



Fish and Wildlife Commission Presentation Summary Sheet

Meeting date:

11/18/2022

Agenda item:

1. Shoreline Stabilization Rule Making (SSB 5273)

Presenter(s):

Margen Carlson, Habitat Program Director

Matt Curtis, Protection Division Manager

Theresa Nation, Protection Division Environmental Planner

Background summary:

Materials:

Because the Hydraulic Code Rules are significant legislative rules, a large volume of materials is associated with this rule making. Attached to this summary sheet you will find:

- Proposed rule changes to WAC 220-660-370 (Bank Protection in Saltwater Areas)
- Summary of comments received and WDFW's responses to those comments
- Implementation Plan

In addition, the following materials were provided prior to the briefing on October 28, 2022 and can be found on the project website at <https://wdfw.wa.gov/about/regulations/development/shoreline-stabilization-hpa-rule>:

- [Final Regulatory Analysis document](#), with least-burdensome alternative analysis (finalized, no substantive changes)
- [Cost-benefit analysis](#) (no changes)
- [Small Business Economic Impact Statement](#) (SBEIS) (no changes)
- [CR-102 Proposed Rule Making form](#) (no changes)

The rule filing (CR-103P Rule Making Order) and a Concise Explanatory Statement (including the summary of comments received) will be available online when the rule adoption is filed with the code reviser.

Summary:

Habitat Program staff will brief the Commission on comments received and changes proposed to the amendments to the Hydraulic Code rules needed to implement Substitute Senate Bill 5273 (SSB 5273)¹ - a bill passed by the legislature during the 2021 legislative session.

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 before proposing a hard armoring technique.

The Commission held a public hearing on the proposed rule changes on October 28, 2022.

Changes between the CR-102 proposed rule and the proposed final (amended) rule

There are two changes between the CR-102 version of the rules and the proposed adoption version rules. The rule proposal attached to this summary sheet contains the changes.

WAC Section	Proposed change from CR-102	Reason for change
220-660-370(1)	Soft shore techniques...can provide erosion protection using strategically placed natural materials while allowing <u>reducing impacts to</u> beach processes and fish habitat to remain intact.	Clarification. The previous wording could be read to imply that soft shore techniques have no impact on beach processes and fish habitat. The change is in response to public comments.
220-660-370(2)	Added language: <u>Sea level rise will magnify the loss of beach habitat if beaches are unable to retreat due to the presence of shoreline stabilization.</u> This alteration can cause a loss of the beach spawning habitat for Pacific sand lance and surf smelt. 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, <u>and this may be exacerbated by the effects of climate change.</u>	Elaboration on fish life concerns. Adding language about sea level rise and climate change is consistent with the legislative intent of SSB 5273. The changes are in response to public comments.

¹ Laws of 2021, Chapter 279; Codified in RCW 77.55.231

Staff recommendation:

Recommend adoption of the rule as presented by Department staff.

Policy issue(s) and expected outcome:

Details of the rule proposal were discussed during the October 28, 2022 Commission meeting. Minor changes to the proposal have been made in response to public comments as detailed above. These changes are found in the “Description” and “Fish life concerns” sections of the rule and do not make changes to the regulatory portion of the rule.

Purpose of the rule change: As stated in the CR-102, *the agency’s purpose for this rule amendment is to implement Substitute Senate Bill 5273 (SSB 5273), passed by the legislature in 2021.*

Administrative Procedure Act determinations for Significant Legislative Rules

The following determinations relate to the entire 2022 Hydraulic Code Rule changes needed to implement SSB 5273, with amendments as noted earlier. Staff will walk the Commission through the following determinations and answer questions.

No.	Chapter 34.05 RCW Section and Subsection	The Commission determines that...
1	328(5)(a) Significant	Hydraulic code rules in chapter 220-660 WAC implementing chapter 77.55 RCW are significant legislative rules as specified in RCW 34.05.328(5)(a)(i).
2	328(1)(a) Goals	The general goal of chapter 77.55 RCW (Construction projects in State Waters) is to protect fish life. The specific objectives of chapter 77.55 RCW are to ensure that hydraulic projects in Washington State are reasonably assessed and conditioned to adequately protect fish life in a manner that is proportionate to the impacts of the projects.
3	328(1)(b) Rule needed	The proposed rule is needed to implement elements of SSB 5273, as enacted, into Chapter 220-660 WAC: <ul style="list-style-type: none"><li data-bbox="570 1661 1455 1768">• Specify that replacement of residential marine shoreline stabilization must utilize the least impacting technically feasible alternative for the protection of fish life.

		<ul style="list-style-type: none"> Specify that a site assessment and alternatives analysis report is required as part of an application for a Hydraulic Project Approval (HPA) permit for this type of project.
Note	328(1)(c) Cost-benefits analysis notification	This item is not a determination. It is a notification requirement that was fulfilled in the CR-102 (Notice of Proposed Rulemaking).
4	328(1)(d) Benefits greater than costs	The probable benefits of the proposed rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.
5	328(1)(e) Least Burdensome Alternative	After considering alternative versions of the rule in context with the goals and objectives of the authorizing statute, 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.
6	328(1)(f) Federal or state law	The rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.
7	328(1)(g) Private entities	Requirements are the same for public and private entities wishing to engage in a hydraulic project; the rule does not impose more stringent performance requirements on private entities than on public entities.
8	328(1)(h)(i)-(ii) Differences	Differences between the rule and federal authorities are necessary because there are no federal laws or rules solely protects all fish life from the effects of construction projects and other work in or near the water. The rule differs from any federal regulation or statute applicable to the same activity or subject matter and the difference is necessary to meet the objectives of the hydraulic code statute.
9	328(1)(i) Coordination	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.
10	271(1)(a) Sources of information	WDFW has identified and provided in the Regulatory Analysis document the sources of information reviewed and relied upon by the agency in the course of preparing to take this significant agency action.

Fiscal impacts of agency implementation:

SSB 5273 went into effect on July 25, 2021. WDFW has been implementing the new law since then. Costs can largely be attributed to the changes in statute. The rule proposal primarily incorporates those new statutory

requirements. The costs would still be incurred even if the proposed rule amendments are not adopted. Costs relate to staff time to review site assessment and alternatives analysis reports, and to evaluate whether a shoreline stabilization proposal meets the standard of least impacting technically feasible alternative for the protection of fish life. Staff time is also necessary to continue conducting outreach and for training regional staff on the new statute and rule.

Public involvement process used and what you learned:

The department has conducted outreach to stakeholders throughout the rule-making process, starting with emails to the Tribes, key stakeholders including shoreline consultants and contractors, and other state and federal natural resource agencies to inform them about the rulemaking. The Notice of Proposed Rule Making was filed on May 18, 2022 and published in Washington State Register 22-11-094 on June 1, 2022. The department held a live webinar and discussion for tribal partners on Aug, 12, 2022 and an informational webinar for the public on Sept. 11, 2022. The informational webinar was recorded and posted on the project website and the agency YouTube channel and was livestreamed by TVW. WDFW invited a subset of stakeholders to conduct early review of the rule proposal in August. A complete list of outreach activities can be found in section 6 of the [Regulatory Analysis document](#).

Comments received:

A total of 14 written comment letters were submitted during the formal comment period. One of these was a petition-style letter was sent by the Washington Environmental Council and signed by 326 residents of Washington and 227 people from outside of Washington. Three comments were given orally at the Commission’s public hearing on October 28, 2022, with two of those comments also submitted in writing. Four letters were received prior to the formal comment period in response to an invitation to review an early draft of the rule in August 2022.

Comments	Number
Support ²	11
Oppose	0
Other (did not express support or opposition, or wrote on an unrelated topic)	6

Action requested and/or proposed next steps:

Recommend adoption of the rule as presented by Department staff.

² Two organizations submitted early reviews, formal comments, and oral comments. Those organizations have each only been counted once because their submissions reiterated the same issues.

Draft motion language:

Motion: *I move to adopt the determinations made in the Final Regulatory Analyses as summarized by staff today, and to adopt the amended rule as presented by staff.*

Is there a "second?"

If so, then motion maker discusses basis for motion; other Commissioners discuss views on the motion; and amendments, if any, are proposed and addressed, before a vote is taken.

Post decision communications plan:

Staff will implement communication elements of the Implementation Plan.

Form revised 1-20-21

WAC 220-660-370 ((Bank protection)) Shoreline stabilization in saltwater areas. Appropriate methods to assess the need for marine ((bank protection)) shoreline stabilization and, if needed, to design marine ((bank protection)) shoreline stabilization are available in the department's *Marine Shoreline Design Guidelines*, as well as other published manuals and guidelines.

(1) **Description:** A broad spectrum of ((bank protection)) shoreline stabilization techniques can be applied to protect property. These range from ((natural)) passive techniques that require minimal or no engineering ((to)), engineered soft shore protection ((to)), and hard ((shore)) shoreline armor. ((Natural)) Passive techniques include planting native vegetation, improving drainage, and relocating ((structures. Natural)) buildings, roads, and improvements (e.g., wells, utilities, septic fields, and the like). Passive techniques typically preserve the natural condition of the shore and have few to no negative impacts on fish life. Soft shore techniques ((include)) such as log placement, beach nourishment, resloping the bank, and re-vegetation can provide erosion protection using strategically placed natural materials while ((allowing)) reducing impacts to beach processes and fish habitat ((to remain intact)). Conventional hard techniques include bulkheads, seawalls, revetments and ((retaining walls)) related structures, which are designed to preclude shoreline migration and bank erosion. Each type of approach has varying degrees of impact. In general, ((natural)) passive techniques result in the fewest impacts to fish life and hard ((armor)) techniques have the most impacts.

(2) **Fish life concerns:** Conventional hard techniques as well as some soft shore techniques can physically alter the beach and disrupt beach processes. Sea level rise will magnify the loss of beach habitat if beaches are unable to retreat due to the presence of shoreline stabilization. This alteration can cause a loss of the beach spawning habitat for Pacific sand lance and surf smelt. 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, and this may be exacerbated by the effects of climate change. To protect fish life, the department protects both beaches where saltwater habitats of special concern occur and the beach processes that form and maintain this habitat.

(3) ((Bank protection)) **Alternative selection:**

(a) To ensure the protection of fish life, a person must use the least impacting technically feasible shoreline stabilization alternative. For the purpose of this section, "feasible" means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. 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.

(b) Common alternatives for both new shoreline stabilization and the replacement or rehabilitation of shoreline stabilization that extends waterward of an existing shoreline stabilization structure are, from most preferred to least preferred:

(i) Remove any existing shoreline stabilization structure and restore the beach;
(ii) Control upland drainage;
(iii) Protect, enhance, and replace native vegetation;
(iv) Relocate buildings and improvements;
(v) Construct a soft structure;
(vi) Construct upland retaining walls;
(vii) Construct a hard structure landward of the ordinary high water line; and
(viii) Construct a hard structure at the ordinary high water line.

(c) Common alternatives for replacement or rehabilitation of residential shoreline stabilization are, from most preferred to least preferred:

(i) Remove the existing shoreline stabilization structure and restore the beach;

(ii) Remove the existing shoreline stabilization structure and install native vegetation;

(iii) Remove the existing shoreline stabilization structure and control upland drainage;

(iv) Remove the existing shoreline stabilization structure and replace it with a soft structure constructed of natural materials, including bioengineering;

(v) Remove the existing hard structure and construct upland retaining walls;

(vi) Remove the existing hard structure and replace it landward with another hard structure, preferably at or above the ordinary high water line; or

(vii) Remove the existing hard structure and replace it in the same footprint with another hard structure.

(d) Except as provided in (f) of this subsection, HPA applications for the following types of projects must include a site assessment, alternatives analysis and design rationale for the proposed method(s) prepared by a qualified professional (Qualified Professional's Report):

(i) New shoreline stabilization;

(ii) Replacement or rehabilitation of shoreline stabilization that extends waterward of an existing shoreline stabilization structure; and

(iii) Replacement or rehabilitation of residential shoreline stabilization.

(e) 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 shoreline stabilization technique proposed;

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

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

(f) The department may grant an exemption to the Qualified Professional's Report required under (d) and (e) of this subsection based on the scale and nature of the project for the following:

(i) Projects for the removal of an existing shoreline stabilization structure and restoration of the beach.

(ii) Projects employing passive techniques such as controlling upland drainage or planting native vegetation.

(iii) Other projects as assessed by the department.

(g) Emergency or expedited applications submitted under RCW 77.55.021 (12), (14), or (16) that do not include a site assessment and alternatives analysis report should identify the work necessary to address the immediate situation authorized under RCW 77.55.021. A site assessment and alternatives analysis report must be submitted within 90 days from the permit issuance unless the department issues an exemption. After consideration of the assessment and analysis report, if the department determines that shoreline stabilization work conducted under the emergency or expedited permit is not the least impactful technically feasible alternative, the applicant may be required to replace the structure with one that is the least impactful technically feasible alternative.

(4) Shoreline stabilization design:

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

(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) Control upland drainage;~~

~~(iii) Protect, enhance, and replace native vegetation;~~

~~(iv) Relocate improvements or structures;~~

~~(v) Construct a soft structure;~~

~~(vi) Construct upland retaining walls;~~

~~(vii) Construct hard structure landward of the OHWL; and~~

~~(viii) Construct hard structure at the OHWL.~~

~~(e)) The construction of all (~~(bank protection)~~) shoreline stabilization must not result in a permanent loss of surf smelt or Pacific sand lance spawning beds.~~

~~((d) An HPA application for new bank protection, or the replacement or rehabilitation of bank protection that extends waterward of an existing bank protection structure must include a site assessment, alternatives analysis and design rationale for the proposed method prepared by a qualified professional. The department may grant an exemption depending on the scale and nature of the project. 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 bank protection technique proposed;~~

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

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

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

~~((4) Bank protection))~~ **(5) Shoreline stabilization location:**

(a) Locate the waterward face of a new hard ((~~bank protection~~)) shoreline stabilization structure at or above the OHWL. Where this is not feasible because of geological, engineering, or safety concerns, the 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 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 hard ((~~bank protection~~)) shoreline stabilization further waterward than the structure it is replacing. Where removing the existing hard ((~~bank protection~~)) structure 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 ((~~bank protection~~)) shoreline stabilization to extend waterward of, but directly abutting, the existing structure. In these instances, a person must use the least-impacting type of structure and construction method.

~~((5) Bank protection))~~ **(6) Shoreline stabilization construction:**

(a) The department requires that plans submitted as part of a complete application show the horizontal distances of the structure(s) from permanent local benchmark(s) (fixed objects). 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))~~ 10 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. Remove all excavated or stockpiled material from the beach within ~~((seventy-two))~~ 72 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.



Comments Received and WDFW Responses

Proposed rules were filed with the Washington State Code Reviser as WSR 22-19-081 (CR-102) on September 20, 2022 and appeared in WSR 22-19 published on October 5, 2022. The public comment period for this rule making was open October 5-31, 2022. The Commission held a public hearing on October 28, 2022 with a hybrid in-person and online format.

On August 3, 2022, WDFW emailed information about the rule proposal to 29 federally recognized tribes located in or with rights in Washington. Information included background, draft rule proposal, overview, timeline, and an invitation to comment and/or initiate government-to-government consultation. A webinar was conducted for those tribal partners on August 12, 2022 to review the proposal and receive feedback. WDFW sent notice to 315 email addresses on October 4, 2022, informing people that the proposed rules had been filed with the Code Reviser. Included in that distribution were Hydraulic Code Implementation Citizen Advisory Group members, state and federal agency representatives, shoreline contractors and consultants, local governments, professional organizations, environmental organizations, and other parties who have indicated interest in marine shoreline stabilization rules.

Related rule making documents were posted on WDFW's Rule Making web page¹ prior to September 20, 2022, including copies of the CR-102, the draft Regulatory Analysis and Cost Benefits Analysis documents for significant legislative rule making pursuant to the Administrative Procedure Act, and a Small Business Economic Impact Statement pursuant to the Regulatory Fairness Act. WDFW provided an internet portal, email address, postal address, fax number and voicemail number where comments could be submitted.

Table 1 shows the number of comments received. A total of 13 written comment letters were submitted during the formal comment period. One of these was a petition-style letter sent by the Washington Environmental Council and signed by 326 residents of Washington and 227 people from outside of Washington. Three comments were given orally at the Commission's public hearing on October 28, 2022, with two of those comments also submitted in writing. Three letters were received prior to the formal comment period in response to an invitation to review an early draft of the rule in August 2022. Two letters were received from tribal partners in addition to the submissions described above.

Table 1 Descriptive statistics for comments received

Category	Number
Support ²	11
Oppose	0

¹ <https://wdfw.wa.gov/about/regulations>.

² Two organizations submitted early reviews, formal comments and oral comments. Those organizations have each only been counted once because their submissions reiterated the same issues.

Category	Number
Other (did not express support or opposition, or wrote on an unrelated topic)	6
Individuals signing joint letter (326 WA residents and 227 non-residents)	553

Following is a summary of comments received during the formal comment period and WDFW’s responses to those comments. Comments that are not specific to the exact wording of the proposed rule are grouped in section A. Comments specific to the rule language are provided in Table 2 in Section B. Section C discusses comments on rule implementation.

A. Non-Wording-Specific Comments

Comments in this section are grouped by topic.

1 General support for the proposal

Most commentors expressed general support of the proposal and of increasing protections for shorelines. Some simply indicated that they supported the proposal. The language for emergency and expedited permits was identified by some for particular approval. Additional issues presented by commentors are covered in the responses below.

Commenters:

One petition-style letter and 12 individuals³

WDFW Response:

Comments noted.

How the final rule reflects this group of comments:

Final adoption of the proposal is supported by these comments.

2 Emergency and expedited permits

Several comments were made on this topic: Three commenters requested that the standards to qualify for emergency and expedited permits be increased or elaborated. One commentor objected to the exemption of the application process for emergency and expedited permits for shoreline stabilization. One commenter objected to requiring the site assessment and alternatives analysis report *after* emergency or expedited work is conducted. One commenter asked that applicants be required to justify their expedited permit request as part of an application.

Commenters:

Four individuals

³ WDFW received letters from both citizens and organizations. “Individual” in this use may refer to either a single person or an organization.

WDFW Response:

The standards to qualify for an emergency or expedited permit are dictated by statute. WDFW is required by statute to issue emergency or expedited permits to projects that qualify. Additionally, changes to (or elaboration of) qualifications are not necessary to implement SSB 5273. Such changes would impact all HPA projects, not just shoreline stabilization. This rule proposal describes procedures for emergency and expedited shoreline stabilization permits that are compliant with statute and consistent with existing rule. This rule proposal does not provide a blanket exemption to the report requirement for projects that qualify for emergency or expedited permits. The rule does require them to conduct the minimum amount of work necessary to protect existing structures, and to follow up with a full site assessment and alternatives analysis report to WDFW within ninety days. This is the same approach taken with emergency and expedited water crossing structures. See WAC 220-660-190(8). WDFW is not proposing any changes to application requirements for either emergency or expedited permits. Justification for expedited permits must already be provided by the applicant as part of a permit application.

How the final rule reflects this group of comments:

No changes to the rule proposal are made as a result of this group of comments because the comments address concerns that are outside the scope of WDFW's proposed rules or are not aligned with state statutes. Justification for all emergency and expedited requests is already required during the permitting process.

3 Sea level rise

Several commenters expressed concern that sea level rise will impact shoreline habitat, and the presence of shoreline protection will magnify the problem. They requested that sea level rise be added as a consideration in the site assessment and alternatives analysis report. The Washington Coastal Hazards Resilience Network's sea level rise projection tool⁴ was recommended as a resource.

Commenters:

Seven individuals

WDFW Response:

The Department agrees that sea level rise poses a serious threat to both the natural environment and the built environment. Sea level rise projection tools such as the one recommended allow people to consider what a specific site may look like in the future. WDFW has high scientific confidence that the Washington Coastal Hazards Resilience Network's sea level rise projection tool is suitable for providing information to inform project planning. However, we have not answered questions about how the tool will inform the regulatory and legal processes that WDFW is required to undertake through our Hydraulic Code. We believe this work is needed and will be included as part of a future, specific rulemaking effort.

⁴ <https://wacoastalnetwork.com/research-and-tools/slr-visualization/>

[How the final rule reflects this group of comments:](#)

No changes to the rule proposal are made as a result of this group of comments because the comments are outside the scope of the proposal.

4 The role of cost in determining feasibility

One comment concerned the way that cost will be considered in determining the least impacting technically feasible alternative for a project. Specifically, concern about how the cost of armor removal is figured into comparisons of different alternatives. There was also concern about how removal costs would figure into compliance cases for illegally built armoring.

[Commenters:](#)

One individual

[WDFW Response:](#)

The cost of removing an old structure is a sunk cost because it applies to a project site regardless of what treatment is being proposed. With very few exceptions, old structures must be completely removed before a new project of any kind may be built. (The exception in WAC 220-660-370(4)(b) allows where “removing the existing 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 bank protection to extend waterward of, but directly abutting, the existing structure.”) The cost of compliance actions, such as removal of an illegal structure, are a separate issue from legally permitted projects and do not influence those legal projects.

[How the final rule reflects this group of comments:](#)

No changes to the rule proposal are made as a result of this comment because the comment does not present an actionable issue.

5 Waterward replacement of shoreline stabilization

Two comments asserted that waterward replacement of shoreline stabilization is contrary to SSB 5273 and must not be allowed.

[Commenters:](#)

Two individuals

[WDFW Response:](#)

Waterward replacement of shoreline stabilization is not prohibited in statute. The existing rule and SSB 5273 both include lists of common design alternatives in order from most to least preferred. Waterward replacement does not appear on these lists because it is an uncommon alternative that requires specific circumstances to be allowed. Waterward replacement remains as an uncommon, but important, tool for addressing shoreline stabilization. WAC 220-660-370(4)(b) describes when it may be used: “Where removing the existing 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 bank

protection to extend waterward of, but directly abutting, the existing structure.” Waterward replacement, when it is allowed, is permitted as a new structure. This includes all the regulatory discretion associated with new structures, up to and including compensatory mitigation.

[How the final rule reflects this group of comments:](#)

No changes to the rule proposal are made as a result of this comment because there is no statutory prohibition.

6 Archeological sites and Indian burials along shorelines

One comment recommended provisions to include identification, assessment and consultation for impacts to archeological sites and Indian burials when selecting a least impacting technically feasible alternative during the HPA process.

[Commenters:](#)

One individual

[WDFW Response:](#)

WDFW recognizes and respects the need to protect archeological and Indian burial sites. However, WDFW is authorized in Chapter 77.55 RCW only to protect fish life and fish habitat. WDFW does not have authority over matters outside of that subject. We encourage any interested party to review incoming HPA applications and check their location on our public HPA portal⁵ during the application review period.

[How the final rule reflects this group of comments:](#)

No changes to the rule proposal are made as a result of this comment because the comment address concerns outside the scope of WDFW’s authority.

7 Necessity of shoreline stabilization

Two comments requesting language to emphasize that shoreline stabilization should only be used where it is necessary.

[Commenters:](#)

Four individuals and one petition-style letter

[Response:](#)

The rule already requires that a site assessment and alternatives analysis report must contain evidence of erosion and/or slope instability to warrant the stabilization work.

[How the final rule reflects this group of comments:](#)

No changes proposed because this item is already covered in the rule.

⁵ https://www.govonlinesaas.com/WA/WDFW/Public/Client/WA_WDFW/Shared/Pages/Main/Login.aspx

B. Comments on specific rule language

WDFW received a number of comments on individual subsections of the proposed rules. Comments and responses are presented on Table 2.

Table 2 Comments specific to rule sections, with responses and dispositions

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
WAC 220-660-030 - Definitions			
220-660-030	Add definitions for major improvements or infrastructure, such as “major improvements are the primary residence/principal structure (including sewer, septic and driveway) but does not include accessory structures such as sheds, greenhouses, fences, pools, parking areas, etc.”	For the purpose of shoreline stabilization, examples of major improvements are provided in 220-660-370(1). A formal definition would encompass all project types beyond just shoreline stabilization and may not be relevant for those project types.	No change proposed because the definitions suggested may not be relevant to all HPA project types.
220-660-030	Introduce and define additional soft shore categories. Consider some of the terminology used by the U.S. Army Corps of Engineers and the National Oceanic and Atmospheric Administration.	The term “soft shore” is described in 220-660-370(1) as encompassing a variety of techniques. These techniques are applied on a site-specific basis and may have different impacts depending on the conditions present. Soft shore techniques are constantly evolving. Defining and ranking them would hinder flexibility to customize their application or may omit new and improved methods.	No change proposed because the level of detail suggested is not required for the purpose of the rule.
WAC 220-660-370 Bank Protection in Saltwater Areas			
220-660-370(1)	Modify language to indicate that soft shore techniques may impact fish habitat, but less so than hard armoring.	WDFW agrees that soft shore techniques may have some impact to fish habitat and that the original language may be misleading.	We propose amending 220-660-370(1) to read: “Soft shore techniques...can provide erosion protection using strategically placed natural materials while <u>allowing reducing impacts to</u> beach processes and fish habitat to remain intact. ”

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-370(2)	Include the impacts of sea level rise on fish habitat.	WDFW agrees that sea level rise poses a threat to fish habitat, especially where shoreline stabilization impairs beach processes.	We propose adding the following language to 220-660-370(2): <u>Sea level rise will magnify the loss of beach habitat if beaches are unable to retreat due to the presence of shoreline stabilization.</u>
220-660-370(2)	Including juvenile salmon concerns in this section has the potential to reduce disputes between applicants and WDFW as to what is to be included in the Qualified Professional's Report.	RCW 77.55 requires permits for the protection of all fish life, including but not limited to juvenile salmon. The permit review and provisioning process considers all the fish resources present at a particular site. The statements in WAC 220-660-370(2) are not an exhaustive list.	No changes proposed because while WAC 220-660-370(2) gives some examples of fish life concerns, it does not provide an exhaustive list.
220-660-370(3)	There should be consideration for "risk to existing, permitted infrastructure" as part of the alternatives review process.	That requirement is found in 220-660-370(3)(e)(i).	No changes proposed because this item is already covered in the rule.
220-660-370(3)(a)	The definition of feasible is problematic.	WDFW has adopted the definition of feasible directly from RCW 77.55.231(1)(c).	No changes proposed because the definition is determined by statute.
220-660-370(3)(b) and (c)	Harmonize alternatives for all replacement shoreline stabilization.	WDFW has intentionally retained the language from the existing rule that includes relocation of developments as a preferred alternative for certain project categories. The alternatives list for residential projects comes directly from statute and does not contain the relocation alternative.	No changes proposed because combining the lists would require using only the list from statute, thus eliminating the relocation option from rule entirely. Changing the list brought in from statute would make it inconsistent with the law.
220-660-370(3)(e)	Require the site assessment and alternatives analysis report to include detail supporting rejection of preferred alternatives.	The rule proposal requires discussion of alternatives considered and rationale for the proposed technique.	No changes proposed because this item is already covered in the rule.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-370(3)(e)	Include discussion of the relocation or decommissioning of development in the report.	WDFW agrees that relocation or decommissioning of developments is an important option for shoreline stabilization projects. Relocation is already required by rule as a preferred alternative for new and waterward replacement of shoreline stabilization. SSB 5273 does not include it in the preferred alternatives list for replacement or rehabilitation of residential shoreline stabilization.	No changes proposed because relocation was specifically excluded from SSB 5273. However, that does not prohibit a project proponent from considering it when planning a residential shoreline stabilization project.
220-660-370(3)(e)	Should be narrative allowing for discussion of maintenance and level of risk for the soft shore stabilization category.	Risk considerations for any stabilization technique should be stated in a report as part of the requirements found in 220-660-370(3)(e)(i), (iii), and (iv). Maintenance considerations fall under the “analysis of the benefits and impacts of the chosen protection method” in 220-660-370(3)(e)(iv).	No changes proposed because these items are already covered in the rule.
220-660-370(3)(g)	To meet the law, change “may” to “must” in the phrase “the applicant may be required to replace the structure with one that is the least impactful technically feasible alternative.”	Modifications to an emergency or expedited project may be possible to make the permanent solution the least impacting technically feasible alternative without necessitating complete replacement.	No changes proposed because complete replacement of a project may not be necessary in order to comply with statute.

C. Comments on rule implementation

Suggestions and comments included:

1. Concerns about the quality or quantity of information provided in the report or application
2. Concern that emergency and expedited permits are issued too frequently and that the proposed rule will be difficult to enforce. (Audubon, Sound Action)
3. Concern that only minimal work should be conducted under emergency and expedited permits.

Commenters:

Four individuals (Audubon, Sound Action, Phillips, Suquamish)

WDFW Response:

Part of the HPA review process is evaluating the information provided in the application as well as evaluating the actual project site to ensure that information is accurate. If a critical piece of information is missing, a Habitat Biologist will work with the applicant to obtain that information. If a site assessment and alternatives analysis report is incomplete or inaccurate, an HPA may be delayed or denied until an acceptable report is provided. What constitutes critical information varies depending on the characteristics of the individual project sites. An exhaustive list of report requirements would not be relevant across all marine shorelines.

Enforcement of any rule can be challenging. To help avoid enforcement scenarios, WDFW works with partners to conduct outreach and education on shoreline issues. When noncompliance arises, WDFW has the civil authority to take action. The WDFW compliance program exists specifically for addressing those cases. The proposed language for emergency and expedited permits in WAC 220-660-370 helps to eliminate the perceived loophole from compliance with statute and rule that some perceive exists. It also clearly establishes that projects conducted under such permits must, at the end of the day, meet the exact same standards as projects conducted with standard permits, even if it means reconstructing that project.

These are the work parameters for all emergency and expedited permits (not just shoreline stabilization):

Emergency HPA authorizes “work to protect life or property threatened by waters of the state because of the emergency.” (WAC 220-660-050(4)(a)(iv)).

Expedited HPA issued for imminent danger authorizes “work to remove obstructions, repair existing structures, restore banks, and to protect fish life or property.” (WAC 220-660-050(5)(c)).

Expedited HPA issued “when normal processing would result in significant hardship for the applicant or unacceptable environmental damage would occur” (WAC 220-660-050(7)) does not contain any specified work limitations.

How the final rule reflects these comments:

The comments do not directly address the proposed rule, so no changes are made to the final rule based on these comments.



Washington
Department of
**FISH and
WILDLIFE**

Implementation Plan

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]

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.*

Persons with disabilities who need to receive this information in an alternative format or who need reasonable accommodations to participate in WDFW-sponsored public meetings or other activities may contact Civil Rights Compliance Coordinator by phone (360-902-2575) or cell (360) 870-6175, TTY (711), or by email at Title6@dfw.wa.gov. For more information, see http://wdfw.wa.gov/accessibility/reasonable_request.html.

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Purpose

The Washington Department of Fish and Wildlife (WDFW) proposed changes to Chapter 220-660 WAC – Hydraulic Code Rules. We are providing this implementation plan to meet department and Administrative Procedure Act requirements (RCW 34.05.328) related to rule adoption.

Introduction

On November 18, 2022, the Fish and Wildlife Commission will adopt the proposed changes to Chapter 220-660 WAC - Hydraulic Code Rules. These changes are necessary to implement elements of SSB 5372 - 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.

The purpose of this rule implementation plan is to inform the public how WDFW intends to:

- Implement and enforce the rule.
- Inform and educate persons affected by the rule.
- Promote and assist voluntary compliance of the rule.
- Evaluate the rule.
- Train and inform department staff and interested stakeholders about the amended rule.

Also included in this plan is information about:

- Supporting documentation that may need to be written or revised because of the amended rule.
- Other resources where more information about the rule is available.
- Contact information for a department employee who can answer questions about the rule implementation.

Implementation and Enforcement

WDFW will implement the amended Hydraulic Code Rules on the date they become effective. Regulatory Services Section staff will implement any procedural changes and biologists will include the technical provisions that reflect the amendments to the Hydraulic Code Rules in new permits they issue or revise. The new requirement to submit a site assessment and alternatives analysis report will be confirmed before a permit is processed in most cases, and is therefore generally not subject to violation.

Since hydraulic code laws and regulations are complicated, WDFW has a responsibility to help the regulated community understand how to comply. We use a range of tools as our roles

move from educator to enforcer. WDFW will improve compliance with the Hydraulic Code Rules through increased public education and technical assistance. The Compliance Division addresses noncompliance cases, although that will not be relevant to this rule proposal for most permit holders. If a site assessment and alternatives analysis report is incomplete or inaccurate, an HPA may be delayed or denied until an acceptable report is provided. WDFW is responsible for determining that a project proposes the least impacting technically feasible alternative before issuing an HPA permit. In the case of emergency or expedited permits that are issued before a report is submitted, failure to submit the report within 90 days of permit issuance may result in noncompliance. When voluntary compliance is not successful, Compliance Division staff will seek authorization from management to take appropriate administrative enforcement. The department will employ a continuum of increasingly stringent enforcement tools as our role moves from technical assistance to enforcer. This continuum runs from correction requests advising people of areas of noncompliance, to administrative enforcement actions and, when appropriate, criminal prosecution.

Informing and Educating Persons Affected by the Rule

WDFW communicated with the public, other natural resource agencies and tribes during rulemaking. The codified rule incorporating all revisions will be posted on WDFW rules webpage when the revised rule is published by the Office of the Code Reviser. WDFW will inform affected persons about the Hydraulic Code Rule changes by the following methods:

- Washington State Register
- News Release
- Agency Website
- Direct email to interested tribes, agencies, and stakeholders.

The department's habitat biologists and frontline staff will continue to provide technical assistance and answer questions. The department will also continue to leverage outreach opportunities such as the Shore Friendly program and during public Marine Shoreline Design Guidelines training.

Promoting and Assisting Voluntary Compliance

WDFW will continue to work with stakeholders to encourage voluntary compliance with the rule. The main requirement of the new rule, submission of a site assessment and alternatives analysis report, is a mandatory step in applying for an HPA. No standard HPA will be issued without it unless it has been specifically exempted. Emergency and expedited HPA permits may be issued before the report is submitted, but the report must still be submitted within 90 in order to be compliant with the permit.

The report requirement will appear as a provision in emergency or expedited HPA permits issued for shoreline stabilization. WDFW has an established technical assistance program that promotes and assists with voluntary compliance with the Hydraulic Code Rules. The Compliance Division will also assist with promoting voluntary compliance.

Evaluating the Rule

The purpose of the rule is to implement SSB 5273. WDFW will conduct internal monitoring to ensure that HPA applications for marine shoreline stabilization are processed in accordance with the Hydraulic Code Rules. We will also continue to interact with the regulated community and gather feedback about the permit application process so that we can make adjustments as necessary to ensure that reports are accurate and complete when first submitted.

Training and Informing WDFW Staff

Rulemaking requires outreach to the department's habitat biologists, administration, compliance staff and others involved with Hydraulic Project Approvals. This will be done through meetings, email communication, written guidance, and one-on-one communication. Details of the statute (Chapter 77.55 RCW) and rules (Chapter 220-660 WAC) will be updated in HPA training materials for staff. Training will focus on changes to the permit process, evaluating site assessment and alternatives analysis reports and evaluating projects for the least impacting technically feasible alternative.

Implementation Actions:

- Identify and engage employees who interact with the regulated community as part of their daily work.
- Brief frontline employees about the rule amendments and available resources, and give them educational resources to share with applicants.
- Continue to hold biweekly office hours to discuss implementation and project review until implementation is complete.

List of Supporting Documents that May Need to be Revised

Documents that may need to be revised or updated include:

- HPA Manual
- Regulatory Services Section Desk Manuals

For Further Information:

For more information about the Hydraulic Code Rule amendments see:

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

For more information about Hydraulic Project Approvals see:

<https://wdfw.wa.gov/licensing/hpa/>

For HPA application assistance see:

<https://wdfw.wa.gov/licenses/environmental/hpa/application>

To talk with a habitat biologist, see:

<https://wdfw.maps.arcgis.com/apps/MapJournal/index.html?appid=48699252565749d1b7e16b3e34422271>

For more information about HPA rule implementation, contact:

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