Washington Department of FISH and WILDLIFE

Concise Explanatory Statement

Hydraulic Code Rules Chapter 220-660 WAC

2019 HPA Suction Dredge Rule Making

WAC 220-660-030 Definitions (Amended)

WAC 220-660-300 Mineral Prospecting (Amended)

WAC 220-660-305 Suction Dredging (New Section)

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

June 4, 2019

Mission
of the
Washington Department of Fish and Wildlife

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

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INTRODUCTION

This report presents Washington Department of Fish and Wildlife (WDFW) concise explanatory statement for *2019 HPA suction dredge rule makin*g rule adoption, pursuant to the Administrative Procedure Act (APA) Revised Code of Washington (RCW) section 34.05.325 - *Public Participation - Concise Explanatory Statement*. Rules proposed for amendment include Hydraulic Code Rules in 220-660-030 and 220-660-300 of the Washington Administrative Code (WAC). Rules proposed for a new section are Suction Dredging rules in 220-660-305 WAC. WDFW writes and adopts Hydraulic Code Rules to implement Chapter 77.55 RCW titled *Construction Projects in State Waters* and also known as the *Hydraulic Code*.

Analyses relating to APA sections RCW 34.05.320 - Notice of proposed rule and RCW 34.05.328 - significant legislative rules are provided in a separate document entitled *2019 HPA Suction Dredge Rule Making Regulatory Analyses.* Analyses relating to Regulatory Fairness Act, chapter 19.85 RCW, are provided in a separate document entitled *2019 HPA Suction Dredge Rule Making Small Business Economic Impact Statement*. Both of these separate documents are available on WDFW's HPA rule making web page at https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking .

This *Concise Explanatory Statement* document is organized in relation to APA section 34.05.325 Public Participation - Concise Explanatory Statement, as follows:

Documents relating to this rule making include WSR 18-11-037 (CR-101) filed May 8, 2018 and appearing in Washington State Register 18-13 published on June 6, 2018; and WSR 19-05-094 (CR-102) filed February 20, 2019 and appearing in Washington State Register 19-05 published on March 6, 2019.

The public comment period for this rule making was open from February 25, 2019 through 5pm April 8, 2019. The Washington Fish and Wildlife Commission held a public hearing on April 5, 2019 at 3pm in Olympia, Washington. An audio transcript of that hearing is available at https://wdfw.wa.gov/about/commission/meetings/2019 .

SECTION 1: Rules affected by this rule making

Amended Sections:	220-660-030 Definitions
	220-660-300 Mineral Prospecting
New Section:	220-660-305 Suction Dredging
Repealed Sections:	None

SECTION 2: Describe the proposed rule and its history

On April 14, 2018, the Fish and Wildlife Commission (Commission) directed WDFW to propose rule changes that will remove suction dredging as an activity authorized under the Gold and Fish Pamphlet. New rules would be needed to require suction dredgers[1] to apply for standard HPAs. The Commission also directed WDFW to propose rules that require suction dredgers to report their activities annually and rules that reduce risk that dredgers will spread aquatic invasive species.

2.1 Specific Objectives for this Rule Making

To better assess the risk to fish life, target compliance inspections, and prevent the spread of aquatic invasive species, WDFW's objectives in this rule making include the following:

- ✓ Remove suction dredging as an allowed method under Gold and Fish Pamphlet rules (section 220-660-300)
- ✓ Develop an individual HPA application method for suction dredging that is streamlined;
- ✓ Develop application and reporting methods to enable WDFW to determine:
  - the number of prospectors engaged in suction dredging and
  - where and how much suction dredging occurs; and
- ✓ Identify methods to prevent the spread of aquatic invasive species through the movement of suction dredging equipment into and around the state.

2.3 History of this Rule Making Action

November 10, 2017: Trout Unlimited filed a petition to the Commission that requested the Commission to remove motorized suction dredging as an authorized activity in the Gold and Fish pamphlet (WAC 220-660-300) and, instead, require individual applications for standard HPAs.

January 5, 2018: WDFW staff briefed the Commission on the Trout Unlimited petition. The Commission denied the petition, but asked for an additional briefing and panel discussion on the science related to mineral prospecting, potential risks to fish life, how the current rule addresses the risks, and other policy considerations.

February 10, 2018: Panels representing WDFW, mineral prospectors, and the environmental community presented the requested information to the Commission. The Commission also heard public comment from interested parties during the meeting. After this meeting, the Commission requested a future briefing from staff on further aspects of motorized mineral prospecting.

April 14, 2018: Staff provided an additional briefing to the Commission, including the geographic extent of the activity in Washington, the enforceability of the current rule, the extent of the threat from aquatic invasive species resulting from movement of mineral prospecting

[1] The terms "suction dredgers," "dredgers," "miners," and "mineral prospectors" are used interchangeably throughout this document and refer to persons who would be required to comply with the proposed rules unless the context clearly indicated otherwise.

equipment around the state, a comparison of Washington and neighboring states' regulations, and options and possible timelines for rule development.

April 14, 2018: Following that presentation, the Commission directed staff to commence rule making to meet the objectives as stated in section 1.1.

May 8, 2018: Filed CR-101 Preproposal Statement of Inquiry with the Washington State Code Reviser, and the notice published in Washington State Register (WSR) 18-11 on June 6, 2018.

July 9, 2018: Met with state and federal agencies to discuss the proposed rule making.

July 13, 2018: WDFW issued a news release announcing public meetings and opportunity to comment on preproposal statement of inquiry.

July 16, 17, 19, and 25, 2018: Preproposal public listening sessions were held in Wenatchee, Spokane, Olympia, and Everett, respectively.

August 1, 2, and 9, 2018: Conducted consultations with Washington Indian Tribes, including Upper Columbia United Tribes, Yakama Nation staff, and Northwest Indian Fisheries Commission, respectively.

August 8 and September 12, 2018: Staff met with an ad hoc stakeholder work group to discuss technical details of the rule proposals.

August 20, 2018: Made a presentation to the Hydraulic Code Implementation Citizen Advisory Committee regarding the proposed rule making.

February 20, 2019: Filed a CR-102 with the Washington State Code Reviser, which published in WSR 19-05 on March 6, 2019.

February 25, 2019: Draft SEPA determination of Nonsignificance and comment period open for SEPA # 19018, documents available at https://wdfw.wa.gov/licenses/environmental/sepa/open-comments .

February 25 through April 8, 2019: Public comment period open for suction dredge rule making. Materials were posted online at https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking .

April 5, 2019: The Washington Fish and Wildlife Commission conducted a public hearing on the rule proposals.

April 26 2019: Final SEPA documents are available at https://wdfw.wa.gov/licenses/environmental/sepa/closed-final

May 31, 2019: Fish and Wildlife Commission adopted the amended rule proposals with an implementation/effective date of November 1, 2019.

SECTION 3: Reasons for Adopting these Rules

RCW 34.05.328 (1)(b): "Determine that the rule is needed to achieve the general goals and specific objectives stated under (a) of this subsection [i.e. for the statute that the rule implements]***, and analyze alternatives to rule making and the consequences of not adopting the rule;"***

3.1 Why is the Proposed Rule Needed?

The proposed rule is needed in order to increase WDFW understanding about potential unaddressed impacts to fish life from suction dredging and to add provisions to prevent the spread of aquatic invasive species through the movement of suction dredging equipment into and around the state.

The Commission gave three reasons why these changes were needed. First, no application is required to work under the Gold and Fish Pamphlet. As a result, WDFW doesn't know how many dredges are operating statewide and where or when they are being operated. Obtaining this information would improve WDFW's ability to assess the potential risks to fish life, including potential cumulative impacts, and to target inspections to ensure dredgers are complying with HPA provisions.

Second, WDFW is concerned that Washington will experience an increase in dredgers as a consequence of Oregon's expanded restrictions on suction dredging that became effective January 1, 2018. The reason WDFW is concerned about this problem is because Oregon experienced a significant increase in suction dredgers, from 656 permitted placer miners in 2008 to 1,095 permitted placer miners in 2010, that Oregon Department of State Lands attributed to the moratorium California placed on suction dredging in 2009[2]. WDFW currently does not know how many out-of-state dredgers work under the pamphlet, and would have no way of knowing how many more were coming into Washington to dredge resulting from the new Oregon rules. Again, obtaining this information would improve WDFW's ability to assess the potential risks to fish life.

Third, WDFW assumes that an increase in the number of out-of-state dredgers would increase the risk of aquatic invasive species (AIS) coming into the state. Dredgers, like other watercraft, could also spread aquatic invasive species in-state when they move their equipment from waterbody to waterbody. Although chapter 77.135 requires inspections and decontamination for aquatic invasive species, the Gold and Fish Pamphlet does not explicitly require inspections of dredges coming into the state, nor does the pamphlet include best practices to prevent the spread of aquatic invasive species in-state. Once non-native species become established in a new environment, where their natural enemies are missing, these invaders can spread rapidly. Aquatic invasive species can out-compete native species and disrupt efforts to recover naturally-reproducing salmon, steelhead, and trout stocks.

The proposed rule is needed to ensure suction dredging rules adequately protect fish life. The rule making will allow WDFW to gather important new information that will increase our understanding about potentially-unaddressed impacts to fish life from suction dredging. WDFW will use this new information to determine whether additional rule making is needed in the future to adequately protect fish life. The rule making also adds provisions to prevent the spread of aquatic invasive species through the movement of suction dredging equipment into and around the state.

[2] Louise Solliday, Director Oregon Department of State Lands. December 14, 2010. Letter to Oregon Governor Theodore R. Kulongoski providing a Status Report on Placer Mining in Oregon.

3.2 Consequences of not adopting the rule

By not adopting the rule, conditions with respect to suction dredge permitting under the hydraulic code rules would remain as they are today. That is, persons wishing to conduct suction dredging and willing to comply with the restrictions and time periods identified in the Gold and Fish pamphlet would continue to suction dredge under the pamphlet. Persons wishing for exceptions to pamphlet equipment, timing, and operational provisions would be required to apply for a standard HPA, as they are today.

WDFW would continue to be unable to account for the numbers and locations of suction dredging activity in Washington. As noted above, WDFW is unable to account for numbers, times, and locations of suction dredging activity conducted under the Gold and Fish pamphlet. This also means the contribution of out-of-state dredgers to Washington suction dredging effort remains unknown. WDFW is increasing concerned that inability to assess dredging pressure poses a risk to fish life in high-effort locations.

There would be no change in the overall implementation of measures to prevent the spread of aquatic invasive species. Non-club-member dredgers would continue to be unaware of aquatic invasive species clean/drain/dry or decontamination requirements, and dredgers entering Washington from out of state would remain confused about whether inspections are needed when they enter Washington. More people moving between water bodies without taking AIS precautions increases the risk of introduction of aquatic invasive species into waters, increasing risk to native fish species.

SECTION 4 Differences between Proposed and Adopted Rules

4.1 Describe the proposed rule and indicate adoption changes

Table 1 presents differences between the rule proposed in the CR-102 and the version adopted by the Fish and Wildlife Commission on May 31, 2019. The table presents changes prior to adoption in bright yellow shading.

Table 1 Differences between CR-102 Version and Adopted version suction dredge HPA rule proposals

WAC Section	Proposed change from CR-102	Reason for change
220-660-030(36) Update definition of “dredge” to exclude subsurface hardrock mining	"Dredging" means removal of bed material using other than hand-held tools. This does not include metals mining and milling operations as defined in chapter 78.56 RCW or subsurface hard rock mining.	Minor wording change reflecting stakeholder comment from Teck Washington International that further clarifies the exclusion of hard rock mining, which is regulated under Title 78 RCW.

WAC Section	Proposed change from CR-102	Reason for change
220-660-300 (1) Removes suction dredges from equipment authorized for use under the Gold and Fish Pamphlet and clarifies this section does not apply to hard rock mining.	Description: Mineral prospecting projects excavate, process, or classify aggregate using hand-held mineral prospecting tools and mineral prospecting equipment. When prospectors locate valuable minerals through prospecting, they may attempt to recover larger quantities of the minerals using a variety of ((small motorized)) equipment, including suction dredges, high bankers, and heavy equipment. The rules in this section apply to using hand-held mineral prospecting tools and ((small motorized equipment)) a variety of small mineral prospecting equipment. This section does not apply to metals mining and milling operations as defined in chapter 78.56 RCW. Suction dredging is not authorized in this section. See WAC 220-660-305 for suction dredging rules.	Added "This section does not apply to metals mining and milling operations as defined in chapter 78.56 RCW." in response to comment from Teck Washington International.
220-660-300(6)…(iv) Remove suction dredge gear under ocean beach prospecting subsection and edit remaining content for clarity.	Power sluice/suction dredge combinations, when configured and used as high-bankers or power sluices, that have riffle areas totaling ten square feet or less, including ganged equipment.	Correcting typographic error where underlined text was inadvertently added to WAC 220-660-300(6)…(v) instead of (6)…(iv)
220-660-300(6)…(v)	High-bankers and power sluices~~, when used only as high-bankers or power sluices,~~ that have riffle areas totaling ten square feet or less, including ganged equipment, and pump intake hoses with inside diameters of four inches or less.	

SECTION 5: Comments Received and WDFW Responses

Proposed rules were filed with the Washington State Code Reviser as WSR 19-05-094 (CR-102) on February 20, 2019, and appear in WSR 19-05 published on March 6, 2019. The public comment

period for this rule making was open from February 25, 2019 through 5 p.m. on April 8, 2019. The Commission held a public hearing on April 5, 2019 at 3 p.m. in Olympia, Washington.

WDFW emailed or mailed 348 notices on February 25 and 26, 2019, informing people that the proposed rules had been filed with the Code Reviser. Included in that distribution were attendees of summer 2018 listening sessions, workgroup members, Hydraulic Code Implementation Citizen Advisory Group members, state and federal agency representatives, contacts from mineral prospecting organizations, miners who responded to economic surveys, preproposal and other early commenters, and other parties who indicated interest.

The related rule making documents were posted on WDFW's HPA Rule Making web page[3] on February 25, 2019, including copies of the CR-102, the proposed rule language, the draft Regulatory Analysis document for significant legislative rule making pursuant to the Administrative Procedure Act, and a Small Business Economic Impact Statement pursuant to the Regulatory Fairness Act. WDFW provided an email address and postal address to which comments could be sent, as well as an online commenting form.

Names of people and organizations submitting comments are provided in Appendix A. Appendix B contains a sample of the miners' form letter.

Numbers of comments received are provided on Table 2. A total of 171 written comments were received during the formal comment period, plus four comments given orally at the Commission's public hearing on April 5, 2019. Of commenters who provided a location, 84% were addresses in Washington State. WDFW received one comment from New Hampshire and three from Oregon.

Table 2 Descriptive statistics for comments received

Category	Number
Support	18
Oppose	146
Other	7
"Opposed" Form Letter	122
Commenters identifying from WA	84%

Following is a summary of comments received during the formal comment period and WDFW's responses to those comments. Comments that are not specific to the proposed rules at WAC 220-660-030, -300, or -305 are grouped in section A. Rule-specific comments are provided on Table 3 in Section B. Section C discusses comments on rule implementation, Section D includes comments on coordination with other agencies, and Section E discusses other miscellaneous comments.

5.1 Non-Rule-Specific Comments

Comments in this section are grouped by topic.

[3] https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking .

A. ESSB 5322

Many commenters appealed to the Commission to pause rule making so that provisions of the Engrossed Substitute Senate Bill (ESSB) 5322, if enacted, could be incorporated into this rule making activity.

Commenters:

Fish Not Gold, Trout Unlimited, Cascade Forest Conservancy, Snoqualmie Tribe, Northwest Indian Fisheries Commission, Sierra Club, Cascadia Wildlands, Clark-Skamania Fly Fishers, and a few individuals.

WDFW Response:

ESSB 5322 did not pass during the 2019 Legislative session. WDFW would initiate future rule making as necessary to implement future legislative changes.

How the final rule reflects this group of comments:

No changes to the rule proposal are made as a result of this group of comments because the comments relate to proposed legislation that has not been enacted.

B. Federal laws

Many commenters oppose the rule proposals because they do not believe the proposed changes ensure compliance with federal laws. Laws cited include the federal Endangered Species Act (ESA) and Clean Water Act (CWA). Some commenters also mentioned concern about compliance of the rules with state and federal cultural resource protections.

Commenters:

Fish Not Gold, Trout Unlimited, Cascade Forest Conservancy, Snoqualmie Tribe, Northwest Indian Fisheries Commission, Sierra Club, Cascadia Wildlands, and Clark-Skamania Fly Fishers.

WDFW Response:

The purpose of WDFW's proposed rule changes is to address fish life protection for the suction dredging activity regulated under the hydraulic code (chapter 77.55 RCW), which could ultimately result in increased oversight of suction dredge prospecting for purposes of protecting fish and their habitat. The hydraulic code mandates that WDFW utilize its expertise to assess potential impacts to fish life posed by hydraulic projects, including suction dredge prospecting, and to limit denial of and conditions on those projects to only those necessary to protect fish life (RCW 77.55.021). In other words, WDFW's authority is limited to a subset of the impacts associated with suction dredge prospecting, and approval of a permit may not be unreasonably withheld or unreasonably conditioned in order to address those impacts. WDFW's authority is also limited in that it cannot deny or condition proposed hydraulic projects in order to optimize conditions for fish life that are out of proportion to the impact (RCW 77.55.231). .

Federal Endangered Species Act: Several commenters expressed concern that WDFW failed during rulemaking to ensure compliance with the federal Endangered Species Act.

Some indicated lack of evidence that WDFW complied with "Section 7 consultation" required under 16 U.S.C. § 1536 of the ESA. Because WDFW is not a federal agency, it does not interpret 16 U.S.C. § 1536 to apply in this context or to impose any obligation on WDFW.

Other commenters expressed concern that WDFW's rules violate 16 U.S.C. § 1539 of the ESA, which provides the authority and mechanisms for incidental, take permits. Incidental take by a non-federal entity may be authorized through a Section 10(a)(1)(B) permit, including approval of a habitat conservation plan. WDFW's proposed rules should not be construed as an attempt by WDFW to supersede any federal requirements. To the extent suction dredge prospectors are required to obtain permits under the ESA or other federal law, including incidental take permits, these rules would not prohibit or discourage them from doing so.

Federal ESA Critical habitat: Several commenters expressed the belief that WDFW proposed rules should prohibit suction dredging activity in federal ESA Critical Habitat. The United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) are responsible for evaluating the status of species listed under the ESA, and developing recovery plans for those species. When a species is proposed for listing as endangered or threatened under the ESA, USFWS or NMFS must consider whether there are areas of habitat that are essential to the species' conservation. Those areas may be proposed for designation as "critical habitat." Under Section 7 of the ESA, all federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species, or destroy or adversely modify its designated critical habitat. These requirements apply only to federal agency actions, and only to habitat that has been designated. Critical habitat requirements do not apply to citizens engaged in activities on private land that do not involve a federal agency.

How the final rule reflects this group of comments:

No changes to the rule proposal are made as a result of this group of comments because the comments address policy concerns that are outside the scope of WDFW's proposed rules.

C. Environmental impact

Several commenters oppose the rules because they believe they will cause unacceptable environmental harm. Some commenters assert that the rule causes "take" under the federal ESA. A few commenters cite the 2006 mineral prospecting white paper commissioned by WDFW when asserting that suction dredging causes harm. One commenter provided new science information in an alternative white paper entitled "*Regulation Considerations for Suction-Dredge Placer Mining*." (2018).

Commenters:

Fish Not Gold, Trout Unlimited, Cascade Forest Conservancy, Snoqualmie Tribe, Northwest Indian Fisheries Commission, Cascadia Wildlands, Clark-Skamania Fly Fishers, and a few individuals.

WDFW Response:

Current rules that are applicable to suction dredging and are published in the Gold and Fish Pamphlet are being carried over to new proposed rule WAC 220-660-305. These rules incorporate measures to mitigate concerns expressed in science reviews.

The direct and indirect effects of suction dredging are considered to be a function of the intensity, frequency, duration, and location of the activity. Under the current rules, if the suction dredging activity is conducted in compliance with the Gold and Fish Pamphlet, then the activity is compatible with protection of fish life. However, WDFW has decided to begin tracking the intensity, frequency, duration, and location of suction dredge prospecting in light of Oregon's January 1, 2018 expanded restrictions on mineral prospecting activities. This is because WDFW is concerned that Washington will, as Oregon did in 2010 when California expanded restrictions on

mineral prospecting activities, experience an influx of suction dredge prospectors as a result of these restrictions.

Currently, WDFW does not comprehensively track where, when, or how much dredging is occurring statewide because such activity is largely regulated via its Gold and Fish Pamphlet. As a result, the extent of any environmental harm to fish or fish habitat posed by an increase in the activity is not yet known. Requiring standard written HPAs for suction dredging that include an annual reporting requirement will help to ensure that WDFW has the information needed to assess the effectiveness of its current regulations, which are designed to protect fish life. Requiring standard written HPAs for suction dredge prospecting will also allow WDFW to propose rule modifications if unmitigated impacts are identified based on an assessment of the data.

2006 Suction Dredging White Paper background: In 2005, WDFW commissioned consultants to review and synthesize literature on the effects of mineral prospecting current at that time.[4] The California Department of Fish and Wildlife conducted a subsequent review,[5] which built on the work of R2 Resource Consultants. The R2 Resource Consultants' white paper identifies impacts that WDFW mitigates in its current rules (as expressed in the Gold and Fish Pamphlet). The white paper (and subsequent reviews) also notes the minimal number of science papers relating directly to suction dredging impacts and identifies the need to fill data gaps.

The alternative 2018 white paper submitted with the public comments contains new science references that are not relevant to Washington regulations; none of the new citations alters the proposed rule changes.

How the final rule reflects this group of comments:

No changes to the rule proposal are made as a result of this group of comments because the commenters did not provide specific evidence that the proposed rules harm fish life. In addition, the current rules address potential impacts identified in science reviews.

D. Treaty-reserved resources

The Northwest Indian Fisheries Commission is concerned that issuing permits for suction dredging causes harm to treaty resources that is beyond the harm caused to ESA-listed species.

Commenters:

Northwest Indian Fisheries Commission

WDFW Response:

If the Commission adopts WDFW's proposed rules, tribes will have the ability to review individual HPA application materials for suction dredge prospecting activities and notify WDFW of any project-specific concerns related to potential harm to treaty resources. WDFW's policy is to work with tribes to provide protection to fish life and fish habitats while WDFW executes its statutory mandate. RCW 77.55.351 required WDFW to develop a permit system that provides local governments, affected tribes, and other interested parties with access to HPA applications. WDFW's application system allows anyone to track project applications by location, project type, and many other combinations of attributes so that external reviewers can be alerted to

[4] R2 Resource Consultants. 2006. Small Scale Mineral Prospecting White Paper.

[5] Horizon Water and Environment. 2009. Literature Review on the Impacts of Suction Dredge Mining in California. California Department of Fish and Game.

applications in their area of interest. Issuance of permits is delayed at least seven days to allow time for external reviewers to contact the permitting habitat biologist or submit comments about a particular project. Anyone having site-specific concerns can convey those concerns to WDFW before a permit is issued.

How the final rule reflects this group of comments:

No changes to the rule proposal are made as a result of this comment because the comments address a policy concern that is already incorporated into WDFW's proposed rule changes.

E. Restoration projects

A few commenters assert that WDFW suction dredge rules cause harm to restored habitat and stream channels. Others deny any harm occurs and object to the characterization of suction dredging as reversing the positive effects of such projects.

Commenters:

Northwest Indian Fisheries Commission, Resources Coalition, Snoqualmie Tribe.

WDFW Response:

Current rules prohibit disturbance to existing fish habitat improvement structures or stream channel improvements. WDFW is not aware of any structures that have been subject to either short- or long-term effects attributable to suction dredging.

How the final rule reflects this group of comments:

No changes to the rule proposal are made as a result of this group of comments because the comments address a policy concern that is already incorporated into WDFW's proposed rule changes.

F. Washington Attorney General Brief in *Bohmker v. Oregon*

Commenters cite Attorney General Ferguson's statements in a brief submitted to the Ninth Circuit court in an Oregon suction dredging case ("Bohmker v. Oregon") as an indicator of the urgency conveyed by elected officials about the suction dredge mining problem, and assert that the rules do not reflect that urgency.

Commenters:

Cascadia Wildlands, Trout Unlimited, Cascade Forest Conservancy.

Response:

The amici curiae brief by Washington State Attorney General Robert Ferguson and California State Attorney General Kamala Harris[6] in support of Oregon's position in litigation occurring there addresses legal questions surrounding state environmental regulations[7] as they relate to the federal Mining Act of 1872. The brief mentions harm from unregulated suction dredging and cites California's research and results, but does not address whether or not California's, Oregon's, or

[6] *Brief of the States of California and Washington as Amici Curiae In Support Of Defendants-Appellees and Affirmance*, 10/21/2019, *Bohmker v. Oregon* (Ninth Circuit Court of Appeals No. 16-35262). Bohmker, et al. assert that the federal Mining Act of 1872 preempts the mineral prospecting restrictions adopted into law as Oregon Senate Bill 3.

[7] For example, regulations limiting certain mining methods, timing, or locations.

Washington's regulatory schemes constitute "adequate regulation." The United States Court of Appeals for the Ninth Circuit upheld a ruling by the United States District Court for the District of Oregon that mining restrictions set forth in Oregon Senate Bill 3 are not preempted by federal law.

How the final rule reflects this group of comments:

No changes to the rule proposal are made as a result of this group of comments because the comments address an interpretation of case law that does not apply in the context of WDFW's proposed rule changes.

G. RCW 77.55.091

Commenters expressed concern that the proposed rule is not consistent with RCW 77.55.091.[8] One commenter notes that the rules do not conform to the definition of small scale under the law. Other commenters indicate the rule is not needed because the statute explicitly directs WDFW to manage suction dredging through the Gold and Fish Pamphlet.

Commenters:

Cascadia Wildlands, Resources Coalition, and 121 identical letters from different commenters.

WDFW Response:

The legislature delegated to WDFW responsibility to review hydraulic projects for means proposed to protect fish life. RCW 77.55.091, enacted in 1997, authorized WDFW to adopt rules for mineral prospecting activities that could be conducted in compliance with the provisions of the Gold and Fish Pamphlet. This statute also authorizes WDFW to refer to Pamphlet provisions in a written HPA. The statute grants authority to regulate by Pamphlet, but does not require it.

If WDFW determines that fish life protection requires greater scrutiny than occurs under the Gold and Fish Pamphlet, then WDFW can implement those rules. WDFW acknowledges the decision by Thurston County Superior Court Judge Chris Lanese on October 19, 2018 affirming WDFW's WAC provisions that regulate certain motorized methods of mineral prospecting and mining under rules set forth in the Gold and Fish Pamphlet. That ruling is on appeal to the Washington State Court of Appeals. It was recent restrictions on this activity in Oregon, and potential effects of restrictions on Washington's resources, that led WDFW to propose requiring an HPA for suction dredging in order to collect the information necessary to assess protection of fish life.

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[8] RCW 77.55.091 provides in full:

(1) Small scale prospecting and mining shall not require a permit under this chapter if the prospecting is conducted in accordance with rules established by the department.

(2) By December 31, 1998, the department shall adopt rules applicable to small scale prospecting and mining activities subject to this section. The department shall develop the rules in cooperation with the recreational mining community and other interested parties.

(3) Within two months of adoption of the rules, the department shall distribute an updated gold and fish pamphlet that describes methods of mineral prospecting that are consistent with the department's rule. The pamphlet shall be written to clearly indicate the prospecting methods that require a permit under this chapter and the prospecting methods that require compliance with the pamphlet. To the extent possible, the department shall use the provisions of the gold and fish pamphlet to minimize the number of specific provisions of a written permit issued under this chapter.

How the final rule reflects this group of comments:

No changes to the rule proposal are made as a result of this group of comments because those comments pertain to an interpretation of the nature and scope of WDFW's regulatory authority that is not contrary to WDFW's interpretation.

H. Ban all motorized methods of placer mining; Ban suction dredging; Ban suction dredging in "Salmon Strongholds" and "Wild Steelhead Gene Banks"; Ban out-of-state suction dredgers; Require AIS measures for other equipment/users; Require suction dredge equipment registration; Include rules for overfishing, dams, sewage discharges, and agricultural runoff

WDFW received a wide range of comments that transcend the scope of the current rule making activity. Many commented that suction dredging ought to be banned or that all motorized mineral prospecting methods should be banned, or that suction dredging should be banned in stronghold or gene-bank streams. Other comments pertained to extending AIS decontamination measures to other project types, equipment, and users of waterways. Some comments suggest that the proposals and comments of others seeking further restrictions or bans are beyond the authority of WDFW because they optimize conditions for fish life. One comment suggested that the rules include a requirement that suction dredge equipment be registered with the state so that equipment can be tracked to owners.

Commenters:

Confederated Tribes of the Colville Reservations, 5 individuals, and 121 identical letters from different commenters.

WDFW Response:

As WDFW has explained, the direct and indirect environmental effects of suction dredging are considered to be a function of the intensity, frequency, duration, and location of the activity. Under the current rules, if the suction dredging activity is conducted in compliance with the Gold and Fish Pamphlet, then the activity is compatible with protection of fish life. Further, WDFW cannot enforce federal laws or state laws in other chapters or titles of the RCW through the Hydraulic Code. Moreover, WDFW does not provision HPAs based on what a location is named or called, but rather on the location-specific and project-specific impacts. Given the state of scientific information on existing mitigation measures under the current regulations, and given the statutory limitations on WDFW's authority to condition or deny permits in relation to an activity's proportionate impacts on fish life (RCW 77.55.021(7); RCW 77.55.231(1)), WDFW does not believe that it currently has a sufficient basis on which to ban motorized mining or suction dredging.

The hydraulic code does not grant authority to require AIS measures for non-hydraulic projects, require suction dredge equipment registration, or include rules for overfishing, dams, sewage discharges, or agricultural runoff.

Tracking equipment to owners is not necessary because it is not illegal to leave a dredge unattended.

How the final rule reflects this group of comments:

No changes to the rule proposal are made as a result of this group of comments because the comments address issues that are beyond the scope of the present rule making activity.

I. Landowner permission

Some commenters assert that suction dredging HPA applicants should be required to provide proof of landowner permission to dredge on that land, just as other HPA applicants must do.

Commenters:

Cascadia Wildlands, Fish Not Gold, Northwest Indian Fisheries Commission, Trout Unlimited, Cascade Forest Conservancy, Snoqualmie Tribe, Clark-Skamania Fly Fishers.

WDFW Response:

These comments do not accurately reflect WDFW's current practice with respect to landowner permission.

WDFW requires proof of landowner permission for WDFW to enter a project site for the purpose of providing technical assistance and monitoring compliance. When a project is conducted on public land, we don't need public landowner permission to access the project site because WDFW already has access to public lands.

Where a landowner or land management entity has authority to regulate waters for suction dredging, WDFW's Hydraulic Code rules do not supersede those restrictions. For example, where federal or state land managers have, using other authority, closed an area or specific waters to mining or imposed some other restriction, WDFW's regulations do not override that closure or restriction/requirement.

How the final rule reflects this group of comments:

No changes to the rule proposal are made as a result of this group of comments because the comments address issues that are beyond the scope of this rule making and are not necessary to protect fish life.

J. Gold and Fish Pamphlet

Many of the comments received assert that the current Gold and Fish Pamphlet is sufficient to protect fish life.

Commenters:

Five individuals, Resources Coalition, and 121 identical letters from different commenters.

WDFW Response:

As WDFW discussed in the 2019 HPA Suction Dredge Rule Making Regulatory Analysis document[9], the Gold and Fish Pamphlet is no longer sufficient to regulate suction dredging because WDFW needs to know the timing, location, and amount of suction dredging in order to assess whether the current levels of suction dredging have unmitigated impacts to fish life, and in order to target compliance inspections and prevent the spread of aquatic invasive species from suction dredging.

How the final rule reflects this group of comments:

No changes to the rule proposal are made as a result of this group of comments because the proposal provides the most feasible way to assess the risk to fish life, target compliance inspections, and prevent the spread of aquatic invasive species from suction dredging.

[9] Available at https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking .

K. General support for the proposal

Eighteen people submitted comments in support of the proposal. One commenter was supportive only if ESA/CWA compliance is not an option. Another commenter is generally not supportive of suction dredging but concurs with WDFW's proposals to collect information about locations, frequency, and intensity of the activity. Many commenters expressed general support or cited a sense of harm caused by suction dredging.

Commenters:

NWIFC, Confederated Tribes of the Colville Reservation, Teck Washington International, and 15 individuals

WDFW Response:

Comments noted.

How the final rule reflects this group of comments:

Final adoption of the proposal is supported by these comments.

L. General opposition to the proposal

The key message of the Resources Coalition letter, and 121 identical letters from different commenters, was opposition to the proposed rules. The letter also asserts that federal mining claims account for only about .0009% of the waters within the borders of the state, which is just a small proportion of state waters. Other commenters mentioned opposition to the proposal based on the lack of population response from California fish species since the moratorium on suction dredging was enacted in California in 2009.

WDFW Response:

Individual concerns expressed in the letters are addressed in the responses above, including concern about perceived inconsistency with RCW 77.55.091 and RCW 77.55.231, concern about harm from suction dredging, and expressions of support for continued regulation under the Gold and Fish Pamphlet. With respect to the proportion of waters comprising federal mining claims, it is not the total amount of habitat that comprises federal mining claims, but rather the locations of those claims and their proximity to fish life that matters in the regulation of suction dredging activity. Also, anecdotal evidence suggests there is suction dredge activity outside of federal mining claims.

How the final rule reflects this group of comments:

For the reasons explained in each of the sections mentioned above, the proposal is not changed as a result of these comments because the proposal provides the most feasible way to assess the risk to fish life, target compliance inspections, and prevent the spread of aquatic invasive species from suction dredging.

M. Costs to comply with the rules and benefits from the rules

We received seven comments about costs and benefits of the rule proposal, and 122 identical letters from different commenters that mention costs. One person expressed confusion about what benefits are intended by the rule. Two conveyed perspectives that suction dredging provides benefits of suction dredging to fish and habitat, including by removing lead and mercury from the environment. One person expressed the multiple benefits to local economies from tourist participation in recreational prospecting and mining. The identical form letters indicated

concern that certain businesses had been excluded from analyses related to economic burden from the proposed rules. One comment expressed the perspective that the economic and social value of salmon and other fish far outweighs the economic benefits of suction dredge mining. Another person commented that WDFW should not burden people engaging in suction dredging as a hobby pastime with HPAs and annual reporting. Finally, a commenter invited WDFW to visit a dredging operation on-site to experience first-hand how the operation works.

Commenters:

Five individuals, Snoqualmie Tribe, Cascadia Wildlands, Resources Coalition, and 121 identical letters from different commenters.

WDFW Response:

WDFW has discussed the benefits of mining to local communities in the cost/benefit analysis, available within the 2019 HPA Suction Dredge Rule Making Regulatory Analysis document. The Small Business Economic Impact Statement (SBEIS) provides a discussion of the methods WDFW used to identify businesses required to comply with the rules. Because no one industry code could be identified that encompasses all businesses required to comply, WDFW used the results of a survey, which was distributed to more than 150 members of the regulated community, as a basis for estimating costs to comply with the proposed rule.

The suction dredging activity and the rules that govern it do not distinguish hobbyists from commercial miners. The activity is the same regardless of whether it is done for business or pleasure, and must be treated the same in the hydraulic code rules.

WDFW recognizes that reporting is a new requirement; however, reporting is needed so WDFW can determine how many dredges operate statewide on a given date, where and when they operate, and how much bed material is dredged. This information is important to understanding whether there are unmitigated impacts to fish life.

How the final rule reflects these comments:

The SBEIS considered the specific businesses identified by the Resources Coalition letter and identical copies submitted by 121 individuals; results of the economic analysis are not changed as a result of this comment. No changes to the rule proposal are made as a result of this group of comments because the proposal provides the most feasible way to assess the risks to fish life, target compliance inspections, and prevent the spread of aquatic invasive species from suction dredging.

5.2 Comments on specific rule language

WDFW received a number of comments on individual subsections of the proposed rules. These comments and responses are presented on Table 3.

Table 3 Comments specific to rule sections, with responses and dispositions

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
WAC 220-660-030 - Definitions			
Rule language (generally)	Regulatory language is very precise. Throughout the proposed regulations WDFW uses "must" where "shall" is the appropriate word. Must expresses insistence, shall expresses a command. Regulations should be a requirement.	According to the Code Reviser, who provides guidance on the use of language in rules and laws, the words "shall" and "must" are interchangeable. Regulations are requirements and these words - "shall" and "must" - both convey that meaning clearly. "Must" is the term we will continue to use throughout the hydraulic code rules.	No change proposed because commenters' language is interchangeable with WDFW's language.
220-660-030(036)	Replace "subsurface hard rock mining" with "metals mining and milling operations as defined in chapter 78.56 RCW."	During the preproposal period WDFW received comments requesting exclusion from these rules for certain purposes of infrastructure maintenance, flood control, or navigation. These uses are not considered mineral prospecting suction dredging, since the equipment is not used for mineral extraction. These activities would be regulated under different sections of the hydraulic code rules. Likewise, subsurface hard rock mining that is covered under chapter 78.56 RCW is not affected by these rules. WDFW will implement this suggestion or a similar one to make it clear that the definition under subsection (36) does not apply to hard rock mining.	Final proposed rule reflects this change because the term "*metals mining and milling operations*" is more precise than "*subsurface hard rock mining.*"
220-660-030(118)	WAC 220-660-030—Removal of the definition of "prospecting" is inappropriate. It should be retained. Prospecting is a term of art that is distinct from "mining." We also note that suction dredge mining, because it occurs on established mining claims, by definition is not "prospecting."	The term "prospecting" is not used in WAC 220-660-300 or -305, and is redundant with the defined term "mineral prospecting." Therefore, we are deleting the term "prospecting." This action does not affect the definition of the term "mining" at WAC 220-660-030(98).	No proposed change because the term is not used in chapter 220-660 WAC.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
WAC 220-660-300 Mineral Prospecting			
220-660-300(2)(a)(ii)	Delete words "and mining" from 1st sentence and section 2(a). Context is mineral prospecting, phrase does not seem relevant.	The terms are defined under this WAC section to exclude metals mining and milling operations. Since the terms "mineral prospecting" and "mining" are not synonymous, both terms are needed.	Instead of making this change, we propose amending WAC 220-660-300(1) to add: "<u>This section does not apply to metals mining and milling operations as defined in chapter 78.56 RCW</u>." This provides more clarity overall.
220-660-300(3)(b)	Add a subsection (d) to specifically exclude any metals mining and milling operations as defined in chapter 78.56 RCW authorized under the Mines Act.	Because the terms "prospecting" and "mining" are defined under this section as excluding metals mining and milling operations, this change is not necessary.	Instead of making this change, we propose amending WAC 220-660-300(1) to add: "<u>This section does not apply to metals mining and milling operations as defined in chapter 78.56 RCW</u>." This provides more clarity overall.
NEW WAC 220-660-305 Suction Dredging			
220-660-305(2)(b)	WAC 220-660-305(2)(b) should include: alteration of riparian areas which may result in loss of aquatic nutrients as well as human debris and disturbance to riparian areas due to encampments, locating access for mining equipment and removal.	Because these effects are not regulated by the hydraulic code, we decline to add this information to the rule.	No change proposed because the effects mentioned are not regulated by the hydraulic code.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
200-660-305(3)(a) Require HPA	[Opposed to requiring an HPA for suction dredging because] Using a pan [instead of a suction dredge] is not the same, and is only used to find the spot to dredge.	Comment noted.	No change proposed because no specific changes to proposed rules were recommended.
220-660-305(3)(a) re: Multi-site	Multi-Site HPAs— We are uneasy with the concept of multi-site HPAs, as applied to this activity. We expect that miners will apply to multi-site HPAs en masse, approving every conceivable location for mining and then some. This approach would seem to place a higher burden onto agency staff, and to remove the burden from miners to identify where they are going to be mining.	RCW 77.55.021(4) allows the department to issue multi-site permits. A multi-site HPA is defined in WAC 220-660-050(3)(b)(ii)(A): "(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." Multi-site HPAs do not provide an unlimited opportunity for miners to work unlimited locations. Multi-site HPAs do not receive less scrutiny than single-site HPAs during the permitting process, and do not have more potential to harm habitat than a single-site HPA because only one site can be worked at one time. Multi-site HPAs are a proven approach to providing the efficiency and flexibility that applicants want while ensuring agency staff are able to provide adequate project review before issuing a permit.	No changes proposed because multi-site HPAs for suction dredge prospecting activities are available as a less burdensome alternative to individual HPAs that would meet WDFW's goal of protecting fish life.
	I'd like clarification on how many sites a multisite HPA contains. You are limiting dredgers to one section of 1,300 feet on one river unless they have a Multisite HPA with no explanation of how many sites it contains.		
	WAC 220-660-305(3)(a) reference to "multisite written HPA…" should be stricken. One of the purposes of this rule making is to determine, with precise accuracy, who, what, where, and when suction dredging is occurring in the waters of the state of Washington. Allowing for multisite HPAs in no way accomplishes this purpose.		

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-305(3)(a) re: Multi-site	Multiple site HPAs as proposed under proposed WAC 220-660-305 are inconsistent with the requirement that projects with the potential to harm habitat need review on an individual basis.	(See above)	(See above)
	In order to implement this program effectively, HPAs should be issued individually, thereby providing an opportunity for WDFW to actually track and monitor suction dredge mining, as well as conduct necessary enforcement. Until WDFW and Ecology properly regulate suction dredge mining, a moratorium on this practice in Washington is warranted.		
220-660-305(3)(b) re: 1,300 feet	What happens when you have an individual site and show up to a spot and there are already several people working the area? You won't be able to dredge or move anywhere else with your 1300 foot limit and having to be 200 feet from everyone else. Gold miners move around. You're asking them to stand still in one spot and hope no one else is in that spot when they arrive.	WDFW chose a site definition of 1,300 feet because is it approximately equal to the length of stream that would be covered by a single federal mining claim. (Note: a site is also defined as a federal mining claim.) We did not receive any specific alternatives during the preproposal or formal comment periods. A claim-length is also the largest practical length of stream that a habitat biologist can survey per site during review of a permit application. A permit to conduct a project at a particular site does not guarantee that the site will be available. Applicants are required to identify the location of their proposed project site. Typically that includes identification of the latitude and longitude coordinates of the site. Additional landmarks are helpful to WDFW when reviewing applications and conducting site visits. WDFW may include landmarks in the project site description in the issued HPA to ensure	No changes because the proposed definition allows a suction dredger flexibility within the limits of capacity for a biologist to review an application.
	A site-specific HPA permit should absolutely be required for all individuals participating in suction dredging. As a gold panner, using nothing but a garden trowel, I have accidentally unearthed juvenile lampreys in Waddell Creek during the dredge season. (And no longer prospect in-stream due to that experience).		

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
	Rivers change depending on their water levels and you're asking someone to identify their spots for dredging in the Spring so they can dredge in the Summer. Even if a dredger is staying in one river staying in a 1300 foot area is restricting too much. There needs to be a way to work more than that small of an area. I have two spots on my river and they are a mile apart from one another. Under these rules I won't be able to work one area simply because WDFW wants to be able to track me down. My dredging would have the same impact in the two different spots (none) but I can't go to the second spot because why again?!	permittees are aware of the boundaries of the permitted project location.	
	Since we are supposed to identify the 1,300 ft that will be dredged will the department put up mile markers on all the streams and rivers that allow dredging? Will the areas in the Gold and fish book be OK?		
220-660-305(4)	Invasive Species. We appreciate the agency taking on the important regulatory gap regarding invasive and non- native species. This is a significant concern that needs to be addressed. We commend and thank Department staff for identifying and seeking to address this issue.	Comments noted.	No change proposed because the comments support the original proposal.
	We also agree that WDFW needs to implement effective methods to prevent the spread of invasive species resulting from suction dredge mining practices		

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
	Good add. All references to invasive species in the annotated suction dredge rules are prudent.		
220-660-305(4)	The invasive species spreading is highly unlikely due to the fact that all equipment is washed thoroughly to retrieve the gold. This seems like one specific activity is being targeted.	Comment noted.	No change proposed because WDFW has determined that the original proposed rule is necessary to protect fish life.
	WAC 220-660-305(4)(a) should read: All suction dredges used in the waters of the state shall be inspected (not just suction dredges from out of state).	Comment noted.	No change proposed because the recommendation is not the least burdensome alternative that achieves fish life protection.
220-660-305(4)	Hikers who cross creeks, fly fishermen who walk up the river, jet boats, drift boats, etc. all hold the risk of spreading and are often not washed properly. I see no changes to those outdoor activities. This seems like one specific activity is being targeted.	All aquatic conveyances, as defined in chapter 77.135 RCW, are required to comply with aquatic invasive species control measures pursuant to that chapter. The term "Aquatic conveyance" means "transportable personal property having the potential to move an aquatic invasive species from one aquatic environment to another. Aquatic conveyances include but are not limited to vessels and associated equipment [including kayaks], … construction equipment, … personal fishing and hunting gear, and materials used for aquatic habitat mitigation or restoration." RCW 77.135.010(1).	No change proposed because these activities would not be regulated under WAC 220-660-305.
	…If this is really about invasive aquatic wildlife species, I'm sure it would be a lot more effective to start requiring a permit every time someone wanted to launch a boat or kayak or wade into a body of water to fish because that happens a lot more often.		

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-305(5)(b)(i)	[commenter] uses 2" dredge, has no dirty plume;	WDFW is not proposing substantive changes to suction dredge provisions at this time.	No change proposed because no science support for the suggestion was provided and because the proposal is beyond the scope of the current rule making activity.
220-660-305(5)(e)	Return turbid water from aggregate processing back to the stream to provide fish with bugs or worms deposited in the outflow.	Comment noted.	No change because WDFW has determined the proposed rule is necessary to protect fish life.
220-660-305(5)(f)	WAC 220-660-305(5)(f) should read: A person may not use vehicle-mounted winches.	The current rule language includes this statement.	No change proposed because the current rule contains the commenter's language.
220-660-305(5)(g)	WAC 220-660-305(5)(g) should read: Equipment should be located 500’ apart.	The commenter did not provide any science supporting a change from a 200-foot to a 500-foot separation between operating equipment.	No change proposed because no science support for the suggestion was provided and because the proposal is beyond the scope of the current rule making activity.
220-660-305(5)(g)	Turbidity doesn't hurt fish - turbidity from mineral prospecting outflow is less than natural rainfall runoff.	Comment noted.	No change proposed because no specific modified language was recommended.
220-660-305(5)(h)(i)	WAC 220-660-305(5)(h)(i) should read: There should be no fueling on water.		No change proposed because the

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
	Dredge fueling [should not] be allowed within the wetted perimeter or scour zone.	The rule requires that users prevent petroleum products from entering into the water. It is not necessary to require fueling out of the water provided users do not cause a spill.	recommendation is not the least burdensome alternative that achieves fish life protection.
220-660-305(5)(j)	WAC 220-660-305(5)(j) should read: No suction dredges should be left unattended at any time.	Unattended equipment that is not operating poses no risk to fish life. Therefore, no restriction on unattended, non-operating equipment is needed.	No change proposed because fish life is not impacted by unattended, non-operating equipment.
220-660-305(5)(l)	WAC 220-660-305(5)(l) should include: Prior to beginning work, a suction dredge miner shall locate all fish restoration projects within 1 mile of project.	WDFW rules already prohibit a mineral prospector from disturbing a fish habitat improvement structure or stream channel improvements. Knowledge of the location of such structures is implied, and is the responsibility of the permittee.	No change proposed because the concern expressed by the comment is already addressed in the proposal.
220-660-305(5)(m)	WAC 220-660-305(5)(m) should read: A suction dredge miner shall not remove boulders or woody debris. HPA terms and conditions should prevent suction dredge miners from undermining stable woody debris or rocks from shorelines or within the stream, including the scour zone, because these activities degrade stream habitat structure, cover, and pools necessary for ESA listed salmon and other fish life.	WDFW rules prohibit a person from undermining, moving, or disturbing boulders and large woody material that are embedded in slopes or located wholly or partially within the wetted perimeter. Moving nonembedded woody material or boulders is allowed within the frequent scour zone.	No change proposed because the concern expressed by the comment is already addressed in the proposal.
220-660-305(5)(o)	WAC 220-660-305(5)(o) should read: Tailings and fill shall be restored upon completion of daily work.	The intent of suction dredge mining is to access gold that is lodged at the interface between streambed material and bedrock. Frequently, not enough material can be removed in one session to access bedrock. The current rules allow suction dredgers to attempt to access bedrock over several mining sessions. A miner is required to restore the site when mining is completed and before the site is abandoned.	No change proposed because the recommendation is not the least burdensome alternative that achieves fish life protection.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
220-660-305(5)(o)	Rules should be changed to leave holes for fish to use.	Holes are required to be filled when a miner abandons a site because holes can strand fish when flows drop.	No change proposed because the comment is not protective of fish life.
220-660-305(5)(q)	WAC 220-660-305(5)(q): We believe a suction dredge miner shall not be allowed to create any diversions.	The current rule specifies limits on the size of a diversion structure and that the structure must be removed when work is complete.	No change proposed because the current rule provides fish life protection.
220-660-305(5)(s)	We believe these proposed regulations ... are woefully inadequate to protect the fish, lamprey, fresh water mussels and cultural resources in Washington State.	Protection of freshwater mussels is addressed in WAC 220-660-305(5)(s). No substantive changes have been proposed to existing rules reproduced into WAC 220-660-305. The permitting biologist can amend the authorize work times to address project- and site-specific risks to fish life.	No change proposed because this issue is partially addressed by current rules and substantive changes are beyond the scope of the present rule making activity.
220-660-305(7)	The proposed WAC 220-660-305(7) provides work time windows for waters where suction dredge mining should not be permitted at any time, because direct and cumulative effects to fish habitat persist long after mining activities have ceased. Suction dredge mining HPAs are inappropriate in fish bearing waters at any time, especially those that provide habitat for treaty-reserved resources or ESA-listed species.	Current rules, as reproduced into WAC 220-660-305, were based on science evaluating suction dredge impacts to streams and known timing of fish life presence in streams. Work windows were developed to avoid impacts to newly emerged fish before the start of the work window and to avoid disturbing spawning fish and newly-deposited eggs after the end of the work window. Locations without work windows are places where there is overlap between the emergence of fry and the start of spawning.	No change proposed because no specific modifications to proposed rules were recommended and substantive changes are beyond the scope of the present rule making activity.

Topic or WAC	Comment	WDFW Response	How final proposed rule reflects this comment
	Suction dredge mining HPA work windows or other restrictions will likely not prevent changes to spawning habitat. Instead, mining will result in less stable streambeds for spawning, or streams with stronger currents through erosion and other changes to channel morphology.		
220-660-305(8)	It seems to me gold mining utilizing suction dredges should be monitored through the HPA. We're living in a time where salmon, steelhead and bull trout are endangered and/or threatened in many of our rivers and tributaries; it seems appropriate that our fisheries managers would have a central point for knowing where in-stream disturbances occur.	Annual reporting of suction dredging activity is required and will assist WDFW in evaluating the extent and impact of suction dredging statewide. Comment noted.	No change proposed because the comment supports the proposal.

5.3 Comments on rule implementation

Suggestions and comments included:

1. The rule should also include requirements to enable effective compliance by WDFW, including measures such as mandatory training or certificates for operators, pre-work meetings or required call-in at beginning of operations.
2. Additional scrutiny for HPA application form questions, permit language, guidelines provided to WDFW Habitat Biologists, and enforcement is critical to ensure protection of fish. The commenter also asked WDFW to consider the quality and quantity of data collected in order to inform Commissioners and the public on the impacts of suction dredging mining on Washington State's rivers, streams and fish.
3. Concern about the ability of WDFW to enforce suction dredge mining regulations.
4. Support for placing more burden on miners to demonstrate compliance.
5. Requests for increased enforcement/compliance visits by WDFW staff.

Commenters:

Cascadia Wildlands, Confederated Tribes of the Colville Reservation, Fish Not Gold, and three individuals.

WDFW Response:

WDFW deals with all HPA applicants fairly and equally. It is not appropriate to hold one applicant group to a higher standard than another. Our habitat biologists make permit decisions based on facts, reason and logic and in accordance with the applicable laws, rules, and policies.

WDFW recognizes that both customer service and fish life protection are served when our biologists consult on permits, conduct inspections, and perform site inspections and on-site technical assistance. WDFW provides these services to any HPA applicant or permittee requesting them.

WDFW can already require, as a provision of an HPA, that permittees call-in at the beginning of operations. We would like to provide additional training or materials for operators, but are limited by funding capacity. WDFW will endeavor to conduct site visits as necessary within constraints of agency resources. We recognize that site visits provide an opportunity for our biologists to coach permittees into compliance with permit provisions using education and technical assistance. WDFW's Implementation Plan provides more information about compliance and enforcement monitoring plans.

How the final rule reflects these comments:

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

5.4 Consultation/coordination with state and federal agencies or tribes

Commenters expressed concern that proper consultations with agencies and tribes were not conducted.

Commenters:

Cascade Forest Conservancy, WDFW Lands Division, Fish Not Gold, Snoqualmie Tribe, Clark-Skamania Fly Fishers, and Trout Unlimited.

WDFW Response:

As WDFW has explained, because WDFW is not a federal agency, it does not interpret 16 U.S.C. § 1536 (Section 7 of the federal ESA) to apply in this context or to impose any obligation on WDFW. Further, WDFW has carried out its responsibilities under state law to coordinate with state and federal agencies on this particular rule making. Formal consultation with tribes was conducted during the preproposal period, facilitated by WDFW Tribal Liaison Jim Woods. Please refer to the Regulatory Analysis document for more information about agency and tribal coordination.

How the final rule reflects this group of comments:

No changes to the proposed rule are made as a result of these comments because they do not address specific rule provisions.

5.5 Other miscellaneous comments submitted in response to rule making

One person submitted specific suggestions for improving the application process for HPAs, and this information has been passed along to the people responsible for developing an updated HPA application system.

Two people requested that implementation of the proposed rule be delayed until 2020. The concern is that, if the rule is implemented as planned in late June 2019, most applicants would not receive their HPA until after all or most of the suction dredging authorized work time has elapsed in most locations.

One person suggested that costs to apply should be commensurate with the damage to fish life identified in "Fish Life Concerns" in addition to fully funding the administration and field enforcement of the program.

WDFW Response:

The alternative of delaying implementation was presented to and considered by the Commission during the rule adoption briefing. There are no fees to apply for an HPA.

How the final rule reflects these comments:

Date of implementation is independent from the rule language, and was specified as November 1, 2019 by the Commission when they adopted the rules. Otherwise, no changes to the rule proposal are made because the comments are outside the scope of the rules.

5.6 SEPA comments

Ten comments were submitted in response to the draft SEPA determination. These comments and their responses are provided with the Determination of Nonsignificance on the WDFW SEPA web site at https://wdfw.wa.gov/licenses/environmental/sepa/closed-final .

SECTION 6: Report Preparation

This report was prepared by:

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Appendix A - List of Commenters

WDFW received 171 comment letters, emails, and online submissions. 122 were signed copies of the miners' form letter.

Commenters sending individual letters, email, or online comments:

Cindy Alia, Citizens Alliance for Property Rights; Bill Arthur, Sierra Club; Matthew Baerwalde, Snoqualmie Tribe; Melissa Babik; Charles Ballard; Scott Brown, Resources Coalition; Nicole Budine, Cascade Forest Conservancy; Pat Burdick; Jim Byrne; Brent Caldwell; Brian Davern; Michael Dunican; Tom Ellis; Gary Elmer; Dean Finnerty, Trout Unlimited; Colin Forsyth; Dwayne Fossen; Larry Franks; Joel Fulmer; Jim Gray; Dan Hall; Guy Hansen; Jeff Haynes; James Hughes; Debby Jackson; Kevin Jones; Steve Jones, Clark-Skamania Fly Fishers; Mark Keene; Katherine Kelly, WDFW Lands Division; Mike Kelly; Rocco Maccarrone; Kim McDonald, Fish Not Gold; Dave Morrow; Blake Nelson; Justin Parker, Northwest Indian Fisheries Commission; Alan Peterman; Rolland Roberts; Gabriel Scott, Cascadia Wildlands; Michael Siptroth; David Stillmaker; Catherine Suda, Teck; Nathan Suit; Terry Tennis; Gary Thompson; Todd Thorn, Confederated Tribes of the Colville Reservation; Owen Tolley; Charles Walter; and Gene Woodruff.

Commenters sending individually-signed copies of the miners' form letter:

Dan Afinrud, Cindy Alia, Jed Allen, Davis Ames, William Baker, Alyse Barnes, Mr. Beals, Evelyn Bills, Lane Bills, John D. Bishop, John F. Bishop, Jesse Boel, Steve Boswell, Billy Bourgeots, Sandi Bruntlett, Delrene Buckley, Gordon & Kristina Cawker, Dale Chapman, Mike Chapman, Travis Clark, Allen Comstock, Stephen Cook, Frank Cordell, Colton Creer, Richard Crump, James Curtiss, Mike Davis, David Degner, Kenneth Denny, June Dorning, Stephen DuBoise, David Earhart, Harley Edwards, Paul Erickstad, Tony Evans, Willie Flint, James Franklin, Lowell James Freeman, David Frickelton, Debra Fyles, Jack Gibson, Roger Gill, Ron Grubb, William Haines, John Hall, Glenn & Patricia Hanning, Lacey Helf, Larry Henke, Danny Hicks, Richard Holcomb, Kirk Holman, Tabatha Holman, Dan Jones, Gary Kentner, Rollyn Kidd, Larry & Bonnie Kniveton, Craig Kolven, Martin Leizers, Joe Lima, Michael Lindsay, Kathy Litch, Lyle Litch, Tom Little, Tim Lorkowski, Evelyn Mahaffy, Everett Mahaffy, Joe Mandoli, Tony Marston, Marion Mawby, Jim Mayer, Rob McCandless, Dan Miller, Jon Miller, Sandie Morehead, Bruce Morton, Richard Nieman, Brian O'Keefe, Paul Onstott, Todd Passineau, Dennis Peterson, Glen Peterson, Vic Pisoni, Chad Plumlee, Lee Poquette, Jim Reynolds, Lewis Reynolds, Greg Richardson, Benjamin Rusk, Chris Scheckla, Kyle Schmitz, Jerald Senn, Leland Senn, Larry & Wanda Shaw, Alan Smith, Jerimy Smith, Louis Smith, Robert Sorgen, Jorja Starr, Mark Stevens, David Stillmaker, Linda Stillmaker, Fred Stolz, Marcia Summers, Dirk Sundbaum, Adrienne Swider, Terry Taylor, Zachary Taylor, Joanne VanSteenkist, Ronald Voss, Troy Warts, Elaine Weatherby, Kameron West, Carlton Whitmire, and Chuck Wilson.

SEPA DNS 19-018 Comments were received from the following:

Larry Franks; Kim McDonald, Fish Not Gold; Guy Moura, Confederated Tribes of the Colville Reservation; Gabriel Scott, Cascadia Wildlands; and "Terry."

Appendix B - Miners' Form Letter sample

TO: WDFW Commmission
P.O. Box 43200
Olympia, WA 98504-3200
Attn: Randi Thurston

RE: Opposition to Rule Making

WSR 19-05-094

RECEIVED
MAR 06 2019
FISH AND
WILDLIFE COMMISSION

I am opposed to the current rule making under WSR 19-05-094 for the following reasons:

Under testimony from the petitioners, they stated that billions of dollars have been spent on restoration projects that the Suction Dredgers have repeatedly destroyed, we have not been presented any proof of said destruction especially on any Federally registered and maintain mining claims. Petitioners also testified that Suction Dredgers are killing fish, again no documented proof of said fish kills by a dredger has been presented. The burden of proof of these such activities fall upon the accusers. It was also stated in testimony in the commission meeting that with the evidence of NEW science which has not been presented nor shared with the mining community.

In a report dated September 17, 2013 on Mortality Rates of Fish from catch and release by the Utah Division of Wildlife Resources, bait fishing has a mortality rate of 1 in 3 fish (33%) and in fly or lure fishing 1 in 10 (10%) mortality rate. And again, no documentation of a fish mortality by suction dredger.

As stated during testimony that the mining community's FEDERAL mining claims only take up approximately .0009% of the waters within the borders of the state. This is just a small droplet of water compared to a full bucket.

Our current rules are adequate for protection of fish life. We have moved forward from when rules were implemented in 1997 (22 years) under HB 1565, later codified as RCW 77.55. We have moved forward with Washington State being the lead example of how it can be accomplished. Documentation has been presented to the commission on the downfall of salmon, unfortunately it was caused by over fishing and predators.

When staff put out the survey to see what if any burden would be on the Small-Scale mining community, they used NACIS code 2122 which DOES NOT include the retail supply stores in the state of Washington, examples:

Every Last Ounce
Black Jack Metal Detectors and Mining Supply
Packwood Prospecting
West Coast Mining Supply

Regarding the proposed rule changes, they do go against the most recent court ruling in Thurston County by Judge Chris Lanese ruling that Suction Dredging can remain in the Gold and Fish Pamphlet.

RCW 77.55.011

(17) "Pamphlet hydraulic project" means a hydraulic project for the removal or control of aquatic noxious weeds conducted under the aquatic plants and fish pamphlet authorized by RCW 77.55.081, or for mineral prospecting and mining conducted under the gold and fish pamphlet authorized by RCW 77.55.091.

No where in the proposed rule change is RCW 77.55.081 ever mentioned. This an outright biased attack upon the small-scale miners

RCW 77.55.091

(3) Within two months of adoption of the rules, the department shall distribute an updated gold and fish pamphlet that describes methods of mineral prospecting that are consistent with the department's rule. The pamphlet shall be written to clearly indicate the prospecting methods that require a permit under this chapter and the prospecting methods that require compliance with the pamphlet. To the extent possible, **the department shall use the provisions of the gold and fish pamphlet to minimize the number of specific provisions of a written permit issued under this chapter.**

RCW 77.55.231

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

Findings—1997 c 415: "The legislature finds that small scale prospecting and mining: (1) Is an important part of the heritage of the state; (2) provides economic benefits to the state; and (3) can be conducted in a manner that is beneficial to fish habitat and fish propagation. **Now, therefore, the legislature declares that small scale prospecting and mining shall be regulated in the least burdensome manner that is consistent with the state's fish management objectives and the federal endangered species act."** [1997 c 415 § 1.]

_____ _____

Name Date