that to occur.

Comment:

WDFW received multiple comments about removals being for “ungulate retention” or for protecting deer and elk being a justification for permits.

WDFW Response:

The permits are to be issued solely in response to private timber damage. That is the reason for the rule. Other management hunt options remain available to WDFW if these other resource management concerns are at issue.

Comment:

WDFW received numerous comments about expanding the definition of timber damage to include prior year damage. Including comments from self-identified timber owners.

WDFW Response:

WDFW issues damage depredation permits (i.e., crop, livestock, and other damage issues, such as timber damage) to address wildlife damage situations that are on-going or imminent. Not for damage that has already occurred, where the animal that did the damage may not even be present or even alive any longer.

Comment:

The department received numerous comments about adding text to the rule that would state, “a lactating sow doesn’t necessarily mean there were cubs.” Commenters seem to be concerned that if they removed a bear under one of the permits, they could be found in violation if there were indications of lactation on the bear. Similar comments varied in the wording but were in the same direction.

WDFW Response:

WDFW considers these proposed edits unnecessary. The rule is clear, it will be unlawful to remove a bear with cubs with a timber depredation permit.

Comment:

The department received numerous comments requesting that a general spring black bear hunt be enacted. Often these comments made no reference to support for, or opposition to the rule proposal under consideration. Some comments were not in support of the proposal and stated a spring bear hunt open to licensed hunters should be used instead.

WDFW Response:

The request for a general recreational hunt is outside of the scope of the rule proposal (see CR101 and CR102 filings proposing amendments to WAC about issuing black bear timber depredation permits). Spring bear hunting season or licensed hunters is not the subject of the proposal.

Comment:

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The department received comments about a permittee being able to have a “designee” for the permit application, amendment, and renewal processes.

WDFW Response:

The department agreed this was needed and appropriate, considering how some commercial timber operations delegate or assign work. The department has historically issued various damage removal permits through a designee in many commercial enterprises. The department made a change from the proposed to final text to address this concern.

Comment:

The department received numerous comments requesting that baiting or use of dogs to pursue be allowed in using the depredation permits.

WDFW Response:

These activities are generally prohibited by RCW 77.15.245, and the proposal explicitly disallowed use of bait or dogs. The proposed rule would have required substantial changes to allow for the use of bait or dogs within one or more of the statutory exemptions in RCW 77.15.245. Under the rule framework (proposed and adopted), use of bait or dogs is outside of the scope of Fish and Wildlife Commission authority to allow by rule.

Comment:

The department received numerous comments requesting the department follow the recommendations found in the commenting letter from the “*American Bear Foundation*” submitted in this rule making commenting process.

WDFW Response:

The department has reviewed the comments submitted by the Washington chapter of the American Bear Foundation and found them substantively duplicative of many other comments received. These comments were considered by the department and are responded to on a thematic basis throughout this CES.

Comment:

The department received numerous comments in support of the rule’s license and tag requirement allowing personal use retention of removed bears to reduce potential wastage of bears.

WDFW Response:

The department appreciates the support for the proposal. The department retained the language in the final rule.

Comment:

The department received numerous comments expressing a concern about fees potentially charged by timber owners to hunt on private lands to use one of the permits. These commenters supported the proposed rule.

WDFW Response:

The department appreciates the support of the rule text and retained the revised language in the rule that prohibits permittees from charging an access fee to hunters exercising a removal permit. The permittee, however, is allowed to charge for a fully refundable key deposit.

Comment:

The department received several comments from timber owners opposing the requirement to allow hunting access to their lands during the preceding general bear season.

WDFW Response:

The department retained this requirement in the rule. Hunting seasons are a tool of the department to regulate bear populations. By not allowing access to hunters during a hunting season preceding the “damage season” the department loses an opportunity to have existing regular hunting season hunters harvest bears, thus reducing local populations to a level where bear damage may be more tolerable. However, the department did revise the initial proposed rule language to refocus this requirement to be at the property where the actual damage permit is being requested. As previously written, the proposal could have been interpreted as applying to all owned lands, regardless of permit location.

Comment:

One commenter had a related concern about providing hunting access and the possibility that fire closures could prevent a permittee from obtaining future permits for damage. An additional concern was that the proposal prevents charging access fees or requires unrestricted access during the general bear season.

WDFW Response:

The current bear general season structure runs from August 1-November 15 in any given year. We are unaware of any private timber fire closures that would cover that entire window of time. And the rule does not require lands to allow access the entire bear season. Access to a partial season would still meet the rule proposal’s requirement.

Comment:

A timber owner voiced concerns about the rule preventing fee collection for access during the general bear hunting season on their lands outside of the time damage removal permits are normally issued.

WDFW Response:

Nothing in the proposal prevents the current practices that many timber owners have of charging a fee for access, or being selective about what they require of hunters wishing access during a general bear hunting season. The only rule requirement is to not charge an access fee for use of the depredation permit.

Comment:

The department received numerous comments in support of the rule, but against certain subsections. Most notable was the opposition to permit denial provisions that involved the reasons for safety and/or conservation concerns as being “too broad of authority for the department”.

WDFW Response:

The Director already has broad authority RCW 77.12.240 to respond to damage by issuing permits to lethally remove wildlife causing damage. The department cannot anticipate in advance every safety concern that may arise, nor all unforeseen conservation issues that may, likewise, arise. Therefore, the department retained the text as proposed to allow flexibility to respond to future unknown situations.

Comment:

The department received several comments about using “professional” or “department” hunters to perform the removals instead of timber owners or their designated hunters.

WDFW Response:

The department does not have professional staff nor the financial resources to perform removals of bears depredating on commercial timber. If that changes in the future, the rule retains the department's authority to respond to bear depredation, regardless of the rule constraints on permittees. However, timber owners who are experiencing damage could contact USDA-APHIS for assistance with removals by their animal control specialists. Under this rule, federal agents are not required to have these removal permits from WDFW before taking action.

Comment:

The department received several comments about extending permitting to include timber damage on publicly owned timber lands.

WDFW Response:

Existing damage laws and rules center around private property damage prevention and reduction. And the stewardship agencies for public timber lands, such as Washington State DNR or USFS, have not requested that public timber lands be included in bear damage permitting. No comments have been identified as coming from them on any part of this proposal. If public land stewardship agencies request WDFW assistance to mitigate timber damage in the future, WDFW will work with those agencies to identify appropriate solutions.

Comment:

The department received several comments that the proposal was too narrowly focused on commercial timber damage by black bears and should include damage to, essentially, anything in private ownership that is damaged by bears.

WDFW Response:

This is beyond the scope of the proposal. The department already has processes in place to evaluate and respond to other bear-related conflict or damage issues.

Comment:

There were numerous comments in support of and in opposition to the proposal that asserted the agency needs to “use” or “follow” “...the science.”

WDFW Response:

These broad comments lacked clarity about what science was being referred to. Therefore, the department is unable to respond to these comments with any specificity.

Comment:

The department received several comments, particularly some were from (self-identified) timber owners or timber workers, that the proposal is too cumbersome and/or lengthy.

WDFW Response:

The department believes the rule provides the appropriate amount of detail and needed clarity around the process of applying for, obtaining, and using a black bear timber depredation damage permit. The former text being repealed lacked clarity and specific process steps. This proposal corrects those deficiencies for both the permittee and for the department.

Comment:

The department received comments requesting that a set quantity of damage be incorporated into the proposal as a minimum damage level to first establish qualifying amounts of damage for an owner to obtain a permit.

WDFW Response:

The rule requires the applicant to provide photos and location of current damage to timber to ensure there is actual damage. The department does not agree that a set amount of damage should trigger issuance, or denial of a permit in rule language. The department is not in the position to establish a generally applicable rule for what specific level of economic loss a broad range of otherwise qualified applicants should have to tolerate before being able to get a permit to remove bears.

Comment:

The department received several comments about the permits not ensuring that the “right bear” causing the damage would be removed, or that the department does not know if these removals result in less damage and therefore the rule proposal should not be adopted.

WDFW Response:

No practical method has been identified by the department and has not been found in available published literature on targeting the specific bear causing tree damage. Issuing permits in a timely fashion in a well-defined geographic area relative to the damage is an

attempt to increase the likelihood of removing the bear causing damage. In the professional judgement of department staff, the removal of a bear pursuant to one of these permits is likely to reduce damage in the near future. First, a bear removed in a localized area may remove the bear causing damage. Second, because of competition for food resources within a geographic area, the department believes it is likely that removal of any bear will reduce competition for available food resources and will result in a reduction of timber damage in the same geographic area. Third, even if no bear is lethally removed, the increased human presence by permit hunters in the area where timber damage occurs may result in a change in bear behavior and reduce future timber damage.

Comment:

The department received numerous comments about the risk of removing sows with cubs and resulting cubs being orphaned and likely dying as a result.

WDFW Response:

The department appreciates the concern and support for reducing the risk of cub orphaning by sow removal. The rule restricts the removal of any bears accompanied by cubs. There is no exception language. The department has reviewed commercial timber depredation permit removals in recent years and finds no information that females with cubs have been harvested, nor that cubs were orphaned as a result. The processes set out in this rule are very similar to the approach the Department used in issuing case-by-base permit decisions under RCW 77.12.240 in 2022 and 2023. Given the similarities between 2022 and 2023 processes and this newly adopted rule, the department anticipates that permittees and their designees will continue to carefully assess the potential presence of cubs before lethally removing a bear.

Comment:

The department received several comments about increasing supplemental feed or allowing supplemental feeding nearly right up to the date of the depredation permit.

WDFW Response:

Supplemental feeding is commonly used and potentially useful as a mitigation tool to deter bears from causing damage to commercial timber. However, in the experience of department staff, bears are likely to be attracted to human supplied food sources and develop a site-specific expectation of the presence of such food. And thus, bears will readily and frequently return to sites where they found food earlier in the year. The Department is concerned about the possibility of removing bears that have simply become habituated to supplemental feeding. To further ensure that bears actually causing timber damage are those most likely to be removed, and to avoid lethal removal of bears who only were looking for human supplied food, the department staff believe there should be adequate separation in time between supplementary feeding and hunting to ensure food conditioned bears are not being killed. Timber depredation permits are typically issued April through June. In the professional judgement of department staff, the January 1 cease date provides adequate separation.

Comment:

The department received several comments about wastage of bears taken under these removal permits.

WDFW Response:

The current proposal provides a method for the permittee or designated hunter to retain the bear with a valid bear hunting tag. Absent that option being used by the permittee, the proposal provides for permits to be conditioned to cover the disposal of the bear carcass within existing WAC 220-440-090.

Comment:

The department received comments to add language to require using Master Hunters to be in whole, or part of the removal process.

WDFW Response:

The department does not want to be overly directive of who the landowner uses to complete the removal process under their issued permits. They can choose a myriad of compliant ways to complete the removal including use of a Master Hunter if they choose.

The department would recommend that Master Hunters reach out to timber owners and offer to assist as any license bear hunter will be free to do. Then it is up to the owner to make the decision. The department has no current rule under proposal to create a Master Hunter hunt option for spring bear hunts in timber damage prone areas.

Comment:

The department received a comment from the timber owner about his request that the department issue permits for the “entire season”.

WDFW Response:

The rule does not establish restrictions on permit timing or length. Thus, the Department will have latitude in issuing permits for varying time periods, as appropriate to the circumstances identified on the application and other information available at the time a permit application is evaluated.

Comment:

The department received comments that the “in writing” requirement in the proposal for amendments or renewal to permits can cause too many delays.

WDFW Response:

The current process has been and will remain for the foreseeable future that permit processing will occur substantially, if not wholly, by email. That is already the current process so the department does not believe it will add any delays in processing. And as these are permits for action requiring legal compliance, a written record needs to be created providing any changes for the record, and this cannot easily be done through text or phone calls.