

HCICAG Worksheet for January 23, 2020 Meeting

Topic or WAC	Organization	Comment	HCICAG Recommendation
220-660-050(9)(c)	Env Com	Retain “habitat that supports fish life” to clarity that the application requirements include specific evaluation of impacts to habitat that supports fish life.	
220-660-050(13)(b)	Env Comm	Add “and” to the following “Based on current rules the procedure for an emergency, imminent danger, chronic danger, or an expedited HPA requires that these projects meet the mitigation provisions and requirements in WAC 220-660-080 <u>AND</u> the provisions in WAC 220-660-100 through 220-660-450 that are included in an HPA.”	
220-660-050(13)(b)	Env Comm	We suggest the language be revised to require that projects meet the mitigation provisions in WAC 220-660-080 <i>and the applicable technical provisions in WAC 220-660-100 through 220-660-450.</i>	
220-660-050(13)(c)	BIAW	Builders may have inconsistent work schedules due to inclement weather or poor working conditions causing to put the project on hold. Working against the department's time limitation makes it more difficult to ensure quality work in order to comply, thus subjecting them to high fines.	
220-660-050(19)(a)	WSDOT	We would like clarification that state agency applicants are included in the “project proponent” definition.	
220-220-050(19)(b)	WSDOT	If a WSDOT contractor fails to comply with an order or notice will the department refuse to accept an HPA application from WSDOT?	
220-660-370(1)	WSDOT	We appreciate and support the change from “bulkhead” to “bank protection structure” because it’s a clearer description.	
220-660-370	Env Comm	While soft armoring may not have the same impact as hard armoring, impacts and changes to beach processes and fish habitat are still	

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		created and should be reflected in the description.	
220-660-370(2)	Env Comm	Language should not suggest that soft shore techniques eliminate physical alteration of the beach. This is not accurate and should be amended.	
220-660-370(3)(b)	BIAW	Removal of "bulkhead" to "hard structure" and "beach nourishment/woody material" to "soft structure" may cause lack of clarity and lacks specificity for builders.	
220-660-370(3)(b)	Env Comm	This section should lead with the rules related to the requirement for a risk and needs assessment and evaluation of the least impacting method report should a protection need be documented.	
220-660-370(3)(b)	WEC	Add language to require an applicant to prove that the lesser impacting techniques within the hierarchy have been used or are not possible before moving on to subsequent levels in hierarchy	
220-660-370(3)(b)	WEC and Env Comm	Move the hierarchy position of construction of an upland retaining wall to be less impacting than soft armoring techniques, if that construction is well beyond the shoreline jurisdiction.	
220-660-370(3)(d)	WSDOT	Regional designers may not always be licensed geologists or geomorphologists. Would the department allow designs from non-licensed geologists or geomorphologists?	
220-660-370(3)(d)	Phillips and Env Comm	The discipline of "coastal engineer" should be added as that is one of the critical professional disciplines needed for this type of assessment.	
220-660-370(4)	WSDOT	Clarify that maintenance of existing projects is exempt from these requirements.	
220-660-370(5)	WEC and Env Comm	Require that specific project location coordinates be added in project plans to allow for more streamlined	

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		mapping and documentation of armoring for monitoring and recovery efforts.	
220-660-370(5)	WSDOT	Provide more leeway on the benchmark requirement depending on the scale and location of the project since it requires survey crews. The rule should also clarify the frequency of measuring the benchmarks.	
220-660-370(5)	Phillips	Confirm in the rule language that it's a local benchmark.	
220-660-460(9)	WSDOT	Will an informally appealed permit be withheld or suspended? Clarify when the department will send a response in writing.	
220-660-470	WSDOT	Include state agencies as project proponents if the definition of person does not include state agencies.	
220-660-480	DNR	Change forest practice HPA to Forest Practices Hydraulic Project (FHP).	
220-660-480	WSDOT	The introduction should clarify what action would trigger each specific compliance action.	
220-660-480(2)	WSDOT	Define what is meant by "more than minor harm" to fish life.	
220-660-480(3)	WSDOT	We are concerned about actions from one WSDOT HPA activity negatively impacting other WSDOT projects statewide. If a W. WA project received a warning or a violation, would a project in E. WA immediately be issued a civil penalty?	
220-660-480(4)(a)	WSAC	The term "Correction Request" should not replace the terms "Notice of Violation" and "Notice of Correction".	
220-660-480(5)(1)(a)	WSDOT	Define "significant harm to fish life".	
220-660-480(5)(f)	WSDOT	How is an immediate stop work order issued in the field if the manager who has authorization to issue it is not in the field?	
220-660-480(5)(f)	WSDOT	How is the authority to issue a stop work order and the specific directives relayed to the project proponent in the field?	
220-660-480(6)	WSDOT and WSAC	Clarify who can issue Notices to Comply.	

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220-660-480(6)(b)	WSAC	The notice to comply as described in 2SHB 1579 (2019) Section 7 (1) (a) does not include such an expanded “scope of notice to comply” as stated here which allows “additional action to prevent, correct, or compensate for adverse impacts to fish life caused by the violation.”	
220-660-480(7)(a)	BIAW	Clarify the civil penalty is per violation.	
220-660-480(8)(a)(i)	WSAC	We do not believe that civil penalties should be issued with the basis of non-compliance with a correction request.	
220-660-480(8)(c)	WSAC	The proposed penalty schedule does not have a specific list (i.e. schedule) of possible violations and their corresponding penalty amounts.	
220-660-480(8)(d)(iii)	BIAW	Clarify that a penalty could be divided between project proponents (if more than one) based on their contribution to the violation.	



2SHB 1579 HPA Rule Making HCICAG Briefing Companion Material

Draft January 23, 2020

New Hydraulic Code statutes from 2SHB 1579

RCW [77.55.400](#) Determination as to whether construction is a hydraulic project— Preapplication determination—Review and comment period—Written determination.

(1) A person proposing construction or other work landward of the ordinary high water line that will use, divert, obstruct, or change the natural flow or bed of state waters shall submit a permit application to the department. However, if a person is unsure about whether the work requires a permit, they may request a preapplication determination from the department. The department must evaluate the proposed work and determine if the work is a hydraulic project and, if so, whether a permit from the department is required to ensure adequate protection of fish life.

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

- (a) A description of the proposed project;
- (b) A map showing the location of the project site; and
- (c) Preliminary plans and specifications of the proposed construction or work, if available.

(3) The department shall provide tribes and local governments a seven calendar day review and comment period. The department shall consider all applicable written comments received before issuing a determination.

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

(5) Determinations made according to the provisions of this section are not subject to the requirements of chapter [43.21C](#) RCW.

[[2019 c 290 § 4.](#)]

NOTES: Finding—Intent—2019 c 290: See note following RCW [77.12.085](#).

RCW [77.55.410](#) Violation of chapter.

(1) When the department determines that a violation of this chapter, or of any of the rules that implement this chapter, has occurred or is about to occur, it shall first attempt to achieve voluntary compliance. The department shall offer information and technical assistance to the project proponent, identifying one or more means to accomplish the project proponent's purposes within the framework of the law. The department shall provide a reasonable timeline to achieve voluntary compliance that takes into consideration factors specific to the violation, such as the complexity of the hydraulic project, the actual or potential harm to fish life or fish habitat, and the environmental conditions at the time.

(2) If a person violates this chapter, or any of the rules that implement this chapter, or deviates from a permit, the department may issue a notice of correction in accordance with chapter [43.05](#) RCW, a notice of violation in accordance with chapter [43.05](#) RCW, a stop work order, a notice to comply, or a notice of civil penalty as authorized by law and subject to chapter [43.05](#) RCW and RCW [34.05.110](#).

(3) For purposes of this section, the term "project proponent" means a person who has applied for a hydraulic project approval, a person identified as an authorized agent on an application for a hydraulic project approval, a person who has obtained a hydraulic project approval, or a person who undertakes a hydraulic project without a hydraulic project approval.

(4) This section does not apply to a project, or to that portion of a project, that has received a forest practices hydraulic project permit from the department of natural resources pursuant to chapter [76.09](#) RCW.

[[2019 c 290 § 5](#).]

NOTES: Finding—Intent—2019 c 290: See note following RCW [77.12.085](#).

RCW [77.55.420](#) Stop work order—Notice—Appeal.

(1) The department may serve upon a project proponent a stop work order, which is a final order of the department, if:

(a) There is any severe violation of this chapter or of the rules implementing this chapter or there is a deviation from the hydraulic project approval that may cause significant harm to fish life; and

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

(2)(a) The stop work order must set forth:

(i) A description of the condition that is not in compliance and the text of the specific section or subsection of this chapter or the rules that implement this chapter;

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

(iii) The date by which the department requires compliance;

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

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

(vi) The right to an appeal.

(b) A stop work order may require that any project proponent stop all work connected with the violation until corrective action is taken. A stop work order may also require that any project proponent take corrective action to prevent, correct, or compensate for adverse impacts to fish life and fish habitat.

(c) A stop work order must be authorized by senior or executive department personnel. The department shall initiate rule making to identify the appropriate level of senior and executive level staff approval for these actions based on the level of financial effect on the violator and the scope and scale of the impact to fish life and habitat.

(3) Within five business days of issuing the stop work order, the department shall mail a copy of the stop work order to the last known address of any project proponent, to the last known address of the owner of the land on which the hydraulic project is located, and to the local jurisdiction in which the hydraulic project is located. The department must take all measures reasonably calculated to ensure that the project proponent actually receives notice of the stop work order.

(4) Issuance of a stop work order may be informally appealed by a project proponent who was served with the stop work order or who received a copy of the stop work order from the department, or by the owner of the land on which the hydraulic project is located, to the department within thirty days from the date of receipt of the stop work order. Requests for informal appeal must be filed in the form and manner prescribed by the department by rule. A stop work order that has been informally appealed to the department is appealable to the board within thirty days from the date of receipt of the department's decision on the informal appeal.

(5) The project proponent who was served with the stop work order or who received a copy of the stop work order from the department, or the owner of the land on which the hydraulic project is located, may commence an appeal to the board within thirty days from the date of receipt of the stop work order. If such an appeal is commenced, the proceeding is an adjudicative proceeding under the administrative procedure act, chapter [34.05](#) RCW. The recipient of the stop work order must comply with the order of the department immediately upon being served, but the board may stay, modify, or discontinue the order, upon motion, under such conditions as the board may impose.

(6) This section does not apply to a project, or to that portion of a project, that has received a forest practices hydraulic project permit from the department of natural resources pursuant to chapter [76.09](#) RCW.

(7) For the purposes of this section, "project proponent" has the same meaning as defined in RCW [77.55.410](#)(3).

[[2019 c 290 § 6.](#)]

NOTES: Finding—Intent—2019 c 290: See note following RCW [77.12.085](#).

RCW [77.55.430](#) Notice to comply—Notice—Appeal.

(1)(a) If a violation of this chapter or of the rules implementing this chapter, a deviation from the hydraulic project approval, damage to fish life or fish habitat, or potential damage to fish life or fish habitat, has occurred and the department determines that a stop work order is unnecessary, the department may issue and serve upon a project proponent a notice to comply, which must clearly set forth:

- (i) A description of the condition that is not in compliance and the text of the specific section or subsection of this chapter or the rules that implement this chapter;
 - (ii) A statement of what is required to achieve compliance;
 - (iii) The date by which the department requires compliance to be achieved;
 - (iv) Notice of the means to contact any technical assistance services provided by the department or others;
 - (v) Notice of when, where, and to whom a request to extend the time to achieve compliance for good cause may be filed with the department; and
 - (vi) The right to an appeal.
- (b) The notice to comply may require that any project proponent take corrective action to prevent, correct, or compensate for adverse impacts to fish life or fish habitat.
- (2) Within five business days of issuing the notice to comply, the department shall mail a copy of the notice to comply to the last known address of any project proponent, to the last known address of the owner of the land on which the hydraulic project is located, and to the local jurisdiction in which the hydraulic project is located. The department must take all measures reasonably calculated to ensure that the project proponent actually receives notice of the notice to comply.
- (3) Issuance of a notice to comply may be informally appealed by a project proponent who was served with the notice to comply or who received a copy of the notice to comply from the department, or by the owner of the land on which the hydraulic project is located, to the department within thirty days from the date of receipt of the notice to comply. Requests for informal appeal must be filed in the form and manner prescribed by the department by rule. A notice to comply that has been informally appealed to the department is appealable to the board within thirty days from the date of receipt of the department's decision on the informal appeal.
- (4) The project proponent who was served with the notice to comply, the project proponent who received a copy of the notice to comply from the department, or the owner of the land on which the hydraulic project is located may commence an appeal to the board within thirty days from the date of receipt of the notice to comply. If such an appeal is commenced, the proceeding is an adjudicative proceeding under the administrative procedure act, chapter [34.05](#) RCW. The recipient of the notice to comply must comply with the notice to comply immediately upon being served, but the board may stay, modify, or discontinue the notice to comply, upon motion, under such conditions as the board may impose.
- (5) This section does not apply to a project, or to that portion of a project, that has received a forest practices hydraulic project permit from the department of natural resources pursuant to chapter [76.09](#) RCW.
- (6) For the purposes of this section, "project proponent" has the same meaning as defined in RCW [77.55.410](#)(3).

[[2019 c 290 § 7.](#)]

NOTES: Finding—Intent—2019 c 290: See note following RCW [77.12.085](#).

RCW [77.55.440](#) Penalties—Notice—Appeal—Authority of attorney general to recover penalty—Penalty schedule.

(b) *[(1)] Penalties must be authorized by senior or executive department personnel. The department shall initiate rule making to identify the appropriate level of senior and executive level staff approval for these actions based on the level of financial effect on the violator and the scope and scale of the impact to fish life and habitat.

(2) The penalty provided must be imposed by notice in writing by the department, provided either by certified mail or by personal service, to the person incurring the penalty and to the local jurisdiction in which the hydraulic project is located, describing the violation. The department must take all measures reasonably calculated to ensure that the project proponent actually receives notice of the notice of penalty. The civil penalty notice must set forth:

(a) The basis for the penalty;

(b) The amount of the penalty; and

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

(3)(a) Except as provided in (b) of this subsection, any person incurring any penalty under this chapter may appeal the penalty to the board pursuant to chapter [34.05](#) RCW. Appeals must be filed within thirty days from the date of receipt of the notice of civil penalty in accordance with RCW [43.21B.230](#).

(b) Issuance of a civil penalty may be informally appealed by the person incurring the penalty to the department within thirty days from the date of receipt of the notice of civil penalty. Requests for informal appeal must be filed in the form and manner prescribed by the department by rule. A civil penalty that has been informally appealed to the department is appealable to the board within thirty days from the date of receipt of the department's decision on the informal appeal.

(4) The penalty imposed becomes due and payable thirty days after receipt of a notice imposing the penalty unless an appeal is filed. Whenever an appeal of any penalty incurred under this chapter is filed, the penalty becomes due and payable only upon completion of all review proceedings and the issuance of a final order confirming the penalty in whole or in part. When the penalty becomes past due, it is also subject to interest at the rate allowed by RCW [43.17.240](#) for debts owed to the state.

(5) If the amount of any penalty is not paid within thirty days after it becomes due and payable, the attorney general, upon the request of the director, shall bring an action in the name of the state of Washington in the superior court of Thurston county or of the county in which such a violation occurred, to recover the penalty. In all such actions, the rules of civil procedure and the rules of evidence are the same as in an ordinary civil action. The department is also entitled to recover reasonable attorneys' fees and costs incurred in connection with the penalty recovered under this section. All civil penalties received or recovered by state agency action for violations as prescribed in subsection (1) of this section must be deposited into the state's general fund. The department is authorized to retain any attorneys' fees and costs it may be

awarded in connection with an action brought to recover a civil penalty issued pursuant to this section.

(6) The department shall adopt by rule a penalty schedule to be effective by January 1, 2020. The penalty schedule must be developed in consideration of the following:

- (a) Previous violation history;
- (b) Severity of the impact on fish life and fish habitat;
- (c) Whether the violation of this chapter or of its rules was intentional;
- (d) Cooperation with the department;
- (e) Reparability of any adverse effects resulting from the violation; and
- (f) The extent to which a penalty to be imposed on a person for a violation committed by another should be reduced if the person was unaware of the violation and has not received a substantial economic benefit from the violation.

(7) This section does not apply to a project, or to that portion of a project, that has received a forest practices hydraulic project permit from the department of natural resources pursuant to chapter [76.09](#) RCW.

[[2019 c 290 § 8.](#)]

NOTES: *Reviser's note: The governor partially vetoed section 8, chapter 290, Laws of 2019.

Finding—Intent—2019 c 290: See note following RCW [77.12.085](#).

RCW [77.55.450](#) Administrative inspection warrant.

(1) The department may apply for an administrative inspection warrant in either Thurston county superior court or the superior court in the county in which the hydraulic project is located. The court may issue an administrative inspection warrant where:

- (a) Department personnel need to inspect the hydraulic project site to ensure compliance with this chapter or with rules adopted to implement this chapter; or
- (b) Department personnel have probable cause to believe that a violation of this chapter or of the rules that implement this chapter is occurring or has occurred.

(2) This section does not apply to a project, or to that portion of a project, that has received a forest practices hydraulic project permit from the department of natural resources pursuant to chapter [76.09](#) RCW.

[[2019 c 290 § 9.](#)]

NOTES: Finding—Intent—2019 c 290: See note following RCW [77.12.085](#).

RCW [77.55.460](#) Disapproval of an application—Notice—Review.

(1) The department may disapprove an application for hydraulic project approval submitted by a person who has failed to comply with a final order issued pursuant to RCW [77.55.420](#) or

[77.55.430](#) or who has failed to pay civil penalties issued pursuant to RCW [77.55.440](#).

Applications may be disapproved for up to one year from the issuance of a notice of intent to disapprove applications under this section, or until all outstanding civil penalties are paid and all outstanding notices to comply and stop work orders are complied with, whichever is longer.

(2) The department shall provide written notice of its intent to disapprove an application under this section to the applicant and to any authorized agent or landowner identified in the application.

(3) The disapproval period runs from thirty days following the date of actual notice of intent or when all administrative and judicial appeals, if any, have been exhausted.

(4) Any person provided the notice may seek review from the board by filing a request for review within thirty days of the date of the notice of intent to disapprove applications.

[[2019 c 290 § 10](#).]

NOTES: Finding—Intent—2019 c 290: See note following RCW [77.12.085](#).

RCW [77.55.470](#) Remedies under chapter not exclusive.

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

[[2019 c 290 § 11](#).]

NOTES: Finding—Intent—2019 c 290: See note following RCW [77.12.085](#).

Disposition 77.55.141 Marine beach front protective bulkheads or rockwalls.

[2010 c 210 § 28; 2005 c 146 § 501; 1991 c 279 § 1. Formerly RCW 77.55.200, 75.20.160.]

Repealed by 2019 c 290 § 14.

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

Description:

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

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

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

(3) **Standard HPA:**

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

(b) Special types of standard HPAs:

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

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

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

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

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

(ii) Multisite HPA.

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

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

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

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

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

(iii) General HPA.

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

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

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

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

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

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

(D) The department and the applicant may negotiate the scope and scale of the project types covered. The department and the applicant must agree on the fish protection provisions required before the application is submitted.

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

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

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

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

(iv) "Model" HPA.

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

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

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

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

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

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

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

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

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

(4) **Emergency HPA:**

(a) Declaring an emergency.

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

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

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

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

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

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

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

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

(5) **Imminent danger HPA:**

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

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

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

(d) When imminent danger exists, and before starting work, a person must submit a complete written application to the department to obtain an imminent danger HPA. Compliance with the provisions of chapter 43.21C RCW (State Environmental Policy Act) is not required for imminent danger HPAs.

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

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

(6) Chronic danger HPA:

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

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

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

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

(7) Expedited HPA:

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

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

(c) Compliance with the provisions of chapter 43.21C RCW (State Environmental Policy Act) is not required for expedited HPAs. The department must issue expedited HPAs within fifteen calendar days after receipt of a complete written application. Work under an expedited HPA must be completed within sixty calendar days of the date the HPA is issued.

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

(8) Pamphlet HPA:

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

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

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

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

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

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

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

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

(b) How to get an emergency HPA: Upon an emergency declaration, and before starting emergency work, a person must obtain a verbal or written HPA from the department. A complete written application is not required. However, a person must provide adequate information describing the proposed action. Compliance with the provisions of chapter 43.21C RCW (State Environmental Policy Act), is not required for emergency HPAs. A person may request a verbal or written emergency HPA from the biologist who issues HPAs for the geographic area where the emergency is located Monday through Friday from 8:00 a.m. to 5:00 p.m. If the biologist cannot be contacted or it is after business hours, a person must contact the emergency hotline at 360-902-2537 to request an emergency HPA.

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

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

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

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

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

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

(B) The current version of the JARPA;

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

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

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

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

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

entering the property where the project is located to inspect the project site or any work;

(B) Plans for the overall project;

(C) Complete plans and specifications for all aspects of the proposed construction or work waterward of the mean higher high water line in salt water, or waterward of the ordinary high water line in fresh water;

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

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

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

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

(iv) HPA application submission:

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

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

(II) Sending the package via mail to:

Department of Fish and Wildlife
P.O. Box 43234
Olympia, WA 98504-3234;

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

(IV) Fax: 360-902-2946;

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

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

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

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

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

(10) **Incomplete applications:**

(a) Within ten days of receipt of the application, the department must determine whether an application meets the requirements of this section. If the department determines the application does not meet

the requirements, the department will provide written or emailed notification of an incomplete application to the applicant or authorized agent. This written or emailed notification must include a description of information needed to make the application complete. The department may return the incomplete application to the applicant or authorized agent or hold the application on file until it receives the missing information. The department will not begin to process the application until it receives all information needed to complete the application.

(b) The applicant or authorized agent must submit additional information in response to a written notification of incomplete application through the department's online permitting system or to the department's habitat program, Olympia headquarters office. The department will not accept additional information submitted elsewhere or by other than the applicant or authorized agent.

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

(11) Application review period:

(a) Once the department determines an application is complete, the department will provide to tribes and local, state, and federal permitting or authorizing agencies a seven-calendar-day review and comment period. The department will not issue the HPA (~~(permit)~~) before the end of the review period to allow all interested tribes and agencies to provide comments to the department. The department may consider all written comments received when issuing or provisioning the HPA. The review period is concurrent with the department's overall review period. Emergency, imminent danger, expedited, and modified HPAs are exempt from the review period requirement.

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

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

(12) Suspending the review period:

(a) An applicant or authorized agent may request a delay in processing a standard HPA. The applicant or authorized agent must submit a written request for the delay through the department's online permitting system or to the habitat program's Olympia headquarters office. The department may not accept delay requests submitted elsewhere or by a person other than the applicant or authorized agent.

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

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

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

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

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

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

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

(13) Issuing or denying a hydraulic project approval:

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

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

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

(d) The department may require a person to notify the department before construction or other work starts, upon project completion, or at other times that the department deems necessary while the (~~per-~~~~mit~~) HPA is in effect. The department may also require a person to provide periodic written reports to assess (~~per-~~~~mit~~) HPA compliance.

(e) The HPA must contain provisions that allow for minor modifications to the work timing, plans, and specifications of the project

without requiring the reissuance of the ((permit)) HPA, as long as the modifications do not adversely affect fish life or the habitat that supports fish life. The permittee should contact the habitat program's Olympia headquarters office through email or the department's online permit application system to request a minor modification.

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

(14) Hydraulic project approval expiration time periods:

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

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

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

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

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

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

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

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

(b) Requests for time extensions, renewals, or modifications of HPAs are deemed received on the date received by the department. The department may declare applications submitted to habitat program after normal business hours as received on the next business day.

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

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

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

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

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

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

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

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

(17) Revoking an HPA.

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

(i) At the written request of the permittee or authorized agent;

(ii) As the result of an informal or formal appeal decision;

(iii) As the result of a court ruling finding that the department issued the HPA in error;

(iv) Following change of a determination of nonsignificance or mitigated determination of nonsignificance to a determination of significance by a lead agency under chapter 43.21C RCW that applies to the hydraulic project approved by the HPA;

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

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

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

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

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

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

(18) Requesting a preapplication determination:

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

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

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

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

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

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

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

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

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

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

(19) Notice of intent to disapprove HPA applications:

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

(b) The department may disapprove HPA applications submitted by such project proponents for up to one year after the date on which the department issues a notice of intent to disapprove HPA applications, or until such project proponent pays all outstanding civil penalties and complies with all notices to comply and stop work orders issued under WAC 220-660-480, whichever is longer (disapproval period).

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

(d) The disapproval period begins on the date the department's notice of intent to disapprove HPA applications becomes final. The no-

tice of intent to disapprove HPA applications becomes final thirty calendar days after the department issues it, or upon exhaustion of all applicable administrative and/or judicial remedies.

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

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

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

WAC 220-660-370 Bank protection in saltwater areas. ((RCW 77.55.141 applies to single-family residence bank protection that will not result in a permanent loss of critical food fish and shellfish habitat. RCW 77.55.021 applies to nonsingle-family residence bank protection and single-family residence bank protection that does not comply with the criteria in RCW 77.55.141. The department may deny bank protection applications processed under RCW 77.55.021 that do not provide proper protection of fish life.)) Appropriate methods to design marine bank protection are available in the department's *Marine Shoreline Design Guidelines*, as well as other published manuals and guidelines.

(1) **Description:** ((A bank protection structure is a permanent or temporary structure constructed to protect or stabilize the bank. Bank protection methods are either hard or soft techniques. Soft approaches attempt to mimic natural processes by using biotechnical methods such as live plantings, rootwads and large woody material (LWM), and beach nourishment. Usually, soft approaches are designed to be less impacting to fish life. Hard approaches armor the bank with material such as rock, concrete, or wood intended to prevent erosion of the bank. Some projects use both hard and soft approaches. To be considered soft, at least eighty-five percent of the total project area must be constructed with naturally occurring materials in a manner that mimics the natural shore processes taking place in the vicinity of the project. In addition, the remaining fifteen percent of the total project area must not interrupt sediment delivery to the beach (e.g., must not bulkhead a feeder bluff). The total project area extends cross-shore from MLLW to the OHWL, and long-shore from a line perpendicular to the shoreline at the beginning of one end of construction to the other end.)) A broad spectrum of bank protection techniques can be applied to protect property. These range from natural techniques that require minimal or no engineering to engineered soft shore protection to hard shore armor. Natural techniques include planting native vegetation, improving drainage, and relocating structures. Natural techniques typically preserve the natural condition of the shore and have few to no negative impacts on fish life. Soft shore techniques include log placement, beach nourishment, resloping the bank, and revegetation can provide erosion protection using strategically placed natural materials while allowing beach processes and fish habitat to remain intact. Conventional hard techniques include bulkheads, seawalls, revetments and retaining walls, which are designed to preclude shoreline migra-

tion and bank erosion. Each type of approach has varying degrees of impact. In general, natural techniques result in the fewest impacts to fish life and hard armor have the most impacts.

(2) **Fish life concerns:** ~~((Bank protection structures))~~ Conventional hard techniques as well as some soft shore techniques can physically alter the beach and disrupt ((nearshore ecosystem)) beach processes ((and physical conditions)). This alteration can cause a loss of the beach spawning habitat for Pacific sand lance and surf smelt ((and a loss of migration, feeding, and rearing habitat for juvenile salmon)). These forage fish species are a primary food source for some adult salmon species. This alteration can also reduce beach complexity, the presence of marine riparian vegetation including overhanging vegetation alongshore that produces terrestrial insects that are eaten by juvenile salmon. To protect fish life, the department protects ((the)) both beaches where ((critical food fish or shellfish habitat)) saltwater habitats of special concern occur and the ((nearshore zone geomorphic)) beach processes that form and maintain this ((critical)) habitat.

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

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

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

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

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

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

~~((ii) If construction of a new single-family residence bulkhead or other bank protection project, or replacement or repair of an existing single-family residence bulkhead or other bank protection project waterward of the existing structure will result in the permanent loss of critical food fish or shellfish habitat, the department must instead process the application under RCW 77.55.021. However,))~~ The construc-

tion of all ~~((bulkheads or other))~~ bank protection must not result in a permanent loss of surf smelt or Pacific sand lance spawning beds.

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

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

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

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

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

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

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

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

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

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

~~(5))~~ **Bank protection ~~((projects processed under RCW 77.55.021))~~ location:**

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

(b) Do not locate the waterward face of a replacement or repaired ~~((bulkhead))~~ hard bank protection further waterward than the structure it is replacing. Where removing the existing ~~((bulkhead))~~ hard bank

protection will result in environmental degradation such as releasing deleterious material or problems due to geological, engineering, or safety concerns, the department will authorize the replacement (~~(bulk-head)~~) bank protection to extend waterward of, but directly abutting, the existing structure. In these instances, (~~(the design)~~) a person must use the least-impacting type of structure and construction method.

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

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

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

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

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

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

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

WAC 220-660-460 Informal appeal of administrative actions. An informal appeal is an (~~(appeal to the department pursuant to)~~) internal department review of a department HPA decision and is conducted under chapter 34.05 RCW (Administrative Procedure Act).

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

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

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

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

(3) Requesting an informal appeal.

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

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

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

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

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

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

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

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

(a) Mailed to the:

HPA Appeals Coordinator
Department of Fish and Wildlife
Habitat Program
P.O. Box 43234
Olympia, WA 98504-3234;

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

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

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

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

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

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

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

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

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

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

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

(h) The specific relief requested;

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

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

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

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

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

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

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

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

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

(2) The department encourages (~~aggrieved persons~~) a person ag-
grieved by a department HPA decision to take advantage of the informal
appeal process under WAC 220-660-460 before initiating a formal ap-
peal. However, (~~the informal appeal process is not mandatory, and~~) a
person may (~~proceed directly to~~) pursue a formal appeal under this

section without first completing the informal appeal process under WAC 220-660-460.

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

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

(3) Requesting a formal appeal.

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

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

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

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

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

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

(4) The recipient of a stop work order must comply with the order immediately upon receipt. However, the board may stay, modify, or discontinue the order upon motion, under such conditions as the board may impose.

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

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

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

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

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

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

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

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

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

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

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

(h) The specific relief requested;

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

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

(a) Mailed to:

HPA Appeals Coordinator
Department of Fish and Wildlife
Habitat Program
P.O. Box 43234
Olympia, WA 98504-3234;

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

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

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

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

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

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

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

WAC 220-660-480 Compliance with HPA provisions. A project proponent must comply with all provisions of chapter 77.55 RCW, this chapter, and the HPA. If a project proponent violates chapter 77.55 RCW or this chapter or deviates from any provision of an HPA issued by the department, the department may issue a correction request, a stop work order, a notice to comply, or a notice of civil penalty. The term "project proponent" has the same definition as in RCW 77.55.410. This section does not apply to a project, or to that portion of a project, that has received a forest practices HPA from the department of natural resources under chapter 76.09 RCW.

(1) **Technical assistance program:** ~~((Pursuant to))~~ Under chapter 43.05 RCW, the department will continue to develop programs to encourage voluntary compliance ~~((with HPA provisions))~~ by providing technical assistance consistent with chapter 43.05 RCW. The programs include technical assistance visits, printed information, information and assistance by telephone, training meetings, and other appropriate methods for the delivery of technical assistance. In addition, ~~((provisions of chapter 43.05 RCW require))~~ the department ~~((to))~~ must provide, upon request, a list of organizations ~~((, including private companies,))~~ that provide technical assistance. This list ~~((must be))~~ is compiled by the department from information submitted by the organizations and does not constitute an endorsement by the department of any organization.

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

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

(ii) Information on methods to avoid compliance problems;

(iii) Assistance in applying for permits; and

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

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

(2) **Technical assistance visit:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(3) **Compliance inspection:**~~

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

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

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

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

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

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

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

~~(c)) project proponent.~~

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

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

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

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

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

~~(i) The ((person)) project proponent has previously been subject to an enforcement action for the same or similar type of HPA viola-~~

tion, or has been given previous notice of the same or similar type of HPA violation; or

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

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

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

(c) ~~Appeal of a civil penalty. If a civil penalty order is not appealed in a timely manner under WAC 220-660-460 or 220-660-470, the civil penalty order is final and nonappealable. If appealed, the civil penalty becomes final upon issuance of a final order not subject to any further administrative appeal. When a civil penalty order becomes final, it is due and payable.~~

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

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

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

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

(6-)) harm to fish life.

(4) **Correction request:**

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

(b) If during a technical assistance visit or compliance inspection, the department discovers a violation of any provisions within chapter 77.55 RCW, this chapter, or an HPA issued by the department, it must, during the visit or within a reasonable time thereafter, issue a correction request to the project proponent detailing steps needed to bring the project into compliance.

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

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

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

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

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

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

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

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

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

(5) Stop work order:

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

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

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

(b) Stop work orders are effective immediately upon issuance. Project proponents must therefore comply with stop work orders immediately upon receipt.

(c) Scope of a stop work order: A stop work order may require that any person stop all work connected with the project until corrective action is taken and the department has indicated that work may resume. A stop work order may also require that the project proponent take corrective action to prevent, correct, or compensate for adverse impacts to fish life caused by the violation.

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

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

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

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

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

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

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

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

(viii) The right to appeal the order.

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

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

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

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

(6) Notice to comply:

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

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

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

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

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

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

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

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

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

(vii) The right to appeal the notice.

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

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

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

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

(7) Civil penalties:

(a) The department may levy civil penalties of up to ten thousand dollars for every violation of chapter 77.55 RCW, this chapter, or provisions of an HPA. Each and every violation is a separate and distinct civil offense. Penalties are issued in accordance with the penalty schedule provided in subsection (8) of this section.

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

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

(ii) The amount of the penalty; and

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

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

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

(i) By certified mail to:

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

and

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

(ii) By personal service to:

(A) The person incurring the penalty; and

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

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

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

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

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

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

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

(8) Civil penalty schedule:

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

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

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

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

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

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

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

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

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

(c) Determining civil penalty amounts: When the department issues a civil penalty under this section and based on factors listed in (b) of this subsection, it considers the following in setting penalty amounts independently for each violation upon which the penalty is based:

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

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

Violations that injure or kill fish life, decrease habitat function, value, or quantity, or cause long term or irreparable damage will likely result in a higher penalty amount.

(iii) Whether the violation(s) was intentional, which the department determines by considering whether the person knew or should have known the action was a violation, whether and to what extent the violation was foreseeable, whether the person to incur the penalty took precautions to avoid committing the violation, and whether the person to incur the penalty had an economic incentive for committing the violation. Violations that are intentional, foreseeable, where economic incentives are clear, or when precautions were not taken to avoid the impact likely result in a larger penalty amount.

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

(d) Adjusting civil penalty amounts:

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

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

(iii) Where more than one person has committed or contributed to a violation, and the department issues a civil penalty for that violation, the department may allocate penalty amounts to each person having committed or contributed to the violation.

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

(i) Choosing not to issue a civil penalty;

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

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

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

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

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

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

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

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

(b) A paperwork violation is limited to:

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

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

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

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

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



111 21st Avenue SW | Olympia, WA 98501
(360) 352-7800 | BIAW.com

January 15, 2020

Ms. Randi Thurston
Washington Department of Fish & Wildlife
Natural Resources Building
1111 Washington St. SE
Olympia, WA 98501

PO Box 43200
Olympia, WA 98504-3200

RE: Written Comments on Proposed Hydraulic Permit Rules

SUBMITTED VIA EMAIL: HPARules@dfw.wa.gov

Dear Ms. Thurston:

On behalf of the Building Industry Association of Washington (BIAW), I write to provide comment on the Proposed Hydraulic Permit Rules that the Washington Department of Fish and Wildlife (WDFW) is considering adopting pursuant to HB 1579. For the reasons outlined in this letter, WDFW should either: refrain from adopting the proposed rule; or in an abundance of caution, should hold off on rulemaking until the Court has had an opportunity to clarify the effective language of the statute upon which the Department's authority to enact the rule rests.

Background:

By way of background, BIAW is a state trade association representing 8,000 member companies engaged in all aspects of residential construction. BIAW has a strong commitment to ensuring Washingtonians can access homes. During the 2019 session BIAW opposed the passage of HB 1579. As originally introduced, the bill contained a penalty increase from the current law of \$100 a day per violation to \$10,000 per violation. The version of the bill that passed the legislature contained subsection 8(1)(a) that conditioned the fine increase and its

authorization on the enactment of section 13 of the bill. The Governor vetoed both section 13 and subsection 8(1)(a). The Governor in his veto message ordered WDFW to use its rulemaking authority to support a \$10,000 per violation penalty.

In July of 2019, BIAW filed suit against the Department and Governor Jay Inslee alleging that the Governor's veto of a subsection 8(1)(a) of HB 1579 was unconstitutional because his veto authority was limited to vetoing an entire section of a bill. The issue of the veto is currently on appeal and has not been resolved by the courts of this state. Whether subsection 8(1)(a) is operative matters to this rulemaking process because if the provision is not vetoed, then the maximum authority of the agency to implement a civil penalty is \$100 per day. If the Court upholds the Governor's veto of the subsection, then there is no statutory authority whatsoever for the fine.

1. Agency Lacks Statutory Authority to Impose Fine:

For the reasons stated above, under either version of HB 1579, no authority exists for the imposition of any fine. To make matters worse, the Department is poised to adopt a penalty that is in excess of anything ever contemplated by the Legislature: a civil fine of \$10,000 per violation per day.¹ This fine amount appears in no previous version of any bill introduced by the legislature and is not a fine requested by the Governor in his veto message. This is the very definition of a rule adopted by an agency that is *ultra vires* and clearly prohibited under case law. *See eg* RCW 34.05.570; *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wn.2d 825 (2008)(holding that Dep't of Ecology exceeded statutory authority when it fined a developer without a statutory basis for such a fine, rather than challenging via LUPA appeal); *Shanlian v. Faulk*, 68 Wn. App. 320, 843 P.2d 535 (1992) (evaluating as dispositive the question of whether or not the relevant statute permitted an agency to levy fines against certain parties).

2. Proposed Fine Violates Federal and State Constitutions:

Assuming that a rule creating such fine was enacted under color of law, the fine is clearly excessive under both the federal and state constitutional excessive fines provisions. The Eighth Amendment of the United States Constitution prohibits

¹ The basis for this interpretation of the proposed rule is that p. 26 (7) describes civil penalties and includes the following language: "Each and every violation is a separate and distinct civil offense." BIAW staff obtained clarification from WDFW staff in a call that this provision of the rule was intended to allow for each new day in which a violation is ongoing to constitute a separate offense. If WDFW's position has changed, and the agency no longer intends to enforce each violation on a per day basis, BIAW requests that WDFW clarify the language in the rule to prohibit per day fines.

the imposition of excessive fines and federal courts have applied them to civil fines and forfeiture provisions of state law. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The state constitutional provision would likely be construed similarly.

WDFW is unilaterally and exponentially increasing a fine by \$9,900 per violation per day. As a reminder, the average salary of a Washingtonian is \$70,000. Assuming a single ongoing violation in one week, an entire year's salary would be forfeited. While the harm to the environment for an ongoing permit violation can be substantial and the purpose of protecting habitat for fish and orca is noble, this penalty seems unlikely to bear a relationship to the gravity of the offense when contrasted with the penal codes.

For example, if a person actually kills an orca whale, the maximum penalty under RCW 77.15.120 is \$10,000 total for a Class C felony. If a person commits premeditated murder of a human being, he is subject to a \$50,000 maximum fine for a Class A felony which is still less than a week's penalty for an ongoing violation of a hydraulic permit. In short, it seems unlikely that the Department will be able to defend a higher potential penalty for protection of fish habitat than for the lives of orca (or people) under the state or federal constitutions.

3. Provisions within the rule are arbitrary and capricious

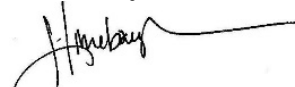
There are a number of provisions of the rule that are so problematic as to render the rule arbitrary and capricious. Under applicable authority, an agency action (including rulemaking) is arbitrary and capricious if the action is willful and unreasoning and taken without regard to attending facts and circumstances. *Wash. Independent Association v. Wash. Utilities and Transp. Comm.*, 148 Wash. 2d 887, 904-5, 64 P.3d 606 (2003). Here are some examples of drafting issues within the rule that are unreasoning and taken without regard to facts and circumstances:

- *Possible time limitations* Under Pg. 8 Section 13.C. builders may have inconsistent work schedules due to inclement weather or poor working conditions causing to put the project on hold. Working against the department's time limitation makes it more difficult to ensure quality work in order to comply, thus subjecting them to high fines.
- *Unclear language* Under Pg. 13 subsection 3.B.1-8 removal of "bulkhead" to "hard structure" and "beach nourishment/woody material" to "soft structure" may cause lack of clarity and lacks specificity for builders.

- *Unclear language* Under Pg. 19 WAC 220-660-480, the WAC states that a project proponent may be issued a notice of civil penalties. But as defined in 77.55.410, project proponent includes the person who applies, an authorized agent on the application, a person who has obtained a HPA or a person who undertakes a HP without an HPA. It is unclear whether all that fit within the definition of “proponent” will be subject to the same penalties.

In conclusion, there are also a number of potential violations of the administrative procedures act that are under review. BIAW also reserves the right to add additional issues with the rule not listed here and is not waiving an issue not identified. The bottom line is that the WDFW should hit pause on rulemaking to allow the courts to clarify its statutory authority as well as give careful consideration to ensure the language of the rule is clear enough to be effective. Otherwise, BIAW will be forced to challenge the rule under the process afforded by law.

Sincerely,



Jan Himebaugh
Government Affairs Director

From: [RATCLIFF, MARC \(DNR\)](#)
To: [Thurston, Randi L \(DFW\)](#)
Subject: Hydraulic Code Rule Making 220-660 WAC
Date: Wednesday, January 08, 2020 8:52:41 AM

Randi

This is the term correction I mentioned on the phone – I may have gotten the #s wrong in my first message. The last sentence should read “...forest practices FPHP from the department of natural resources...”. If FPHP is not defined in the definition section it probably needs to be unless the code spells in out once.. Forest Practices Hydraulic Projects.

WAC 220-660-480 Compliance with HPA provisions. A project proponent must comply with all provisions of chapter 77.55 RCW, this chapter, and the HPA. If a project proponent violates chapter 77.55 RCW or this chapter or deviates from any provision of an HPA issued by the department, the department may issue a correction request, a stop work order, a notice to comply, or a notice of civil penalty. The term "project proponent" has the same definition as in RCW 77.55.410. This section does not apply to a project, or to that portion of a project, that has received a forest practices HPA from the department of natural resources under chapter 76.09 RCW.

Let me know if this email works for Forest Practices’ comments or shall we go through the formal comment process.

Thanks so much

Marc

Marc Ratcliff

Policy & Services Section Manager
Forest Practices Division
Washington State Dept. of Natural Resources
360.902.1410
Marc.ratcliff@dnr.wa.gov

Randi Thurston
WDFW
PO Box 43200
Olympia, WA 98504

January 21, 2020

Ms. Thurston,

The undersigned organizations, on behalf of thousands of our collective members, submit the following comments on the department's proposed Hydraulic Code rulemaking to implement 2SHB 1579, amending sections WAC 220-660-050, WAC 220-660-370, WAC 220-660-460, WAC 220-660-470 and WAC 220-660-480.

As you are aware, 2SHB 1579 created civil enforcement authority for WDFW and repealed RCW 77.55.141 regarding marine beachfront protective bulkheads or rock walls. 2SHB 1579 implements a top-level recommendation from Governor Inslee's Orca Task Force and the related Prey Availability Work Group to ensure habitat protection and increase salmon availability for the starving and endangered Southern Resident Orcas. The legislation and implementing rules in WAC-220-660 et. seq. are critical to salmon recovery. Since the passage of 2SHB 1579 in April of 2019, three more whales have died leaving a population of only 73 orcas. We cannot emphasize strongly enough how important nearshore habitat protection and the consistent and firm application of the Hydraulic Code is to both salmon and orca recovery.

We urge WDFW to expedite the finalization and implementation of the proposed rules but request the following minor revisions to the language to clarify habitat protection elements and better reflect the intent of both the Task Force and the legislation itself.

WAC 220-660-050 – PROCEDURES

The existing language in WAC 220-660-050(9)(c) should be retained. This rule section currently requires an HPA application to include a description of the measures that will be implemented for the protection of fish life, as well as any reports assessing impacts from the hydraulic project to both fish life and ***the habitat that supports fish life***.

Although the definition of "Protection of fish life" in WAC 220-660-030(119) includes language related to the habitat that supports fish life, it is presented in the context of a mitigation hierarchy only. Retaining the current language provides clarity that the application requirements include specific evaluation of impacts to habitat that supports fish life. This is an important distinction that should be retained.

With the exception of eliminating language related to RCW 77.55.141, the existing language in WAC 220-660-050(13)(b) should also be retained with one small amendment. Based on current rules the procedure for an emergency, imminent danger, chronic danger, or an expedited HPA requires that these projects meet the mitigation provisions and requirements in WAC 220-660-080 AND the provisions in WAC 220-660-100 through 220-660-450 that are included in an HPA.

WAC 220-660-080 generally outlines a range of guidelines or requirements related to project impacts and mitigation. In short, it is not a section that is typically “included in an HPA.” Amending the language in WAC 220-660-050(13)(b) as proposed to read “These projects must comply with the provisions in this chapter that are included in an HPA” could be interpreted to mean that an emergency, imminent danger, chronic danger, or an expedited HPA was not required to comply with provisions in 220-660-080 unless the HPA itself specifies this – yet HPAs do not usually include or reference WAC 220-660-080. The end result would be that under these circumstances, permittees could avoid the requirements of WAC 220-660-080.

Likewise, the original rule language is also problematic because as written, WAC 220-660-080(13)(b) only requires a project to meet the technical conditions in WAC 220-660-100 through 220-660-450 that are included in an HPA. Unfortunately, again, there are times when these provisions are not written into the HPA. To resolve the problems identified above with the old and the proposed new language under WAC 220-660-050 (13)(b), we suggest the language be revised to require that projects meet the mitigation provisions in WAC 220-660-080 *and the applicable technical provisions in WAC 220-660-100 through 220-660-450.*

WAC 220-660-370: BANK PROTECTION IN SALTWATER AREAS

The Reference to the *Marine Shoreline Design Guidelines* (MSDG) in the introduction of WAC 220-660-370 should first emphasize the use of the guidelines to determine if protection is needed at all. By only referencing MSDG use to “design” bank protection, the proposed rules miss an important opportunity to both clarify the requirement for a detailed risk analysis and needs evaluation to be performed and to point the applicant to the high value information on this specific action that is contained in the MSDG.

Description

The proposed language in this subsection describes a range of soft shore techniques, and reports that use of this approach allows beach processes and fish habitat to remain intact. While soft armoring may not have the same impact as hard armoring, impacts and changes to beach processes and fish habitat are still created and should be reflected in final rule language.

Fish Life Concerns

Similar to comments outlined in the description subsection, language outlining fish life concerns should not suggest that soft shore techniques eliminate physical alteration of the beach. This is not accurate and should be amended.

Existing rule language outlining armoring related impacts to juvenile salmonids should be retained. And, based on the intent of both the Orca Task Force and 2SHB 1579, this section should not limit protection or approval considerations and concerns only to forage fish spawning or other habitats noted as a habitat of special concern – particularly as many beaches that are likely used as forage fish spawning areas have not been fully surveyed to formally document the presence or absence of habitat. Further, while habitats of special concern may warrant increased protections, there are a range of other ecosystem features and functions supporting fish life that require protection – for example, impacts to benthic and epibenthic assemblages – and rule language acknowledge that armoring results in wide ecosystem impacts.

Bank Protection Design

For both clarity and flow, this section should lead with the rules related to the requirement for a risk and needs assessment and evaluation of the least impacting method report should a protection need be documented. This requirement to determine risk and need is the first step in both the applicant’s planning and subsequent review process, and should precede rule language related to protection methods. Rule language should also eliminate the generic reference to a “qualified professional” and establish that the risk analysis and related evaluation must be performed by a coastal geologist or coastal geomorphologist.

The discussion of the least impacting methods should move the hierarchy position of construction of an upland retaining wall to be less impacting than soft armoring techniques. Additional language should also be added to require an applicant to document that each lesser impacting technique or steps of the hierarchy have been used or are not possible before moving on to subsequent levels.

We applaud the new requirement that project plans show the location of benchmarks for armoring projects and would request that the specific location coordinates also be added as a requirement. This provision would both allow for easy linear documentation and mapping of armoring to use both as an additional evaluation and compliance tool and for monitoring armoring targets in state recovery planning.

Thank you for your consideration of these comments and the hopeful adoption of the requested amendments. We greatly appreciate the good work of the department and look forward to collaboration and partnership as we strive to improve habitat protection and increase salmon populations.

Sincerely,

Amy Carey, Executive Director
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Defenders of Wildlife
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Melia Paguirigan, Water & Shorelines Policy Manager

Washington Environmental Council

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January 21, 2020

Ms. Randi Thurston
Washington Department of Fish and Wildlife, Habitat Program, Protection Division
P.O. Box 43200
Olympia, WA 98504-3200

RE: New Hydraulic Code Rulemaking 220-660 WAC

Dear Ms. Thurston,

Thank you for the opportunity to offer public comment on the Washington Department of Fish and Wildlife's (WDFW) rulemaking to implement recommendations of the Southern Resident Orca Task Force related to conserving critical aquatic habitat and increasing Chinook salmon abundance. The proposed revisions to Hydraulic Code Rules in chapter 220-660 WAC will improve the state's ability to ensure that adverse impacts to ecologically important coastal and aquatic habitat are avoided, minimized and appropriately mitigated. We appreciate the work of WDFW in developing these revisions and we support strengthening Hydraulic Project Approval (HPA) rules as proposed to better protect Washington's coastal and aquatic ecosystems.

The Surfrider Foundation and the Pew Charitable Trusts work to advance the protection and restoration of ecologically important coastal habitat, including submerged aquatic vegetation (SAV) such as eelgrass and kelp. In Washington, vegetation that serves essential functions for the spawning and development of fish is defined as saltwater habitats of special concern, and includes eelgrass, kelp, and intertidal wetland plants¹. Accordingly, the HPA permitting process provides for protection of these habitats by requiring avoidance, minimization, and mitigation of any adverse impacts. Ensuring a robust HPA permitting process is critically important, as construction and associated development along marine shorelines of Washington has the potential to impact eelgrass and other important vegetation and impair the function of this essential habitat, for both fish and wildlife as well as the communities that depend upon healthy marine ecosystems. By strengthening the HPA rules as proposed, protections for SAV and other ecologically important habitat will be greatly improved.

For these reasons, we support the incorporation of all rule change proposals evaluated in WDFW's draft regulatory analyses of December 15, 2019², to provide the greatest protection for Washington's marine and aquatic resources. As stated in the analysis, "This proposed rule is needed....to help enable WDFW ensure that hydraulic projects provide adequate protection of

¹ [WAC 220-110-250](#) (3) (a, b, and c)

² Washington Department of Fish and Wildlife. December 2019. [Regulatory Analysis: Incorporating Elements of 2SHB 1579 into HPA Rules.](#)

fish life.³” With respect to the protection of coastal habitat and SAV, we particularly support the proposals by WDFW to:

- Enhance existing penalty schedule (up to \$10,000 per violation) to better avoid non-compliance.
- Clarify that WDFW can disapprove new applications if the applicant has failed to pay a penalty, respond to a stop-work order, or respond to a notice to comply.
- Require saltwater bank protection location benchmarks as part of a complete HPA application.
- Strike language from rule that references the repealed marine beach front protective bulkheads or rockwalls statute⁴.

Compliance

Absent robust enforcement and compliance mechanisms, regulatory protections are likely to be ineffective. For this reason, we support enhanced authority for WDFW’s civil compliance program, including the use of new maximum civil penalties, up to \$10,000 per violation, and the associated penalty schedule described in the proposed rule package. We also support the expansion of WDFW’s authority to reject new HPA applications from applicants that have failed to comply with permitting regulations in the past. These regulatory improvements to the HPA process will provide both a deterrent for non-compliance and an enforcement tool to better protect marine habitats such as SAV that are essential for fish and which support coastal communities.

Requiring Benchmarks

It is important to ensure that regulatory agencies have the tools they need to adequately assess the effectiveness of required conservation and mitigation actions. For this reason, we are pleased to see WDFW’s proposed requirement of benchmarks in HPA applications. We recognize that without such a requirement for fixed, permanent reference points, it would be very difficult for WDFW to adequately evaluate permit requirements for habitat mitigation and conservation, let alone determine compliance or measure the adequacy of permit provisions relative to the protection of fish and habitat. We agree with WDFW’s assessment that benchmarks are necessary to implement the other compliance elements of 2SHB 1579 and welcome this requirement.

Bank Protection and Shoreline Armoring

Shore armor is known to profoundly alter coastal ecological processes and function and reduce coastal resilience to rising sea level⁵. That is why we support WDFW’s proposed changes that enhance their authority to regulate bank protection to maintain the ecosystem function provided

³ *Ibid*; Page 10

⁴ [RCW 77.55.141](#)

⁵ Johannessen, J., A. MacLennan, A. Blue, J. Waggoner, S. Williams, W. Gerstel, R. Barnard, R. Carman, and H. Shipman, 2014. [Marine Shoreline Design Guidelines](#). Washington Department of Fish and Wildlife, Olympia, WA.

by intertidal zones by requiring the least impacting technically feasible alternative for every saltwater bank protection project, consistent with the 2SHB 1579 repeal for single-family residence marine beach front protective bulkheads or rockwalls. We know what a huge impact shoreline armoring has had on the function of Washington's nearshore ecosystems, particularly in Puget Sound. WDFW's enhanced authority will certainly help landowners identify and implement ecologically appropriate alternatives. Looking forward, we welcome the improvements to regulatory outcomes that we expect will follow.

Next Steps

While we fully support WDFW's current rulemaking, we encourage further strengthening habitat protections beyond the proposed rules. Looking forward, we support a shift from the current standard of "no net loss" of ecological function to a new standard of "net ecological gain" when it comes to protecting and restoring habitat, as recommended by the Southern Resident Orca Task Force and adopted as a component of the 2020 legislative priorities for Washington's Environmental Priorities Coalition. We agree that it is time to step up policies, incentives, and regulations that result in net ecological gain to regain habitat lost and increase salmon populations in the face of rising risks for Southern Resident orcas here in Washington. We are interested in supporting efforts to make this shift to "net ecological gain" a reality, recognizing that RCW 77.55 - Construction Projects in Washington State - is but one of a number of statutes where such a shift would apply.

Conclusion

We thank WDFW for their ongoing efforts to protect coastal and marine habitat, and fully support current and future rulemaking to implement recommendations of the Southern Resident Orca Taskforce. We look forward to continuing to participate in WDFW and other federal and state agency efforts to increase protections for ecologically important coastal habitat and conserve marine life.

Sincerely,



Paul Shively
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Gus Gates
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WDFW Rule Making Comments
Shane Phillips, P.E.

Introduction

Thank you for the opportunity to review the proposed rule-making regarding bank protection. I believe overall tightening up and refining the language makes good sense and will result in better protection of resources with hopefully a positive benefit to applicants and WDFW for processing and monitoring the permits. With that said, it's important that changes to the code are well understood. Sometimes the best intentions result in un-intended consequences if the new language effects or implications are not well understood. It's important that the major changes be reviewed or "tested" by those who work with these regulations on a regular basis. This can be done through running example scenarios and test cases through the process of review with the new policy. This is referred to as "Project the Outcomes" as a tool for effective problem solving in policy analysis work. This step is an important step prior to finalizing the proposed code changes. It would be good for WDFW to validate that this step has been conducted and who assisted (WDFW staff and/or outside parties) participated in that step. This could be a good task for the Hydraulic Code Citizens Advisory Committee to assist in collaboration with WDFW staff. Ask the committee to review new code relative to their constituency and come up with a list of hypothetical project scenarios that are submitted to WDFW for WDFW staff to run through the new code using those examples. This would help in the policy refinement process and add credibility to the tightness of the new language and alleviate concerns regarding the changes.

CR 102 Rule Making Memorandum Comments

- Section 3.3 0 Evaluation of Small Business Size
Should be considered to use the Median rather than the Mean (Average). There are many businesses registered that have very little to no activity. Those businesses bring the mean numbers down but have little effect on the median. For the purpose the statistics are being conducted, median would be a better measure.
- Section 3.5 – Costs to Comply
The labor rate information is correct in how it is being used. Labor rate statistics cover what an employee is paid not the cost is to the business. The cost of a WDFW employee is much greater than what shows up in their payroll check due to costs for benefits, overhead (building, working space, power, etc...). So, there is an overhead that gets marked up on that labor rate. The hourly rate charged by a licensed civil engineer for this type of work varies from \$85 to \$150 per hour. Costs for compliance should be based on an hourly rate of \$100 and not \$46.47 billable.
- General Benchmark Comment. It appears the benchmark is not required to be surveyed with a designated survey vertical or horizontal datum. That is fine to be just a local reference. If it were required to have traditional survey benchmarks, the cost of

compliance would go up by 1,000% or more. Setting survey control points to an accepted datum varies greatly but can be on the order of \$500 to \$5,000 per occurrence. Would be good to confirm in the code language that it is a local benchmark.

WAC 220-660-370 Bank protection in saltwater areas. Comments

Section 3.d (Bank Protection Design). There is discussion that assessment should be conducted by a coastal geologist, geomorphologist (etc..) for the proposed.... The discipline of “coastal engineer” should be added as that is one of the critical professional disciplines needed for this type of assessment. This term is used in coastal areas elsewhere in the US and Worldwide but not in WA. This is an opportunity to get it corrected to meet the future needs of our waterfront resources and habitat. See link to State of Florida coastal protection program for technical review of beach and shoreline work: <https://floridadep.gov/rcp/coastal-engineering-geology>. This language should state both the type of professional but what the intent is. See below the explanation from Florida agency website....“Technical expertise is provided in coastal hydrodynamics, sediment processes, and geology, and the related principles and practices of coastal engineering and geotechnical analysis.” Suggest using something similar in the code.

Shane Phillips, P.E.

Civil Engineer

Hydraulic Code Implementation Citizen Advisory Committee Member

January 21, 2020

Washington Department of Fish and Wildlife
Randi Thurston
PO Box 43200
Olympia, WA 98504-3200

Ms. Thurston,

Thank you for the opportunity to comment on the Washington Department of Fish and Wildlife's proposed Hydraulic Code rulemaking for implementing 2SHB 1579, which carries out the Governor's Orca Task Force recommendations for increasing chinook abundance. Washington Environmental Council (WEC) applauds the Department's timely adoption of these new rules and supports revisions to Hydraulic Code Rules in chapter 220-660 WAC.

WEC is a 501 (c)(3) organization founded in 1967. Our mission is to protect, restore and sustain Washington's environment for all, and we are committed to clean water protections for Puget Sound and for all Washington State waters.

WEC supports the Department's revisions for:

- Adopting a mechanism for pre-application determination in which a person can request information or a technical assistance site visit prior to submitting and HPA application (*WAC 220-660-050*)
- Removing references to repealed statues and ensuring that people must first use the least impacting, technically feasible, bank protection alternative (*WAC 220-660-370*)
- Changing administration actions for clarification and more efficient processes (*WAC 220-660-470*)
- Implementing enhancements for the department to uphold civil compliance to safeguard fish life and habitat that supports fish life (*WAC 220-660-480*)

While we are in support of these changes, WEC also recommends the following changes to further protect nearshore processes, fish life and habitat:

- Moving the hierarchy position of construction of an upland retaining wall to be less impacting than soft armoring techniques, as long as that construction is well beyond the shoreline jurisdiction
- Adding language to require an applicant to prove that the lesser impacting techniques within the hierarchy have been used or are not possible before moving on to subsequent levels in hierarchy
- Requiring that specific project location coordinates be added in project plans to allow for more streamlined mapping and documentation of armoring for monitoring and recovery efforts

Overall, WEC also encourages the Department to continue to use and incorporate language throughout the chapter that:

- Strengthens mitigation for impacts from hydraulic projects
- Emphasizes the negative impacts to fish life and habitat of hard armoring, and while to a lesser degree, but still present, soft shore armoring
- Stresses the importance of shoreline health across the food web from forage fish to juvenile salmon and adult salmon

Thank you for considering our comments as you continue to protect shoreline health for the critical role it plays in salmon and orca recovery.

Sincerely,

Melia Paguirigan

A handwritten signature in black ink, appearing to read 'Melia Paguirigan', with a stylized, cursive script.

Water & Shorelines Policy Manager
Washington Environmental Council
Melia@wecprotects.org
(206)631-2619



January 17, 2020

Washington Department of Fish and Wildlife
Randi Thurston, Habitat Program Protection Manager
1111 Washington Street SE
Olympia, WA 98501

Dear Randi,

The intent of this letter is to provide comments on the Washington Department of Fish and Wildlife (WDFW) proposed revisions to Hydraulic Code Rules in chapter 220-660 WAC.

The Washington State Association of Counties (WSAC) is a private, non-profit organization serving as the voice of Washington's counties. Our members include elected County Commissioners, Councilmembers, Councilors, and Executives from all 39 counties.

WSAC also represents the interests of several affiliate organizations, including the Washington State Association of County Engineers (WSACE) and the Washington State Association of County and Regional Planning Directors (WSACRPD). WSACE members are the county engineers that oversee construction and maintenance of the vast majority of our state's transportation infrastructure. WSACRPD's members include professionals who lead and operate the county and regional planning and permitting agencies across the state.

Please consider this letter as the official comments of WSAC, WSACE and WSACRPD.

First, we appreciate the amendments to sections 050, 370 and 470. We agree the amendments simplify and clarify to improve readability and understanding. Unfortunately, we do have some concerns and objections with amendments in section 480. They are as follows:

- Our first concern is with the amendments that create the new term "correction request". It is our understanding that "correction request" is intended to replace the terms "notice of correction" and "notice of violation". It is further stated in WAC 220-660-480 (1) (b) that "correction request" means a notice of violation or a notice of correction as defined in chapter 43.05 RCW.

In a review of chapter 43.05 RCW a specific, clear definition of either "notice of correction" or "notice of violation" cannot be found, but rather a loose definition in several locations (RCW 43.05.060, 43.05.100, 43.05.160 for "notice of correction" and 43.05.030 for "notice of violation") that describe how an agency shall inform a facility when the agency observes a violation of law or agency rule. It is important to note that RCW 43.05.100 specifically includes WDFW regarding notices of correction.

One thing that is clear in current statute, however, is that there is a distinct difference between a "notice of correction" and a "notice of violation". A "notice of correction", according to RCW

43.05.060 and 43.05.100, cannot be issued as part of technical assistance visit. It is also specifically “not a formal enforcement action, is not subject to appeal...”. A “notice of violation” however, is the proper way to inform a facility when a violation of law or agency rules are identified during a technical visit. It is unclear as to whether a “notice of violation” is subject to appeal, but it appears it may be as, unlike “notice of correction”, it is not specifically stated otherwise. However, the proposed amendment to WAC 220-660-480 (4) (a) further defines “correction request” and specifically states it is not subject to appeal.

We are concerned that the new term “correction request” will create confusion and ambiguity in rule understanding and enforcement. The terms “correction request” proposes to replace, “notice of correction” and “notice of violation”, are substantively different as described in various sections of RCW 43.05. Combining the two terms into one creates several questions including when a “correction request” can/should be issued – for instance only outside of technical assistance visit or during/after one – and whether it is an appealable action/decision.

The amendments adding “correction request”, defining it as both “notice of correction” and “notice of violation” in RCW 43.05, and then further defining it as unappealable leaves too much to interpretation and may contradict state law. If these rule updates are needed, as stated in your CR-102 “to implement Laws of 2019, ch. 290 (2SHB 1579)”, then why not simply utilize the same terms as used in the bill and existing statute, rather than developing the term “correction request” and creating uncertainty in its meaning?

- Our second concern is with the proposed amendments to WAC 220-660-480 (6) (b). The language in this subsection is very broad and doesn’t occur anywhere in RCW 43.05. Further, the notice to comply as described in 2SHB 1579 (2019) Section 7 (1) (a) does not include such an expanded “scope of notice to comply” as stated here which allows “additional action to prevent, correct, or compensate for adverse impacts to fish life caused by the violation.”

Quite frankly, we question whether the rule can or should include this additional language. That aside, we also believe that language as broad as this should, at the least, also include the approval and signature of agency leadership like the proposals for stop work orders and civil penalties.

During our testimony on 2SHB 1579, we stated more than once that our members are continuously frustrated with the varying interpretation and implementation of the HPA requirements and the State Hydraulic Code by local and regional agency staff. Our members continue to report varying opinions in agency legal requirements from region to region, county to county, and sometimes even among agency field staff. County engineers have reported receiving different interpretations of the regulations from different WDFW biologists from the same regional office. Others have even expressed that working with agency field staff can often feel like a negotiation rather than a well-defined, well-understood and predictable process.

Language like what is proposed for amendment in this section will only exacerbate those experiences and concerns.

- Finally, we have objections to the proposed amendments in WAC 220-660-480 (8).

First, WAC 220-660-480 (8) (a) (i) proposes to allow the levy of a civil penalty if “the project proponent fails to complete actions required to be completed in a correction request, ...” We do not believe that civil penalties should be issued with the basis of a correction request. As stated earlier, it is unclear when and how a correction request can/should even be issued. However, if it is issued as part of, or after, a technical assistance visit, civil penalties should not be issued unless the violations meet the circumstances defined in RCW 43.05.050. As you know and as defined in RCW 43.05, a technical assistance visit is requested or is voluntarily accepted by the facility for business. It is not something that is a required inspection or compliance visit by the agency.

Section 5 (1) of 2SHB 1579 (2019) clearly states that the department “shall first attempt to achieve voluntary compliance.” By issuing a “correction request” or whatever notice is ultimately decided upon as a first action in most cases of violations which don’t meet more urgent action, the agency will be complying with that portion of the bill. However, we believe that violations which qualify for a “correction request” should first be elevated to a notice to comply before civil penalties are levied. We believe that such a requirement is progressive in nature and meets the overall spirit and intent of voluntary compliance.

Our second objection to the proposed amendments in this section are regarding what is missing, rather than what is included. The title of this proposed section is “Civil Penalty Schedule” yet no schedule of penalties is included in the proposed amendments.

While we appreciate inclusion here of an itemized list of considerations and circumstances which may be considered when the department decides if and what civil penalty amount to levy and whether to consider civil penalty adjustments, we also expected a specific list (i.e. schedule) of possible violations and their corresponding penalty amounts.

Section 8 (6) of 2SHB 1579 (2019) was very specific in stating “the department shall adopt by rule a penalty schedule to be effective January 1, 2020.” What is proposed in WAC 220-660-480 (8) is by no means a penalty schedule. There are several excellent examples of penalty schedules for WDFW to refer to, including those governing Fish and Wildlife Enforcement (chapter 77.15 RCW).

Without a specific penalty schedule, agency staff is afforded too much discretion in assigning civil penalty amounts to a violation. Penalties, as proposed in these amendments, may be assessed from \$0 to \$10,000 per violation. How will the public be protected from arbitrary and capricious assessments without written, verifiable guidance that a proper penalty schedule will provide?

We believe that 2SHB 1579 was clear and specific in directing the department to adopt a penalty schedule. What is being proposed here is a far cry from meeting that directive and should be expanded upon to include a specific list of violations and the penalties associated with each one. Nothing less would be acceptable to our members and the citizens of Washington State.

Thank you for the opportunity to provide these comments. We trust you will find them helpful as you continue to develop these amendments and move forward in the rule-making process.

If you have any questions regarding these comments or if we can provide further information, please contact Paul Jewell, WSAC Policy Director at 360-753-1886 or pjewell@wsac.org.

We would also appreciate being notified of any changes to the proposed amendments, any further opportunities to provide comment and any final action being taken.

Respectfully submitted,



Robert Gelder
President
Washington State Association of Counties
Kitsap County Commissioner



Eric Pierson, P.E.
President
Washington State Association of County Engineers
County Engineer, Chelan County



Erik Johansen
President
Washington State Association of County and Regional Planning Directors
Land Services Director, Stevens County

From: [Fox, Peggy](#)
To: [HPA Rules \(DFW\)](#)
Subject: Comments on HPA Rule Making (Incorporating elements of 2SHB 1579 into HPA rules)
Date: Friday, January 17, 2020 8:20:47 AM
Attachments: [HPARuleComments20200115.pdf](#)

Peggy Fox, Admin. Assistant
Environmental Services
360-705-7482
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Northwest Indian Fisheries Commission

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Phone (360) 438-1180

www.nwifc.org

FAX # 753-8659

May 1, 2019

Honorable Jay Inslee
Governor of Washington
P.O. Box 40002
Olympia, WA 98504

Re: Request for Partial Veto of Section 13 in SSHB 1579

Dear Governor Inslee:

The Northwest Indian Fisheries Commission respectfully urges you to exercise a partial veto of Second Substitute House Bill (SSHB) 1579, “an act relating to implementing recommendations of the southern resident killer whale task force related to increasing chinook abundance.” We strongly supported your requested legislation throughout the session. At each committee hearing, we echoed our shared sentiments that we cannot recover orca unless we first recover salmon, and to recover salmon we must protect and restore the remaining habitat. We agree that modernizing WDFW’s civil authorities is an important step toward achieving that goal. We do not, however, support the late addition of section 13 to the bill, which creates several problems.

Section 13 requires that the State Conservation Commission coordinate Washington’s natural resource agencies for the purpose of “expeditious construction of three demonstration projects” and to create a new “model for river management.” The proposed projects are aimed at floodplain management and clearly anticipate dredging streams since there are several references to the removal of gravel and sediment. Pilot projects are slotted for Whatcom, Grays Harbor and Snohomish Counties.

We are opposed to this section on several grounds:

1. The western Washington treaty tribes should not be relegated to stakeholder status in a process designed to, in part, manage the habitat of a treaty-reserved resource. Unfortunately, the proposed process appears to take this approach.
2. The tribes in the proposed watersheds were never consulted as to whether floodplain/dredging projects or a new model of river management are necessary or beneficial.

3. The proposed program was not, in fact, a recommendation of the task force, and does not necessarily contribute to the purpose of the Bill, which is to increase chinook abundance.
4. We already have several collaborative processes in Washington working toward the development and implementation of multiple benefit projects. It is not necessary to expend limited agency resources on a new and likely redundant process.
5. Some of the practices encouraged in section 13 – such as dredging – may be harmful to salmon habitat. Therefore, the proposed approach is counter to the stated intent of the bill.

In closing, we respectfully request you exercise a partial veto of section 13 to restore SSHB 1579 to its stated purpose of increasing chinook abundance by, in part, better protecting salmon habitat. We would also like to thank you for requesting this bill and taking steps to better protect salmon and orca. Should you have any questions regarding this matter please don't hesitate to contact me, or Todd Bolster from my staff at (360) 438-1180.

Sincerely,



Lorraine Loomis
Chairperson

cc: JT Austin, Senior Policy Advisor, Office of the Governor