

Public Comment Summary and WDFW Responses
Includes comments received during concurrent SEPA (DNS 22-044)
and Rule Making public comment periods (Oct. 5-31, 2022)

Washington Department of Fish and Wildlife
Hydraulic Project Approval Program 2022 SSB 5273 Rule Making

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. One comment was submitted regarding the draft SEPA determination. The response is integrated into this document.

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

Table 1 Descriptive statistics for comments received

Category	Number
Support ²	11
Oppose	0
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 of Section B. Section C discusses comments on rule implementation.

A. Non-Rule-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. In particular, supportive comments highlighted the language for emergency and expedited permits.

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 commentors 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 commentor objected to requiring the site assessment and alternatives analysis report *after* emergency or expedited work is conducted. One commentor asked that applicants be required to justify their expedited permit request as part of an application.

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.

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

Commenters:

Four individuals

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 already must 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

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

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.

[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 was in regards to 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. Thus, the cost of removal does not influence cost considerations. (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 process from legally permitted projects and do not have a relevance to this rule proposal.

[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 a problem scenario.

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 of waterward replacement.

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.

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

How the final rule reflects this group of comments:

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

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 3.

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. Alternately, 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

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 believe 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.

Appendix A - List of Commenters

Some individuals sent multiple comments. Three comments arrived anonymously. One letter was petition-style, sent by the Washington Environmental Council and signed by 326 residents of Washington and 227 people from outside of Washington.

Commenters sending letters, emails, and/or providing oral testimony:

Ann Aagaard

Scott Andrews, Audubon Washington

Kathleen Callaghy, Defenders of Wildlife

Amy Carey, Sound Action

Sydney Fishman, Dept. of Ecology

Tim Gates, Dept. of Ecology

R.S. Phillips

Mindy Roberts, Washington Environmental Council

Jesse Salomon, Senator, 38th District

Heather Spore, Swinomish Indian Tribal Community

Tim Trohimivich, Futurewise

Tina Whitman, Friends of the San Juans

Lance Wollwage, Dept. of Archeology and Historic Preservation

SEPA DNS 22-044 Comments were received from the following:

Roderick Malcom, Suquamish Tribe